IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES

Appellee

v.

Joseph R. NELSON
Lieutenant Commander (O-4)
U.S. Navy Reserve,

Appellant

APPELLANT'S BRIEF

Crim. App. Dkt. No. 201900239

USCA Dkt. No. 21-0216/NA

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

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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 VIOLATED ARTICLE 31(b) BECAUSE THEIR RIGHTS ADVISEMENT DID NOT PROPERLY ORIENT LCDR NELSON 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 Convening Authority (CA) approved a court-martial sentence that includes a dismissal of a commissioned officer. (Joint Appendix (JA) 55-58.) Accordingly, the Navy and Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866 (2012). This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ. 10 U.S.C. § 867 (2012).

Statement of the Case

Charges were originally preferred against LCDR Joseph Nelson on July 31, 2018 alleging one violation of Article 85, one violation of Article 107, four violations of Article 133, and three violations of Article 134, UCMJ. 10 U.S.C. §§ 885, 907, 933, 934 (2016). The case was referred to a general court-martial on September 28, 2018 and LCDR Nelson was arraigned on October 18, 2018. Prior to trial on the merits, the government withdrew and dismissed two specifications of Article 133 and two specifications of Article 134, UCMJ.

Trial on the merits began on May 6, 2019 before a panel of officers. LCDR Nelson was convicted of one specification of absence without authority in violation of Article 86, UCMJ; two specifications of conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ (one specification for wrongfully cohabitating with known prostitutes and one specification for giving a false

statement); and one specification of patronizing prostitutes in violation of Article 134, UCMJ. (J.A. 286.) The members sentenced him to forfeitures of $7,596 pay per month for four months and to be dismissed from the service. (J.A. 287.) The Convening Authority approved the sentence as adjudged and ordered the sentence executed except for the punitive discharge. (J.A. 55-58.)

On appeal, the NMCCA set aside one of the Article 133 convictions (for giving a false statement), affirmed the remaining findings, and reassessed the sentence and reduced the forfeitures to $6,596 per month for four months on February 8, 2021. *United States v. Nelson*, 80 M.J. 748 (N-M. Ct. Crim. App. 2021).

On April 8, 2021 LCDR Nelson petitioned this Court for review. The Court granted the petition on August 10, 2021.

Statement of Facts

A. The government accused LCDR Nelson of patronizing prostitutes while stationed in Bahrain.

LCDR Nelson is a Navy Reservist who mobilized to support NAVCENT in Bahrain. (J.A. 369-370.) While at a local bar, Wranglers, he met women who turned out to be prostitutes. (J.A. 387.) Although he occasionally engaged in sexual intercourse with them, he eventually developed non-sexual friendships with these women. (J.A. 378.) When these women became fearful of the controlling

and dangerous people they lived with, they sought refuge with LCDR Nelson. (J.A. 378-81, 388.)

Because LCDR Nelson had several extra rooms in his house in Bahrain, he allowed the women to come live with him in order to safely get on their feet. (J.A. 378-81, 388.) LCDR Nelson treated them with respect. (J.A. 379-381, 388, 399-400.) He did not charge them rent and let them stay in his spare rooms until they could support themselves. (J.A 393, 417.) In exchange, the women helped LCDR Nelson by taking care of his cooking and cleaning. (J.A 393, 417.) The women continued to work as prostitutes while living with LCDR Nelson, but he was not paying them for sex during this time or taking any money from them. (J.A. 391.)

LCDR Nelson worked to help find the women gainful employment. (J.A. 381.) He secured one of the women a job as a nanny and housekeeper for a fellow officer. *Id.* In the course of investigating other servicemembers, LCDR Nelson's name was brought up. (J.A. 345-46.) One of the women claimed that LCDR Nelson paid her money for sex. (J.A. 345-46.) However, she told NCIS that this occurred prior to her living with LCDR Nelson, not that they were having sex in exchange for allowing her to live in his home. (J.A. 378.) This woman did not testify at the trial.

B. During the NCIS interrogation of LCDR Nelson on January 23, 2018, NCIS did not orient LCDR Nelson to the nature of each the offenses he was suspected of during the rights advisement.

When Naval Criminal Investigative Service (NCIS) agents brought LCDR Nelson in for interrogation on January 23, 2018, it was under the pretext that he would be serving as a witness in the investigation of other service members for their criminal activity. (J.A. 374.) But they only notified him that he was suspected of soliciting prostitutes. *Id.* NCIS failed to explain to LCDR Nelson during his rights advisement that his *knowledge* of the misconduct of others—a separate matter from his own involvement in prostitution—was *also* a crime, since he allegedly failed to report these offenses. (J.A. 51, 374.) Instead, they told him it was nothing he needed to worry about. (J.A. 374, 377, 384, 388, 399, 408, 411, 415, 423, 437, 442.) In his statement to NCIS, LCDR Nelson said he was aware that the women were likely prostituting themselves while they were living with him, that they did not engage in prostitution in his house, and that he did not come out and ask them directly if they were still engaging in prostitution. (J.A. 397-99, 417.)

C. NCIS used their deficient rights warning throughout the entire interrogation to elicit incriminating statements from LCDR Nelson.

At the beginning of the interview, immediately before providing the limited rights advisement, NCIS told LCDR Nelson, "we're looking into some other guys for some more nefarious activity, and we think that you might be a really important

witness for our case." (J.A. 374.) They then did not inform LCDR Nelson that being "a really important witness for [their] case," was itself a crime that they suspected him of (and he was ultimately charged with). *Id.* They only told him that he was suspected of prostitution. *Id.* And they minimized to him that the only reason they were reading him his rights was because "I still got to read you your rights regarding something." *Id.* While they were in the middle of advising LCDR Nelson of his rights, they also interjected "I'm really hoping that you can be important for us, cool?" (J.A. 376.)

When NCIS began questioning him, they continued relying on the minimization they had begun prior to the rights advisement, telling LCDR Nelson, "The heart of this investigation has – has little to do with prostitution." (J.A. 377.) They implied that because they were looking at human trafficking involving other service members, his service as a witness was nothing he had to worry about. *Id.*

NCIS continued to frame their entire interrogation around the notion that LCDR Nelson was acting as a witness, so he should help them. Before asking any questions regarding prostitution or cohabitation, NCIS told LCDR Nelson "regardless of whether or not [the allegation of patronizing a prostitute is] true, I want you to kind of walk me through what your knowledge of what the situation is, your knowledge of – [other service members]." (J.A. 378.) NCIS then began their questioning of LCDR Nelson's cohabitation by asking him what he knew about

prostitutes living with other service members. (J.A. 378-80, 384-86.) The entire conversation flowed from questions about his knowledge of others' misconduct. (J.A. 378-86.)

The conversations regarding LCDR Nelson's involvement in prostitution also directly flowed from questions about knowledge of the women's living situation with other service members (and the other service members using the women as prostitutes). (J.A. 378-87.) Again, they told him, "Okay. And -- and listen, brother, I -- I really can't say this enough: The -- the prostitution thing is at the bottom of the barrel for me. I don't really care. But how did you meet Suda originally that -- at Wrangler's or something like that?" (J.A. 387.) And they asked him, "Do you have any other details specific to Suda and I believe the other one was Nattaporn -- any specific details more regarding them and how you went about meeting them and -- and housing them? Because -- because like I said, man… the root in lock (sic) here obviously is not with you. Don't take it personally. It's with [the other service member] because he's the one that's housing them." (J.A. 399.)

Through this point in the interview, although LCDR Nelson admitted to having sex with the women, he denied paying for it. (J.A. 387-89, 394.) It was only after NCIS told LCDR Nelson that they needed to know about him paying for sex because of their investigation into the *other service member's misconduct* that

he admitted to it. (J.A. 411.) After a break in questioning NCIS restarted their interrogation by telling him, "I don't want to be rude but we kind of don't care about you in a good way. We care about the other people…And we're looking towards what we're gonna do with these guys. They're in – they're in a lot of trouble and building a case against them. And that's why brought in – you in here." (J.A. 408.) They told LCDR Nelson, "It's also not helpful to our case when we know you're not, like, owning everything and you're not being straightforward." (J.A. 410.) After these prompts from NCIS, LCDR Nelson for the first time admitted to paying for sex. (J.A. 411.)

D. Defense moved to suppress the statement to NCIS. The military judge found the NCIS agents had violated Article 31(b), UCMJ.

At trial, defense counsel requested that the military judge suppress the statement because, among other reasons, NCIS had violated LCDR Nelson's Article 31(b) rights. (J.A. 306-25, 335-47.) The military judge found the NCIS agents violated Article 31(b) by fundamentally misleading LCDR Nelson regarding the nature of the offenses they were investigating. (J.A. 363-64.) The military judge found the scope of the rights advisement was improper because "the government cannot lead a suspect to believe he is suspected of *x*, but is really being questioned about *y* (as opposed to *x*), and then turn around and use his resulting admissions to charge him with *y* (in addition to *x*)." *Id.* The judge found that

because the rights advisement did not properly orient LCDR Nelson to the nature of the offenses being investigated, his statement was involuntary. *Id.*

The military judge did not attempt to parse out which specific statements he was referring to. *Id.* But the military judge did find that after the rights advisement the "NCIS Special Agent (SA) Stephens advised the accused that his investigation actually had little to do with the accused's own prostitution-related misconduct, but was instead concerned principally with suspected human trafficking by other service members." (J.A. 358-59.) The NCIS agent "advised the accused repeatedly during the interrogation that he was mainly interested in the accused's knowledge of those other service members' activities, but that the accused was read his rights regarding prostitution because he was identified as paying for sex with a prostitute on one or more occasions." (J.A. 359.)

But the military judge only suppressed the statement as applied to the alleged violation of Article 133 for failing to report others.[1] (J.A. 363-65.) The military judge's ruling allowed the government to introduce the involuntary statement at trial as evidence on the remaining offenses. (J.A. 288, 363-65.)

[1] Because the statement was the only evidence the government had for this specification (Charge III, Specification 2 - conduct unbecoming for failing to report other service member's misconduct) the military judge also ordered dismissal of the specification without prejudice.

Summary of Argument

Once a military judge determines that Article 31(b) was not complied with, the ensuing statement is involuntary and must be suppressed as a matter of law. Here, after finding an Article 31(b) violation, the military judge only suppressed the statement as to one offense. He allowed the statement to be admitted in its entirety for the remainder of the offenses. This violates Article 31(d), and Military Rules for Evidence 304 and 305.

The judge erroneously made an admissibility decision based on the government's charging decision. This runs contrary to the litany of cases that divorce the decision of whether a scope violation has occurred, from the ultimate charges on the charge sheet. The Navy and Marine Corps Court of Criminal appeals approved this error by incorrectly holding that even if Article 31(b) is not complied with, a statement can still be admissible if it is otherwise voluntary. They also improperly interpreted their own precedent from *United States v. Blanton* – that after a scope violation, only portions of a statement need to be suppressed – to mean that involuntary portions of a statement can be admitted as long as the government dismisses charges related to statements that were outside the scope of the rights advisement.

Ultimately, the military judge erred because even if only portions of the statement were admissible, he admitted the entire statement. If this Court finds

that the entire statement needed to be suppressed, then LCDR Nelson was prejudiced because his statement to NCIS contained the sole evidence on elements of the patronizing prostitutes and conduct unbecoming for wrongful cohabitation with prostitutes charges.

But if this Court finds that only portions of the statement needed to be suppressed, LCDR Nelson was still prejudiced because:

-the government's case was weak overall and it heavily relied on the statement;

-the government's comments during argument repeatedly attempted to draw the members' attention to the improperly admitted portions of the statement;

-the members were paying attention to the improperly admitted portions of the statement as evidenced by a member's specific question to the NCIS agent;

-the purportedly proper and improper statements were incredibly similar, making the danger of confusion likely; and,

-members were not provided guidance that would suggest they would not or did not consider the improperly admitted statements.

Argument

ARTICLE 31(d) REQUIRES SUPPRESSION OF ANY STATEMENT OBTAINED IN VIOLATION OF ARTICLE 31(b). AFTER THE MILITARY JUDGE FOUND THAT ARTICLE 31(b) WAS VIOLATED, HE ERRED BY ONLY SUPPRESSING THE STATEMENT AS IT RELATED TO ONE OFFENSE, BUT THEN ALLOWING THE GOVERNMENT TO ADMIT THE STATEMENT IN ITS ENTIRETY FOR THE REMAINDER OF THE OFFENSES.

Standard of Review

"An appellate court reviews the denial of a motion to suppress a confession under an abuse of discretion standard[.]" *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000). When considering "a military judge's ruling on a motion to suppress under Article 31(b), we apply a clearly-erroneous standard of review to findings of fact and a *de novo* standard to conclusions of law." *United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001) (internal citations omitted). The prejudicial effect of an erroneous evidentiary ruling is reviewed *de novo*. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019).

Discussion

A. A military judge cannot admit a statement over the objection of the defense after he determines the statement to be involuntary due to a violation of Article 31(b).

After finding that NCIS provided insufficient Article 31(b) warnings, the military judge permitted the government to admit the involuntary statement for two

of the remaining charged offenses. (J.A. 358-65.) The military judge only "suppressed" the statement from being used with regard to one specific offense – which the government dismissed prior to trial on the merits. *Id.* This was error because it was contrary to the plain language of Article 31(d), M.R.E. 304, and M.R.E. 305.

Article 31(d) requires suppression of a statement taken in violation of Article 31(b). 10 U.S.C. § 831 (2016). Article 31(d), states "[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." *Id.* "Congress enacted Article 31(d), UCMJ, as a strict enforcement mechanism to implement the rights' warning requirements of Article 31(b), UCMJ." *United States v. Gardinier*, 65 M.J. 60, 63 (C.A.A.F. 2007).

Article 31(d) does not permit a judge to pick and choose which offenses the offending statement can be admitted to prove. A violation of Article 31(b) renders a statement involuntary, and thus inadmissible. *United States v. Gilbreath,* 74 M.J. 11, 18 (C.A.A.F. 2014). "M.R.E. 305 (a) and (c) provide that statements obtained without a proper rights warning are defined as 'involuntary' and excluded from evidence by operation of M.R.E. 304(a)." *Gardinier*, 65 M.J. at 63. Additionally, M.R.E. 304(f)(7) requires that "[t]he military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may

be received into evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 304(f)(7) (2016) (hereinafter "MCM").

In this case, the military judge ruled that NCIS violated Article 31(b) because the questioning exceeded the scope of the rights advisement. (J.A. 363-64.) This necessarily means that LCDR Nelson did not voluntarily provide the statement. There was only one rights advisement. And although the military judge found that Article 31(b) was "generally" complied with, he ultimately ruled that it was violated. But finding that the Article 31(b) warning was sufficient because the statute was "generally" (but not totally) complied with is like finding that a woman can be half-pregnant. It either was complied with or not, and here it simply was not. Statements cannot be both voluntary and involuntary. And per the plain language of M.R.E. 305 (a) and (c), M.R.E. 304(a)(1)(A) and (f)(7), and Article 31(d), the statement was required to be suppressed. 10 U.S.C. § 831 (2016); MCM, Mil. R. Evid. 304(a)(1)(A), (f)(7), 305(a),(c) (2016).

In *United States v. Reynolds*, this Court's predecessor considered whether interrogators violated the accused's Article 31(b) rights by failing to inform him of the nature of the offenses they were questioning him about. 16 U.S.C.M.A. 403, 404 (C.M.A. 1966). In *Reynolds*, the accused was suspected of being absent without leave and also wrongfully appropriating a car. *Id.* He was apprehended and provided a rights advisement that informed him broadly that the investigator

was interested in his activities during his absence (which allegedly included stealing the car). *Id.* The Court found that this warning was insufficient to properly orient the accused, and thus constituted a violation of Article 31(b). *Id.* at 405. Ultimately, the Court held that "the accused's statement was obtained without proper advice under the Code… and was, therefore, inadmissible in evidence against him." *Id.* at 406. The Court also noted that Congress implemented the language of Article 31(d) "without equivocation." *Id.* The Court ultimately held that once a 31(b) violation has occurred, the "ensuing statement" must be suppressed. *Id.* at 407.

In this case, the military judge ruled that NCIS violated Article 31(b) because the questioning exceeded the scope of the rights advisement, and because NCIS intentionally omitted warning LCDR Nelson that they suspected him of failing to report others' involvement of prostitution. (J.A. 363-64.) LCDR Nelson was only provided with one rights advisement, and the military judge found that it was defective. *Id.* Thus, just as in *Reynolds*, since the sole rights advisement was defective, here, the "ensuing statement" must be suppressed.

B. The government's charging decisions do not affect admissibility when an Article 31(b) violation has occurred.

The military judge's ruling that the involuntary statement could still be admitted as evidence of other charges runs contrary to this Court's precedent regarding "scope violations." It improperly ties the determination of the adequacy

of the rights advisement and admissibility to what specific charges end up on the charge sheet. Long ago, this Court's predecessor rejected the proposition that an Article 31(b) violation occurs because an investigator does not warn an individual of specific offenses. *See Simpson*, 54 M.J. at 284; *United States v. Johnson*, 20 U.S.C.M.A. 320, 324 (C.M.A. 1971); *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (C.M.A. 1960); *United States v. Davis*, 8 U.S.C.M.A. 196, 198 (C.M.A. 1957). Instead, the focus of the sufficiency of the warning is based on the accused's understanding of the scope and nature of the investigation such that he can make an informed decision on whether or not to make a statement in the first place. *See Simpson*, 54 M.J. at 284; *Johnson*, 20 U.S.C.M.A. at 324; *Rice*, 11 U.S.C.M.A. at 526; *Davis*, 8 U.S.C.M.A. at 198.

But the military judge's ruling in this case inappropriately ties the Article 31(b) notification to specific charges, albeit in reverse. To highlight the point, consider what would have happened in this case if the prosecutor had not charged LCDR Nelson with conduct unbecoming for failing to report other service member's misconduct (the specification that the judge ordered to be dismissed as a result of the motion to suppress). Would the fact that the government elected not to charge that offense somehow make the statement completely admissible?

Since the military judge in this case ruled that the involuntary statement was only inadmissible with regard to one offense, presumably if that charge was not on

the charge sheet, he would have found that the statement was voluntary and admissible (since here, the judge *actually did* allow it to be admitted once the "offending" charge was dismissed).

The charges on the charge sheet do not determine whether a statement is voluntary and admissible. The focus is on the topic of the investigation, not what offenses are ultimately charged or referred to court-martial. *See Reynolds*, 16 U.S.C.M.A. 403, 405; *Simpson*, 54 M.J. at 284; *Johnson*, 20 U.S.C.M.A. at 324; *Rice*, 11 U.S.C.M.A. at 526; *Davis*, 8 U.S.C.M.A. at 198. If a statement is involuntary – even if that involuntariness is caused by a scope violation – it is inadmissible regardless of what the specific charges are.

According to *Reynolds, Simpson*, *Johnson*¸ *Rice,* and *Davis* the question of whether or not Article 31(b) has been violated is divorced from the ultimate charging decision. The statement is either voluntary or it is not. And just as a failure of an investigator to specifically outline a charge does not, on its own, render a statement involuntary, the charges that later end up on the charge sheet do not affect whether a statement was made voluntarily. Here, the military judge considered the voluntariness and admissibility of the statement in light of the charges on the charge sheet, allowing him to justify only suppressing the evidence with regard to some offenses and not others.

This is error because it ignores that a defective rights advisement precludes a "voluntariness" analysis, since the statement is rendered involuntary as a matter of law pursuant to M.R.E.s 304(a)(1)(A), 305(a), 305(c)(1), and Article 31(d). 10 U.S.C. § 831 (2016); MCM, Mil. R. Evid. 304(a)(1)(A), 305(a),(c)(1) (2016). And the judge's charge-based determination in this case conflicts with this Court's precedent in *Reynolds, Simpson*, *Johnson¸ Rice,* and *Davis*. Thus, it was improper for the judge to permit the government to admit the involuntary statement at trial.

C. Contrary to the Navy and Marine Corps Court of Criminal Appeals opinion in this case, there is no precedent that allows a statement obtained in violation of Article 31(b) to be admitted for some offenses.

In its opinion, the NMCCA stated,

> Sometimes, a suspect receives proper warnings under Article 31 with regard to one offense or incident but inadequate warnings as to another offense or incident. If the suspect subsequently makes an otherwise voluntary statement, military courts have held that although such a statement is inadmissible as to unwarned offenses, it is admissible vis-à-vis the warned offenses.

Nelson, 80 M.J. at 753.

This is incorrect for two reasons. First, as discussed *supra* – if Article 31(b) is not complied with, the statement is involuntary and inadmissible as a matter of law. 10 U.S.C. § 831 (2016); MCM, Mil. R. Evid. 304(a)(1)(A), 305(a),(c)(1) (2016). Second, there is no military case law that establishes this precedent, and the NMCCA misinterpreted its own opinion in *United States v. Blanton.*

With regard to the second reason, in the unpublished opinion *United States v. Blanton*, the issue of 'whether or not an investigator violated Article 31(b) by failing to orient the accused to the nature of all suspected offenses' was considered in the context of an ineffective assistance of counsel claim. *United States v. Blanton*, No. 201400419, 2019 CCA LEXIS 198, at *11-12 (N-M. Ct. Crim. App. 2019). The court found that the interrogation violated Article 31(b) because it did not orient the accused to the nature of the suspected misconduct. *Id.* at *27-28.

But without providing any legal support for the proposition, the *Blanton* court stated that statements relating to warned misconduct would still be admissible. *Id.* This directly contradicts the *Reynolds* Court's affirmation that Article 31(d) is unequivocal – if the rights advisement is defective, the ensuing statement is inadmissible. *Reynolds*, 16 U.S.C.M.A. at 407; *United States v. Willeford*, 5 M.J. 634, 636 (A.F.C.M.R. 1978). By limiting the suppression to certain offenses or even portions of the statement, the *Blanton* rule would add a caveat to Article 31(d) that does not exist in its plain language. 10 U.S.C. § 831 (2016).

But regardless of whether the court in *Blanton* was incorrect about its unsupported proposition, this case is distinguishable because even in *Blanton,* the court found that the statements relating to the unwarned misconduct were inadmissible. *Blanton*, No. 201400419, 2019 CCA LEXIS 198, at *11-12. In

Blanton, *portions of the statement* were found inadmissible toward *all the charges*. But in this case, the court flipped that proposition to find that the *entire statement* was admissible toward a *portion of the charges*. This is significant because it demonstrates that the court is interpreting *Blanton* to mean that involuntary statements can still somehow be admissible, which is not even what the *Blanton* court stated.

Ultimately, the unsupported portions of *Blanton* cited to by the court in this case are legally incorrect. But even if they are not, the court applied *Blanton* to this case in a manner that runs contrary to the *Blanton* opinion itself.

D. Because NCIS violated Article 31(b) by failing to properly orient LCDR Nelson to the nature of the investigation, the *entire* statement is rendered involuntary and must be suppressed.

This Court should hold that the "scope violation" of Article 31(b) in this case rendered the *entire* statement inadmissible. A "scope violation" of Article 31(b) poisons the entire statement because it prevents an accused from making an informed decision of whether or not to speak to an investigator in light of the totality of the circumstances. The purpose of Article 31(b) is to "orient the accused" to the nature of the offenses so "*as to allow him to intelligently weigh the consequences of responding to an investigator's inquiries*." *Reynolds*, 16 U.S.C.M.A. at 405 (emphasis added).

In this case, NCIS was fully aware of the offenses that they did not warn LCDR Nelson of at the beginning of the interview. (J.A. 374, 377.) They chose not to warn him of specific offenses, and in doing materially affected his ability to decide whether or not to speak to the investigators in the first place. As a result, NCIS did not comply with Article 31(b) because they deprived him of his ability to intelligently weigh the consequences of his decision to speak to them while considering the entire scope of questioning.

A holding that the "scope violation" in this case rendered the entire statement inadmissible is consistent with the Air Force Court of Criminal Review's precedent in *United States v. Willeford,* which was favorably cited by this Court in in *United States v. Simpson*. *Willeford*, 5 M.J. 634 (A.F. Ct. Mil. Rev. 1978); *United States v. Simpson*, 54 M.J. at 284. In *Willeford*, the Air Force Court of Criminal Review held that because investigators did not sufficiently advise the accused of the nature of the offenses during the Article 31(b) advice at the beginning of the interrogation, "the accused's *ensuing statement* was obtained in violation of Article 31 and inadmissible." *Willeford*, 5 M.J. at 636 (emphasis added). But the Air Force court did not clarify what it meant by "ensuing statement."

The Navy-Marine Corps Court of Criminal Appeals interpreted the term to mean only the portion of the statement related to the unwarned offenses. *Nelson*,

80 M.J. at 753. Their holding seems to be based on the assumption that in *Willeford*, the Air Force court only found that the unwarned portions were inadmissible because they only set aside the conviction related to the unwarned misconduct. *Id.*

A more parsimonious interpretation is that "ensuing statement" means the statement *ensuing* from the inadequate rights warning. This would mean that the Air Force Court of Military Review found the entire statement should have been suppressed, but even without the statement there was sufficient evidence to sustain the convictions on all but the charge related to the unwarned misconduct. *Willeford*, 5 M.J. at 636. But because this was not the crux of the issue considered in *Willeford*, the court did not provide any further clarification. *Id.*

E. This Court should not adopt the holding that a "scope violation" of Article 31(b) only requires suppression of part of the statement for four reasons.

First, such a holding fails to recognize that a warning which only relates to some suspected misconduct, but does not orient the accused to the full nature of the suspected misconduct, runs contrary to the purpose of Article 31(b) rights in the first place. This rule exists to orient the accused to the nature of the offenses so "as to allow him to intelligently weigh the consequences of responding to [an interrogator's] inquiries." *Reynolds*, 16 U.S.C.M.A. at 405.

An intentionally incomplete rights advisement runs contrary to the requirement under Article 31(b) that a person needs to be able to consider the full context of the scope of the investigation in order to properly make a determination with regard to whether or not to speak in the first place. *Reynolds*, 16 U.S.C.M.A. at 405. The rights advisement is not simply an exercise in providing a setting (date, time, etc.) to an accused for the topic of questioning. The entire point of the orientation requirement of Article 31(b) in the first place is to ensure the accused understands the *consequences* of making a statement. *Id.* Failure to warn an accused of the scope of the misconduct he is suspected of robs him of his ability to properly consider these consequences, and thus invalidates the entire rights advisement – particularly where, as here, NCIS was fully aware of the other misconduct and intentionally minimized the unwarned misconduct in order to obtain a more thorough statement.

Second, as discussed *supra*, this interpretation adds a caveat to Article 31(d) that is not found in the rule. Contrary to *Reynolds*, this would add an equivocation to Article 31(d), which states "without equivocation" that the statement must be suppressed. *Reynolds*, 16 U.S.C.M.A. at 406.

Third, this rule would be difficult if not impossible to enforce in most cases. Investigators ordinarily do not follow a linear path of questioning when conducting interrogations. As in this case, they routinely weave in and out of topics during the

flow of questioning. *See e.g.* (J.A. 374-450.) Here, answers to one question affected and influenced follow on questions, and the investigators used previous answers to generate their next questions. (J.A. 378-87, 394, 399, 408, 411.) Throughout the course of the interrogation, the investigators used questions about the unwarned misconduct to get LCDR Nelson to make admissions regarding the warned misconduct. (J.A. 378-87, 394, 399, 408, 411.) Attempting to conduct a line by line analysis of a statement would ignore the interconnected nature of the questioning. None of the questions were asked, or answers were given, in a vacuum. As such, it is impossible to fairly excise out problematic statements because of the reality of the flow of the investigation.

Finally, upholding the military judge's ruling here would permit NCIS agents to selectively avoid notifying suspects of known offenses and allegations, so long as the government does not ultimately go forward on the unwarned charges. This would allow NCIS agents to tactically decide which offenses they choose to warn an individual of in order to obtain the most advantageous statement. It would tacitly approve of NCIS utilizing gamesmanship during their rights advisement.

Accordingly, this Court should hold that if a rights advisement does not orient the accused to the nature of all offenses he is suspected of, the rights advisement is invalid; and all ensuing statements are inadmissible.

F. Even if portions of the statements were admissible, the military judge erred by admitting the entire statement without excising the inadmissible portions.

Even if this Court holds that only part of the statement must be suppressed when a "scope violation" occurs, the military judge's ruling in this case was erroneous because he ruled that portions of the statement were involuntary and inadmissible, and yet he admitted the *entire* statement.

The government played the entire substantive interview to the members. (J.A. 121-26, 288, 367-452.) The military judge never articulated which portions of the statement were admissible and which were not, and he did not suppress any portions of the statement at trial on the merits. (J.A. 358-65.) Even if the judge *could* have suppressed only portions of the statement, in this case he did not do so. His admission of involuntary, inadmissible statements was error.

G. The military judge's error materially prejudiced LCDR Nelson's substantial rights.

The government has the burden of demonstrating that the admission of erroneous evidence did not materially prejudice LCDR Nelson's substantial rights under Article 59(a). *United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019) (alterations in original, quotations and citations omitted). "For [preserved] nonconsitutional evidentiary issues" such as this one, "the test for prejudice is whether the error has a substantial influence on the findings." *Id.* "In conducting the prejudice analysis, this Court weighs (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." *Id.*

i. If the Court finds that the entire statement should have been suppressed, LCDR Nelson was prejudiced because the improperly admitted statement contained the bulk of the government's evidence on both Specification 1 of Charge III, and the sole Specification of Charge IV, and provided the only evidence on elements of those offenses.

In *United States v. Gilbreath*, the Court found that a military judge's failure to suppress a statement obtained in violation of Article 31(b) materially prejudiced the substantial rights of the accused. *Gilbreath,* 74 M.J. at 18-19. The Court considered that the government's case "derived from [the accused's] initial admission;" that "[t]here was no other parallel chain of evidence;" and that in general, a "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Id.* The facts in *Gilbreath* are almost identical to this case.

Here the government relied solely on LCDR Nelson's statement to establish that the women he was cohabitating with were known prostitutes (Charge III, Specification 1). This evidence was not presented by any other witnesses. During an R.C.M. 917 motion on this issue, trial counsel conceded that the source of their evidence for this element was LCDR Nelson's statement. (J.A. 187, 194.) The government also did not call any of the women named or alluded to in the sole specification of Charge IV. (J.A. 44-47.) And LCDR Nelson's statement was the

only evidence the government presented establishing that sex had occurred or that money had been exchanged.

As in *Gilbreath*, without LCDR Nelson's statement, the government did not present sufficient evidence to convict on either of these two specifications. Because this evidence was necessary for the government to obtain convictions for Charge III, Specification 2 and the sole specification of Charge IV, it had a substantial influence on the findings. LCDR Nelson was materially prejudiced when the military judge improperly admitted it.

ii. If the Court finds that only portions of the statement must be suppressed, LCDR Nelson was prejudiced because the members were played the entire statement – including the inadmissible portions – without any guidance limiting their consideration of the improper evidence.

But even if only certain portions of the statement needed to be suppressed, the government cannot meet its burden to demonstrate that admission of the inadmissible portions did not prejudice LCDR Nelson's substantial rights.

As an initial matter, the government must show these statements were harmless. But the judge never identified which specific portions of the statement fell within the ambit of his ruling. (J.A. 358-65.) Because the government cannot accurately identify which portions of the statement were involuntary and thus improperly admitted, they cannot demonstrate that LCDR Nelson was not prejudiced. There are very few, if any, admissions made by the accused that did

not flow from the NCIS agent's assurances that LCDR Nelson did not need to worry about discussing the misconduct of others and that they needed him as an important witness in this respect. When these statements are removed, the government's case falters.

The government's case was weak overall, and relied almost exclusively on LCDR Nelson's statement to prove both the patronizing a prostitute and unlawful cohabitation offenses. None of the alleged prostitutes or women that he was living with testified. (J.A. 44-47.) The government provided no witnesses to testify to the sexual intercourse or that the women were involved in prostitution at all. (J.A. 44-47.) The weakness of the government's case increased the danger that the members would rely on the inadmissible evidence. Even if parts of the statement were inadmissible and others were admissible, the statement overall was central to the government's case – which heightened the damage done by the members' consideration of the improper portions.

The government also specifically relied on the improperly advised portions of the statement in its closing argument. The extent to which government counsel relies on the improperly admitted evidence is a factor for the Court to consider in its prejudice analysis. *See United States v. Barnes*, 33 M.J. 468, 474 (C.A.A.F. 1992) (evidence that accused was not a first time offender was not significant for sentencing in part because the prosecutor made only a brief mention of it); *United*

States v. Sherman, 32 M.J. 449, 452 (C.M.A. 1991) (finding no prejudice because government's improper argument was "peripheral and minor" to its case, which focused on significant evidence of gratuitous violence). In *Barnes* and *Sherman*, the Courts found that a brief passing mention of inadmissible evidence, when weighed against a strong government case, was not prejudicial.

By contrast, here, the reliance on inadmissible evidence was a key factor in the government's argument, and not insignificant. First, it was used to specifically address a presumed defense argument. While trying to pre-emptively address the contention that LCDR Nelson was lying about his involvement in prostitution in order to help the investigators – the prosecutor stated, "Defense might suggest to you that he was lying to NCIS to protect himself *or others* or something." (J.A. 236.)(emphasis added). He continued, "How does [admitting to having sex with these women] even help NCIS's investigation? NCIS kept telling him over and over and over again, 'What we're really interested in is these other people over here.' Lieutenant Commander Nelson didn't offer them anything about him, about those guys." *Id.* Thus, the reliability of the admissions in the statement was central to the government's case, and the government relied on the inadmissible evidence to attack the defense's argument.

Likewise, on rebuttal, the government told the members, "yes, the biggest part of the evidence from what happened in Bahrain is the statement of the accused

himself to NCIS…" (J.A. 276.) "And the Defense suggests that that's not legal and competent evidence. Well, Members, it is before you in this court. It has been admitted before you. It is legal and competent evidence that you should consider, *all of it*." *Id.* (emphasis added). The government wields the military judge's erroneous decision to allow the entire statement in as a sword to undermine the defense's argument that there were problems with the interrogation – which there were. The government specifically suggests to the members that the rights advisement was not problematic. (J.A. 278.)

The government's rebuttal argument encouraged the members to look at the "the circumstances surrounding the situation and show (sic) knowledge to show that Lieutenant Commander Nelson knew who these people were and what they were doing, and there's not only the circumstances that they were actually there but what he said in this video." (J.A. 280.) In a statement where close to 70 percent of the questions were beyond the scope of the warning, this invitation to consider "the circumstances surrounding the situation" was certain to draw the members' attention to the improperly admitted portions.

Also, the government alluded to the unwarned misconduct from the statement when trying to establish the element of whether the conduct was unbecoming. For this element and offense, the government urged the members to "look at all the *surrounding circumstances of what was going on and who he is,*

who Lieutenant Commander Nelson is." (J.A. 240.)(emphasis added) These "surrounding circumstances" included all of the inadmissible, unwarned misconduct. Thus, unlike in *Barnes* and *Sherman*, the government's use of the inadmissible portions of the statement were significant and demonstrate prejudice.

Second, since the government only called the NCIS agents as witnesses for these offenses, the defense's case focused on undermining their credibility and the credibility of LCDR Nelson's statement.

Finally, the materiality and the quality of the improper evidence in this case was strong because it went to the heart of the dispute. Although LCDR Nelson's knowledge of other service-member's participation in prostitution and human trafficking was such that it fell outside the scope of the warnings provided, it was similar enough to the charged offenses to confuse the members. The members were provided no guidance on how the unwarned portions should be used (or disregarded). (J.A. 126-27, 224-25.)

As previously stated, a significant portion of the statement related to the unwarned misconduct. For example, NCIS told LCDR Nelson that they did not care about him and were focused on his knowledge of others' misconduct, on 11 separate occasions. (J.A. 374, 377, 384, 388, 399, 408, 411, 415, 423, 437, 442.) Questions and answers related to "knowledge of other's misconduct" constituted

roughly 56 of 78 pages (approximately 72 percent) of the transcribed interview.[2] And the members took notice of this unwarned misconduct, as evidenced by a specific question submitted by a member to the NCIS agent. (J.A. 453.) Although the question was objected to by both parties and never answered, the fact that it was asked at all demonstrates the members were considering this information. (J.A. 168-69, 453.)

Thus, even if the Court finds that only portions of the statement were inadmissible, the government cannot demonstrate that LCDR Nelson's rights were not materially prejudiced based on: 1) The weakness of the government's case and the heavy reliance on the statement as proof; 2) the extent of the government's comments during argument that would draw the members' attention to the improperly admitted portions of the statement; 3) the member's question demonstrating that they were paying attention to the improperly admitted portions of the statement; 4) the similarity between the properly and improperly admitted statements, making the danger of confusion likely; and 5) lack of any guidance to the members suggesting that they did or would not consider the improperly admitted statements. The government cannot demonstrate that LCDR Nelson's rights were not materially prejudiced.

[2] This count excludes biographical questions and other administrative pages of the transcript.

Conclusion

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

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Certificate of Compliance

This Supplement complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. The brief contains 8,148 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Certificate of Filing and Service

I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 18, 2021.

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