IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Koda Harpole, Seaman Apprentice (E-1), United States Coast Guard, Appellant	22 February 2019 ANSWER AND BRIEF ON BEHALF OF THE UNITED STATES CGCMG 0322 Docket No. 1420 Before McClelland, Judge, Brubaker Tried at Seattle, WA and Alameda, CA on 9 October, 10 November, and 1 – 5 December 2014 by a general court-martial convened by Commander, Coast Guard Pacific Area

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 15 of this honorable Court's Rules of Practice and Procedure.

STATEMENT OF THE CASE

Following a remand from the Court of Appeals for the Armed Forces (C.A.A.F.), this case is before the Coast Guard Court of Criminal Appeals for the second time. Over four years ago, a panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of false official statement, two specifications of sexual assault, and one specification of housebreaking in violation of Articles 107, 120, and 130, UCMJ, U.S.C. §§ 907, 920, 930 (2012), respectively. The military judge conditionally dismissed Specification 1 of Charge II, which alleged sexual assault by bodily harm, pending appellate review. The members sentenced Appellant to seven years confinement, reduction to paygrade E-1, and a dishonorable discharge. The convening authority approved the

sentence and, except for the punitive discharge, ordered the sentence executed on March 9, 2015. Convening Authority Action.

Following the initial referral of the record to this Court under Article 66(c), UCMJ, Appellant submitted nine assignments of error, and an additional seven *Grostefon* issues. Among other issues, Appellant alleged that his trial defense counsel were ineffective for failing to suppress his unwarned statements to a victim advocate under Article 31, UCMJ. On November 10, 2016, this Court affirmed the findings and sentence as approved by the convening authority and ordered a corrected promulgating order to reflect the conditional dismissal of Specification 1 of Charge II. *United States v. Harpole*, No. 1420 (C.G. Ct. Crim. App. Nov. 10, 2016). This Court rejected Appellant's ineffective assistance of counsel claims, finding, in part, that "Appellant has not shown any probability that a suppression motion [under Article 31(b)] would have been successful." *Id.* at 11.

On May 1, 2017, C.A.A.F. granted Appellant's petition for review on three issues, including the same allegation that trial defense counsel were ineffective for failing to file a motion to suppress Appellant's statement to a victim advocate under Article 31(b), UCMJ. Despite finding no error with respect to two issues involving the limits of the victim advocate privilege and the military judge's instructions on the sexual assault offense, C.A.A.F., in a 4-1 decision, set aside this Court's decision and remanded the case for a post-trial hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (1967) to further develop the record on the Appellant's ineffective assistance of counsel claim.[1]

[1] In its Opinion, CAAF detailed four issues for the *DuBay* military judge to address in his findings of fact and conclusions of law:

(1) Whether legal and tactical considerations were involved in trial defense counsel's decision not to file a motion to suppress Appellant's statements pursuant to Article 31(b), UCMJ;
(2) Whether trial defense counsel's failure to seek suppression of Appellant's communication with the victim advocate pursuant to Article 31(b), UCMJ was a reasonable strategic decision;

The ordered *DuBay* hearing was held on July 24 – 25, 2018. In his Findings of Fact and Conclusions of Law issued on October 18, 2018, the *DuBay* military judge specifically addressed the four questions detailed by C.A.A.F. and found that:

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

DuBay Hearing Findings of Fact and Conclusions of Law at 7 – 9 [hereinafter referred to as *DuBay* Findings]. The Appellant subsequently filed supplemental assignments of error regarding the *DuBay* Findings to this Court, to which the United States now responds.

STATEMENT OF FACTS

This case arises from events that occurred aboard USCGC POLAR STAR five years ago. On February 26, 2014, USCGC POLAR STAR was in Pape'ete, Tahiti for a port call. R. at 485-86. While on liberty that evening, SK3 GR drank at least twelve alcoholic drinks. R. at 487, 489, 492-94. In the early morning hours of February 27, 2014, SK3 GR returned to her four-person stateroom on USCGC POLAR STAR and passed out. R. at 497 - 98. Two of her roommates, SK3 SR and OS3 LP, were also asleep in the stateroom. R. at 722, 756-57.

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

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

A. SK3 GR's Sexual Assault Report

At about 0500 on February 27, 2014, Appellant let himself into SK3 GR's stateroom. R. at 724, 759. Appellant woke SK3 SR, who slept across from SK3 GR, to determine SK3 GR's location. R. at 759-60. SK3 SR observed Appellant walk over to SK3 GR's rack. R. at 760. SK3 SR and OS3 LP, who had been asleep in the rack below, subsequently heard kissing noises and sounds of sexual intercourse coming from SK3 GR's rack. R. at 722-23, 761. OS3 LP later saw Appellant leave SK3 GR's rack, get dressed, and quietly leave the stateroom. R. at 725-26. After SK3 GR awoke the next morning, she realized she was naked, felt like she had sex, and remembered seeing flashes of Appellant on top of her. R. at 499, 501-03. SK3 GR spoke to SK3 SR and OS3 LP about what happened earlier that morning. R. at 502-03.

Later that same day, SK3 GR made an unrestricted report of sexual assault to LCDR MK, the senior-most victim advocate on USCGC POLAR STAR. *DuBay* Findings at 2. LCDR MK informed YN1 [redacted][2] that SK3 GR had made an unrestricted report of sexual assault against Appellant and directed her to prepare temporary duty travel orders for SK3 GR to travel from Tahiti to Seattle, Washington. *Id.* YN1 [redacted] was never directed to investigate SK3 GR's sexual assault allegation. *Dubay* Hearing Record of Trial at 637, 645 [hereinafter referred to as HROT].

On or about March 2, 2014, POLAR STAR departed Tahiti, and SK3 GR was transferred ashore via small boat. *Dubay* Findings at 3. Appellant was part of the special sea detail for the small boat transfer and was aware SK3 GR was transferred off the ship. *Id.*

B. Appellant's Report to YN1 [redacted]

On the evening of March 2, 2014, Appellant approached his friend, SNBM SC, and told him that he felt he had been sexually assaulted in SK3 GR's stateroom. HROT at 597, 603;

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

Dubay Hearing Exhibit XI at 194-95. At SNBM SC's suggestion, Appellant decided to seek out a victim advocate onboard POLAR STAR immediately that evening. HROT at 583, 603. Appellant specifically chose to make a report to YN1 [redacted] instead of the other two VAs onboard, because he was most comfortable speaking to her. *Id.* at 583, 605. Accompanying Appellant, SNBM SC knocked on YN1 [redacted] door at approximately 9:30 p.m. R. at 788, 837. YN1 [redacted] who had been asleep, opened her stateroom door and asked Appellant what he wanted to talk about. R. at 788; HROT at 570. Appellant responded, "I would like to speak to you about something that had happened." HROT at 570.

Appellant, SNBM SC, and YN1 [redacted] immediately proceeded to the unoccupied First Class Petty Officer's lounge. R. at 789, 837. The door to the lounge was closed for privacy but remained unlocked. *DuBay* Findings at 3. Though YN1 [redacted] sensed something was wrong, she did not know what Appellant was specifically going to talk to her about. HROT at 635. YN1 [redacted] asked Appellant if he was comfortable having SNBM SC present during the meeting. HROT at 635-36. Appellant responded "yes" and stated that he had told SNBM SC "everything" he was about to tell YN1 [redacted] *DuBay* Findings at 3. YN1 [redacted] then informed Appellant that "whatever he was telling me at this point would be unrestricted and I would have to tell the command and he understood that." HROT at 66. YN1 [redacted] then opened up the conversation by asking Appellant "what was going on?," or words to that effect. HROT at 637.

Appellant proceeded to tell YN1 [redacted] that he had spent the day with SK3 GR, they both consumed alcohol, and that he went to SK3 GR's stateroom sometime that evening to retrieve his backpack. *DuBay* Findings at 3. At some point during Appellant's narrative, SNBM SC recalled that YN1 [redacted] asked Appellant, "What were you doing in the female berthing area?" or words to that effect, but then immediately made a gesture to convey to Appellant "never mind." HROT at

598 – 600. SNBM SC took this gesture to mean YN1 [redacted] was withdrawing the question.[3] HROT at 599 – 600. After this meeting, which lasted between five to fifteen minutes, YN1 [redacted] relayed Appellant's unrestricted sexual assault report to LCDR M.K., the senior VA. *DuBay* Findings at 4.

At the *DuBay* hearing, YN1 [redacted] testified that she believed she was meeting with Appellant as a victim advocate. HROT at 644. YN1 [redacted] indicated she was not trying to develop information about the alleged crime. HROT at 637. YN1 [redacted] also did not consider herself to be investigating the alleged crime or to be part of the investigation team, and was never directed to investigate SK3 GR's allegation. HROT at 635, 637, 645. YN1 [redacted] did not take any notes or direct Appellant or SNBM SC to provide a written statement to her. HROT at 641-42. In late March 2014, Coast Guard Investigative Service (CGIS) sought out information from YN1 [redacted] about Appellant's unrestricted sexual assault report to her. HROT at 641. In response to this request, YN1 [redacted] provided a statement to CGIS. HROT at 641; R. at 795.

C. Trial Defense Counsel *DuBay* Hearing Testimony

Trial defense counsel, LCDR T[redacted] C[redacted], and assistant trial defense counsel, LCDR L[redacted] P[redacted], both testified at the *DuBay* Hearing. *DuBay* Findings at 5-6. Both LCDR C[redacted] and LCDR P[redacted] testified that they considered filing an Article 31(b) motion. HROT 548, 671. When asked why an Article 31(b) suppression motion was not filed to suppress Appellant's statements to YN1 [redacted] LCDR C[redacted] testified, "I thought that the chance of prevailing on the 31(b) motion was unlikely." HROT at 548.

[3] Corroborated by notes in LCDR P[redacted]'s file. HROT 199. Appellant, on the other hand, claimed at the DuBay hearing that YN1 [redacted] asked him several additional questions during the course of the conversation including: (1) Why did he need his backpack and what was in it that needed so importantly; (2) Who was the first person he recalled seeing in the stateroom; and (3) Was there anything else he could can remember? HROT 96-98, *DuBay* Findings at 4.

Based on answers from SNBM SC and Appellant, and testimony of YN [redacted] at the Article 32, defense counsel did not pursue the Article 31(b) motion and believed it would fail. HROT at 548-49, 671-72. LCDR P[redacted] detailed reasons why she believed the motion would fail, including that: YN1 [redacted] was acting in her victim advocate capacity; YN1 was not acting on behalf of law enforcement; YN1 [redacted] was not acting for good order and discipline purposes; YN1 [redacted] did not interrogate Appellant; and that Appellant was making a voluntary statement. HROT at 672, 691.

Both LCDR O[redacted] and LCDR P[redacted] indicated that they would have preferred to have Appellant's statements to YN1 [redacted] suppressed, and defense counsel filed a motion under Military Rules of Evidence 514 to suppress his statement. HROT 549, 551, 691. Yet, defense counsel believed that the information Appellant relayed to YN1 [redacted] would have been admissible at trial since Appellant relayed the same information to SNBM SC and the statements to SNBM SC could not be suppressed under any theory. HROT 550-51.

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

I. TRIAL DEFENSE COUNSEL'S DECISION TO NOT MOVE TO SUPPRESS APPELLANT'S STATEMENT TO A VICTIM ADVOCATE UNDER ARTICLE 31, UCMJ DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL'S PERFORMANCE WAS OBJECTIVELY REASONABLE AND DID NOT PREJUDICE THE APPELLANT.

Standard of Review

Ineffective assistance of counsel claims are reviewed *de novo*. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). A *DuBay* military judge's findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed *de novo*. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997).

Discussion

The issue before this Court for the second time centers on trial defense counsel's decision to not file a motion to suppress Appellant's voluntary statements to a victim advocate under Article 31, UCMJ. Military courts review ineffective assistance of counsel claims using the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (incorporating the *Strickland* test in the context of military justice case law). To prevail on an ineffective assistance of counsel claim, an appellant must show both that (1) counsel's performance was deficient and (2) that this deficient performance prejudiced their defense. *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F 2009).

In analyzing an ineffective assistance of counsel claim, Courts are highly deferential to counsel and begin with a strong presumption that defense counsel's performance fell within the wide range of reasonable professional assistance. *Id.* at 475-76. To overcome this strong presumption of competence, an Appellant must show that counsel's performance fell "below an objective standard of reasonableness." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

In this case, the *DuBay* judge's findings support the conclusion that trial defense counsel's performance did not constitute ineffective assistance of counsel. As detailed below, the *DuBay* judge correctly found that there was no reasonable probability that a motion to suppress under Article 31, UCMJ would have succeeded, and that trial defense counsel's decision to not file the motion was a reasonable strategic decision. Therefore, Appellant has failed, under either theory, to meet his burden of proving even the first prong of the *Strickland*

test. Further, Appellant has also failed to show that his counsel's performance prejudiced his defense.

A. The *Dubay* military judge correctly found that there was not a reasonable probability that a motion to suppress under article 31(b) would have succeeded.

"When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. McConnell*, 55 M.J. 479, 482 (quoting *United States v. Napoleon*, 46 MJ 279, 284 (1997)). Under Article 31(b), UCMJ, 10 U.S.C. § 831(b), warning rights are required when "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014). If any of these requirements is not met, a motion to suppress a statement under Article 31(b) would not succeed. Only the second requirement remains at issue in this case: whether YN1 [redacted] interrogated or requested any statement from Appellant.[4]

1. The *DuBay* judge correctly concluded that YN1 [redacted] was not acting, and could not be reasonably considered to be acting, in a law enforcement or disciplinary capacity.

To avoid far reaching and unintended consequences into all aspects of military life, the second textual predicate under Article 31(b), UCMJ – interrogation and the taking of any statement – has been interpreted "in context, and in a manner consistent with Congress' intent that the article protect the constitutional right against self-incrimination." *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006); *see United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000)

[4] *See United States v. Harpole*, 77 M.J. 231, 236 n. 9 (C.A.A.F. 2018) ("The only Article 31(b), UCMJ predicate in dispute in this case is whether the victim advocate interrogated or requested any statement from the Appellant.").

(detailing the rationale for the development of the Article 31 rights' warning requirement in the military). "Under Article 31(b)'s second requirement, rights warnings are required if the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry." *Jones*, 73 M.J. at 361 (internal citation and quotation omitted). Generally, questioning by a person who is not acting in an official law enforcement or disciplinary capacity do not require Article 31(b) rights warnings. *Cohen*, 63 M.J. at 49-50. In determining whether the second requirement is met, courts assess "all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting an official law-enforcement or disciplinary capacity." *Cohen*, 63 M.J. at 50 (internal quotation marks omitted).

Courts have found questioners to be acting in a law enforcement or disciplinary capacity where they act in close cooperation with investigators prior to meeting with an accused, where the interview is aimed at acquiring evidence to support the prosecution of a service member, or where the questioner intentionally discloses an otherwise confidential communication to investigators. *See United States v. Brisbane*, 63 M.J. 106, 113 (C.A.A.F. 2006) (Family Advocacy Specialist's interview was pre-planned with investigators and the reason for interview was to decide if investigators had sufficient evidence to proceed); *United States v. Benner*, 57 M.J. 210, 213-14 (C.A.A.F. 2002) (Chaplain reported contents of privileged communication to investigators). In contrast, courts have found that rights warnings are not required when the questioner has a personal motivation for the inquiry or questions an accused in an official capacity solely to accomplish an operational mission. *See United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999) (commander, acting in an official capacity, sought information needed for the review of the accused's security clearance); *United States v. Loukas*, 29 M.J. 385, 389

(C.A.A.F. 1990) (crew chief of an operational military aircraft questioned accused about drug use). *Cf. United States v. Ramos*, 76 M.J. 372 (C.A.A.F. 2017) (holding that Article 31(b) rights were required because no immediate operational necessity existed).

Here, YN1 [redacted] was not acting in either an official law enforcement or disciplinary investigation or inquiry during her meeting with Appellant. YN1 [redacted] never conducted or was assigned to conduct a law enforcement or adverse administrative investigation related to SK3 GR's report against Appellant, and was not engaged in a self-directed law enforcement or disciplinary investigation. *Dubay* Findings at 8. Instead, YN1 [redacted] was serving as, and believed to be serving as, a victim advocate when Appellant reported that he believed he was sexually assaulted. *Dubay* Findings at 8.

The circumstances surrounding how Appellant made the unrestricted sexual assault strongly support the conclusion that YN1 [redacted] was not acting in a law enforcement or disciplinary capacity. At around 9:30 at night, three days after SK3 GR had made her unrestricted report of sexual assault, Appellant on his own volition approached YN1 [redacted] who was asleep in her berthing area. *See* HROT at 570, 582, 587, 635. Appellant did not explain what he specifically wanted to report to YN1 [redacted] *See* HROT at 570, 635. In fact, YN1 [redacted] did not know when Appellant approached her that his report would have any connection to SK3 GR's report made several days before. HROT at 635.

Consistent with her role as a victim advocate, YN1 [redacted] agreed to speak with Appellant immediately, even though Appellant had woke her up at night and she was assigned to an upcoming midnight watch. *DuBay* Findings at 8. Once YN1 [redacted] Appellant, and SNBM SC moved from YN1 [redacted] stateroom to the first class lounge, YN1 [redacted] asked Appellant is he was comfortable having SNBM SC there. *DuBay* Findings at 3. When Appellant responded

affirmatively and that he had already told SNBM SC everything, YN1 [redacted] then asked Appellant "what was going on." HROT at 637. Appellant then detailed what he claimed occurred during the port call in Tahiti. During Appellant's narrative account, YN1 [redacted] did not take notes, direct Appellant or SNBM SC to make a written statement, or independently memorialize her recollection of the discussion. *See DuBay* Findings at 8.

As the *DuBay* judge noted, the facts and circumstances of this case are even more benign than the circumstances in *Jones*, where CAAF upheld the military judge's conclusion that the questioner, a military police augmentee, was not acting in an official law enforcement capacity. *See DuBay* Findings at 8; *Jones*, 73 M.J. at 362. In *Jones*, the questioner was involved in the investigation of offenses, participated in the search for evidence, and helped secure the scene of the burglary before questioning Appellant. *Id*. Unlike *Jones*, YN1 [redacted] had no law enforcement role whatsoever in the investigation of SK3 GR's sexual assault report. *See id*. And, unlike the inspector general in *Cohen* who had some disciplinary responsibility, YN1 [redacted] in her role as a victim advocate, had none. *See* 63 M.J. at 54. While she relayed Appellant's unrestricted report of sexual assault to the senior victim advocate, and in turn relayed the report to the Commanding Officer and Executive Officer, YN1 [redacted] did so solely in her capacity as a victim advocate and as required by Coast Guard policy. *See* HROT at 638, 640; *see generally* SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM, COMDTINST 1754.10D (cancelled on December 7, 2016).

YN1 [redacted] was also not working in conjunction with Coast Guard investigators prior to her discussion with Appellant. The circumstances of this case are in stark contrast to those in *Brisbane* where the Family Advocacy Specialist was working with investigators prior to the interview and approached the accused to obtain information to determine if there was sufficient

evidence to proceed with a criminal investigation. *See* 63 M.J. at 113. Though she was generally aware Appellant had been accused of sexually assaulted SK3 GR, YN1 [redacted] only role related to that accusation was to prepare travel orders for SK3 GR. *See* HROT 648, 656-58. When Appellant approached YN1 [redacted] at night several days later, YN1 [redacted] did not know what he was going to specifically speak with her about or that it was going to relate to SK3 GR's report of sexual assault. *See* HROT at 635. Moreover, YN1 [redacted] only involvement with investigators came several weeks after her discussion with Appellant, and only after investigators approached her to obtain a statement. *See* HROT at 641.

Furthermore, a reasonable person in Appellant's position would not have reasonably believed YN1 [redacted] was acting in an official law-enforcement or disciplinary capacity. Whether the military questioner could be considered to be acting in an official-law-enforcement capacity is judged by reference to "a reasonable man in the suspect's position." *Jones*, 73 M.J. at 362 (internal quotation and citation omitted). Though YN1 [redacted] was senior in rank, Appellant chose to approach YN1 [redacted] at night to voluntarily make an unrestricted sexual assault report to her in her role as a victim advocate. *See* HROT at 582-83. YN1 [redacted] was not in Appellant's immediate chain of command or in his evaluation chain. *See DuBay* Findings at 8. YN1 [redacted] also had no routine supervisory role over Appellant, and only occasionally stood bridge watch with him. *See id*. Though YN1 [redacted] knew SK3 GR had made a sexual assault report against Appellant, this report occurred several days before Appellant approached YN1 [redacted] Additionally, while Appellant claimed he felt he had no choice but to answer YN1 [redacted] questions, the relevant standard is objective, not subjective.[5] *See Jones*, 73 M.J. at 362. Taken

[5] Although Appellant claims that YN1 [redacted] asked him multiple questions during the course of their discussion and felt he was obliged to answer her questions due to her senior rank, the testimony of YN1 [redacted] and SNBM SC, and the *DuBay* military judge's findings, demonstrate that there was no independent evidence to corroborate Appellant's self-serving statement. *See DuBay* Findings at 4, 8-9.

together, a reasonable person in Appellant's position would not have considered YN1 [redacted] to be acting in an official law enforcement or disciplinary capacity.

Because YN1 [redacted] was not acting, and no reasonable person would have believed she was acting, in a law enforcement or disciplinary capacity, the second requirement under Article 31(b) was not met.

2. YN1 [redacted] superior rank did not create a presumption that she was acting in a law enforcement or disciplinary capacity.

Questioning by a military superior in the *immediate* chain of command is normally presumed to be for disciplinary purposes, but even this presumption is not conclusive. *See Swift*, 53 M.J. at 446; *United States v. Pittman*, 36 M.J. 404, 407 n. 7 (C.M.A. 1993). In *Swift*, the presumption was applied to the accused's immediate military superior who suspected the member was engaging in bigamy and initiated questions to the accused about this suspicion. 53 M.J. at 448. Similarly, in *United States v. Good*, the presumption was applied to a Special Agent who was the accused's supervisor and controller for a covert operation and in the accused's immediate chain of command. 32 M.J. 105, 107 (C.M.A. 1991). However, the limited presumption has not been extended to discussions between an accused and an individual senior in rank but not in the accused's immediate chain of command.

Unlike the supervisors in *Swift* and *Good*, YN1 [redacted] was not in Appellant's immediate chain of command. *See Swift*, 53 M.J. at 448; *Good*, 32 M.J. at 107. Specifically, the *DuBay* judge found that "there is no evidence YN1 [redacted] was in SN Harpole's direct chain of command, was in SN Harpole's enlisted evaluation chain, or had some type of routine, direct supervision of SN Harpole." *DuBay* Findings at 8. Moreover, the fact that YN1 [redacted] was senior in rank to Appellant and occasionally stood watch with him does not, in itself, warrant application of the

presumption in this case. Because YN1 [redacted] was not in Appellant's immediate chain of command, the presumption should not be applied in this case.

Even if the presumption is applied, the testimony of Appellant, SNBM SC, and YN1 [redacted] rebut the claim that YN1 [redacted] was acting in a disciplinary capacity. The testimony of Appellant and SNBM SC at the *DuBay* hearing demonstrates that Appellant sought out YN1 [redacted] instead of a more junior victim advocate, because he was more comfortable speaking to her. *DuBay* Findings at 8. Appellant voluntarily approached YN1 [redacted] in her capacity as a VA, and chose the time and circumstances of the meeting. *Id.* YN1 [redacted] did not initiate this meeting, nor did she know what Appellant wanted to discuss at the outset. As explained above, the facts and circumstances in this case support the conclusion that YN1 [redacted] was not acting in a law enforcement or disciplinary capacity during her discussion with Appellant.

3. YN1 [redacted] opening question to Appellant about "what was going on" did not constitute an interrogation.

"Interrogation includes any formal or informal questioning in which an *incriminating* response either is sought or is a reasonable consequence of such questioning." Mil. R. Evid. 305(b)(2) (emphasis added).[6] Though YN1 [redacted] was generally aware SK3 GR made a sexual assault allegation against Appellant, she did not ask the question to elicit *incriminating* information from Appellant about that accusation. At the time YN1 [redacted] asked Appellant "what was going on," she did not know what Appellant was going to speak to her about. *See* HROT at 570, 635. While she generally thought he was seeking her out in her role as a victim advocate, YN1 [redacted] did not know that the discussion would involve his interactions with SK3 GR. *See* HROT at 635. Further, Appellant approached YN1 [redacted] at night several days after

[6] The United States acknowledges that C.A.A.F.'s opinion noted, "This question, though casual in nature, *could* be construed as interrogation." *Harpole*, 77 M.J. at 237 n. 10 (emphasis added). But, CAAF did not affirmatively decide whether this statement did, in fact, constitute an interrogation. *See id.* at 237.

SK3 GR made her report. This distance in time, the lack of information YN1 [redacted] had when she asked "what was going on," and the circumstances surrounding Appellant's request to speak to YN1 [redacted] all demonstrate that she was not attempting to elicit incriminating information from Appellant.

Additionally, Article 31(b) rights warnings are not required before a spontaneous statement is made. "Spontaneous statement, even though incriminating, are not within the purview of Article 31." *United States v. Lichtenhan,* 40 M.J. 466, 469 (C.A.A.F. 1994). Spontaneous statements include not only those made by an accused without any prompting, but also include those made in response to a questioner's acknowledgement of an accused's request to speak with them. *See id.*; *United States v. Vitale,* 34 M.J. 210 (C.M.A. 1992). In *Lichtenhan,* a Chief Petty Officer was assigned to investigate larcenies at a unit, and was informed that the accused had tried to obtain equipment without authorization. 40 M.J. at 468. The Chief Petty Officer approached the accused to interview him about this attempt. *Id.* Before the Chief Petty Officer would begin questioning, the accused stated "there's something I need to talk to you about first." *Id.* The Chief responded, "Go Ahead," the accused stated he needed help, and the Chief asked "Help with what?" *Id.* The accused then admitted to taking controlled substances. *Id.* The Court of Military Appeals held that the military judge did not abuse his discretion by admitting the statements because the accused's statements were spontaneous and no Article 31(b) rights were required. *Id.* at 469.

Similar to the investigator's prompt for the accused to "Go Ahead" in *Lichtenhan,* YN1 [redacted] asked Appellant the open ended question of "what was going on" in response to his request to speak with her. *See id.* at 468; HROT at 637. Unlike *Lichtenhan,* YN1 [redacted] was not even assigned as an investigator nor was she investigating Appellant when she asked this question.

See id. at 468; HROT at 635, 637, 645. Further, YN1 [redacted] was not interrogating Appellant, and was instead fulfilling her role as a victim advocate. She also did not even know specifically what Appellant wanted to speak to her about. Accordingly, the facts of this case are an even clearer example of a spontaneous statement that did not require Article 31(b) rights.

Moreover, finding that YN1 [redacted] open ended question of "what's going on" constituted an interrogation would lead to comprehensive and unintended reach into aspects of military life that military courts have sought to avoid. *See Cohen*, 63 M.J. at 49. And, it would put a victim advocate in a position to assess the legitimacy of reports, rather than being a neutral resource, and would potentially discourage victims from approaching victim advocates.

For all the above reasons, there was no reasonable probability that the motion to suppress Appellant's statements to YN1 [redacted] under Article 31 would have been meritorious. As such, Appellant cannot show that his counsel's performance was ineffective for failing to file a suppression motion.

B. Trial Defense Counsel's decision to not file an Article 31(b) suppression motion, which included legal and tactical considerations, was a reasonable strategic decision under prevailing professional norms.

Generally, courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *Mazza*, 67 M.J. at 475. To overcome the strong presumption of competence and prevail on an attack of defense counsel's trial strategy or tactics, Appellant has the burden of showing "specific defects in counsel's performance that were unreasonable under prevailing norms." *Id.* Courts have consistently declined to "assess counsel's actions through the distortion of hindsight" and instead consider whether counsel, in considering available alternatives, at the time made an objectively reasonable choice. *Id.* 474-75.

1. The DuBay military judge correctly found that legal and tactical considerations were involved in trial defense counsel's decision to not move to suppress Appellant's statements to YN1 [redacted] under Article 31(b), UCMJ.

Per the testimony at the *DuBay* hearing, Appellant's trial defense counsel considered filing a motion to suppress Appellant's statements under Article 31(b) based on available evidence at the time. *DuBay* Findings at 7. Trial defense counsel conducted an interview of SNBM SC, spoke to Appellant about his report to YN1 [redacted] and questioned YN1 [redacted] at the Article 32 preliminary hearing to gather further information. *See* HROT at 672, 677. Lead trial defense counsel also discussed the trial strategy with her supervisors, and incorporated their insight into her preparation. *DuBay* Findings at 7; HROT at 554.

Ultimately, trial defense counsel decided not to file an Article 31(b) suppression motion because they did not believe the motion would prevail. This was based on their view of the evidence they had at the time which showed YN1 [redacted] did not interrogate Appellant or act in a law enforcement capacity. Specifically, defense counsel assessed that YN1 [redacted] was acting in her victim advocate capacity and not on behalf of law enforcement or for good order and discipline purposes, YN1 [redacted] did not interrogate Appellant and was in "receiving mode," and Appellant was making a voluntary statement. *See* HROT at 672-73. Their assessment was further supported by SNBM SC's statement that YN1 [redacted] only asked one question about Appellant's presence in the berthing area, but then retracted the statement prior to Appellant answering it.[7] *See* HROT 599-600; 677-78. Contrary to Appellant's assertions, trial defense counsel's conclusion that a suppression motion would not have been successful should not be construed as anything other than a legal consideration. And, defense counsel did file a motion to

[7] Though Appellant had told trial defense counsel that YN1 [redacted] had asked additional questions, this self-serving statement was directly refuted by statements from YN1 [redacted] and SNBM SC.

suppress Appellant's statements to YN1 [redacted] under Mil. R. Evid. 514. *See* A.E. 22. Thus, trial defense counsel decision to not file the motion included legal and tactical considerations.

2. The DuBay military judge correctly found that trial defense counsel's decision to not seek suppression of Appellant's statements to YN1 [redacted] was a reasonable strategic decision.

In this case, whether defense counsel's decision to not file a motion to suppress under Article 31 was a reasonable strategic decision relates to the probability that the motion would have been successful. As the *DuBay* judge noted, Appellant has failed to show that "prevailing professional norms require filing each and every motion that has either a remote possibility of succeeding or a 'non-zero' chance of prevailing." *DuBay* Findings at 7. Though both trial defense counsel acknowledged that they would have preferred if YN1 [redacted] had not testified, there was no reasonable probability that an Article 31(b) motion would be meritorious. Rather than devoting their time on preparing an, at best, weak motion to suppress pursuant to Article 31(b), trial defense counsel focused their efforts on preparing a motion to suppress under M.R.E. 514, an issue of first impression that they viewed had a higher likelihood of succeeding. *See DuBay* Findings at 7; HROT at 552, 671-72. Further, when the M.R.E. 514 suppression motion was denied, trial defense counsel crafted a way to incorporate Appellant's statement to develop reasonable doubt and support their theory that the investigation of Appellant was incomplete and biased. *See* R. at 550-51. Thus, trial defense counsel's decision to not file a motion to suppress under Article 31(b) that they did not believe would be meritorious was consistent with prevailing professional norms and a reasonable strategic decision.

3. Appellant did not suffer prejudice based on trial counsel's failure to file a motion to suppress under Article 31(b).

In addition to showing that counsel's performance was deficient, an accused must show that "there is a reasonable probability that but for counsel's [deficient performance], the result of

the proceeding would have been different." *Akbar*, 74 M.J. at 379 (citing *Strickland*, 466 U.S. at 694. For the reasons stated in *supra* Section I.A.1., there was no reasonable probability that a motion to suppress Appellant's statement to YN1 [redacted] would have been successful since YN1 [redacted] did not interrogate Appellant. Since the motion would not have succeeded, Appellant cannot show their decision to not file the motion caused him prejudice.

C. Even assuming YN1 [redacted] testimony had been suppressed, the DuBay military judge correctly found that the members' findings would have only been different as to the Article 107, UCMJ charge.

The United States concedes that the *DuBay* military judge correctly concluded that the findings as to the Article 107, UCMJ charge and specification would have been different had Appellant's statements to YN1 [redacted] been suppressed. However, the findings would not have been different as to sexual assault charge under Article 120 or the housebreaking charge under Article 130 even if Appellant's statements had been suppressed.

First, YN1 [redacted] testimony was only central to the Article 107 false official statement charge and focused solely on Appellant's statements to her during a meeting that lasted less than 15 minutes. While YN1 [redacted] testimony did support the theory that Appellant was trying to fabricate a story as a means to diminish his culpability, Appellant had told SNBM SC "everything" before he approached YN1 [redacted] and there was no valid theory to suppress the statements Appellant made to SNBM SC before the meeting with YN1 [redacted] *See DuBay* Findings at 9; HROT at 597, 603; *Dubay* Hearing Exhibit XI at 194-95. Thus, the same statements, and the fact Appellant subsequently approached a victim advocate immediately following his conversation with SNBM SC, would have been introduced through SNBM SC.

Second, as to the Article 120 sexual assault charge, the United States' case was supported by multiple other forms of evidence, in addition to YN1 [redacted] testimony. In its case in chief,

the United States relied on the testimony of SK3 GR, witnesses including SK3 SR and OS3 LP, and evidence obtained from SK3 GR's SANE exam, including the presence of Appellant's semen inside SK3 GR's vaginal canal. SK3 GR's testimony established that Appellant had sexual intercourse with her and that she incapable of consenting to sex with Appellant. *See* R. at 487-89, 492-94, 496-99. The testimony of SK3 GR's roommates corroborated SK3 GR's testimony, as their testimony established Appellant entered the stateroom by himself, there were sounds of intercourse coming from SK3 GR's rack, and Appellant got dressed quickly and departed the stateroom by himself. *See* R. at 722, 726-27, 757-58, 760-62. Further, SK3 GR's sexual assault claim was further corroborated by evidence from the SANE exam. *See* R. at 556, 558, 580, 582-84. Appellant claims that the panel relied upon his inadmissible statement to settle the question of consent since the testimony of SK3 GR's roommates indicated the sexual encounter was consensual. Yet, YN1 [redacted] did not testify about any events that occurred in SK3 GR's stateroom or about SK3 GR's capacity to consent. And, Appellant's statements, which the United States argued showed a consciousness of guilt, would have been admitted through SNBM SC even if the statements to YN1 Nipp had been suppressed.

Third, YN1 [redacted] testimony was not required in order to prove the elements of the Article 130 housebreaking charge. The United States presented the testimony of SK3 GR, SK3 SR, and OS3 LP to support this charge. None of these witnesses testified that they let Appellant into the room. Rather, SK GR testified that she immediately went to sleep when she entered her stateroom and did not recall letting Appellant into the room. R. at 497-99. SK3 SR also testified that Appellant woke her while she was asleep in her rack and subsequently observed Appellant getting dressed and departing the stateroom by himself. R. at 757-58, 760-62. Further, OS3 LP testified that she awoke to sounds of intercourse and saw Appellant getting dressed and departing

the stateroom. R. at 723, 726-27. The testimony of all of these witnesses supported a finding that Appellant entered SK3 GR's stateroom unaccompanied and without permission, and contradicted the statement Appellant made to YN1 [redacted] Therefore, there is no reasonable probability that this finding would have been different had Appellant's statement to YN1 [redacted] been suppressed.

Even assuming counsel's performance is found to be deficient, Appellant has failed to meet the prejudice prong of the *Strickland* test for the Article 120 and Article 130 charges. Because the findings would have only been different as to the Article 107 charge, Appellant cannot meet his burden of proving that the introduction of YN1 [redacted] testimony resulted in substantial prejudice for the remaining charges. Therefore, the Article 120 and Article 130 charges should be affirmed even if this Court finds that defense counsel's performance in not filing a motion to suppress was deficit.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

Date: 22 February 2019

/s/

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Court and opposing counsel on 22 February 2019.

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