Appendix A: Court of Appeals of Arizona, Division One,
Memorandum Decision Affirming Conviction,
September 6, 2022.

2022 WL 4075333
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Court of Appeals of Arizona, Division 1.

STATE of Arizona, Appellee,

v.

Jared Thomas CARDWELL, Appellant.

No. 1 CA-CR 21-0181

Filed September 6, 2022

As Amended September 7, 2022

As Amended January 25, 2023

Review Denied April 04, 2023

Appeal from the Superior Court in Yuma County, No. S1400CR201600404, The Honorable Brandon S. Kinsey, Judge, **AFFIRMED**

**Attorneys and Law Firms**

Arizona Attorney General's Office, Phoenix, By Linley Wilson, Counsel for Appellee

Yuma County Public Defender, Yuma, By Joshua B. Tesoriero, Counsel for Appellant

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge David D. Weinzweig and Judge Brian Y. Furuya joined.

## MEMORANDUM DECISION

PERKINS, Judge:

*1 ¶1 Jared Thomas Cardwell appeals his conviction and sentence for second-degree murder. For the following reasons, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view and thus recount the facts in the light most favorable to sustaining the verdict. *See* *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013). For privacy purposes, we refer to the victims by pseudonyms. *See* Ariz. R. Sup. Ct. 111(i).

¶3 In May 2015, Cardwell, a Lance Corporal in the United States Marine Corps, lived with his wife Barbara and twenty-month-old stepdaughter Cara in on-base housing at the Marine Corps Air Station in Yuma ("Yuma Base"). On May 18, Barbara spent

the day with a then-healthy Cara, taking videos and photographs of her. That evening, their neighbors watched Cara while Cardwell drove Barbara to work. Neither Barbara nor the neighbors saw any scalp bruises or facial burns on Cara, and Barbara's videos and photographs depicted no such injuries.

¶4 When Cardwell picked up Barbara that night, she was upset he had not brought Cara with him because she never left Cara alone at home. Cardwell told Barbara on the drive home that he "spanked [Cara] on her butt" earlier that evening because he "had taken Cara to the potty; she said that she was done; and she had an accident." Barbara had repeatedly told Cardwell she was not okay with him spanking Cara. Barbara went directly to bed once they arrived home while Cardwell checked on Cara.

¶5 The next morning, after Cardwell left for work, Barbara went to Cara's room and found her "laying halfway off her bed with her head on the floor." Cara's body was cold and stiff, and Barbara could not move her or open her eyes or mouth. Barbara saw "dark red marks" on Cara's face that resembled burns and called 911.

¶6 When the paramedics arrived, they unsuccessfully tried to resuscitate Cara, who was unresponsive and had no pulse. Cara showed signs of rigor mortis and had a bright red face with dried blood near her mouth and nostrils. The paramedics transported Cara to the hospital, where an emergency-room doctor pronounced her dead. Based on her physical signs, including a core temperature of 80 degrees, the doctor concluded she died several hours earlier. Once Cardwell arrived at the hospital, Barbara immediately demanded to know what happened the night before. Cardwell apologized but denied any wrongdoing.

¶7 At the hospital, a Naval Criminal Investigative Service ("NCIS") agent spoke with Cardwell and Barbara about Cara's death. Barbara insisted she needed to tell her mother Nancy that Cara died, but she allowed the agent to examine Cara. The agent observed "large circle areas" on Cara's face that appeared burn-like. Meanwhile, other NCIS agents went to Cardwell's home to investigate.

¶8 Cardwell, Barbara, and the NCIS agent then went to Nancy's home to inform her of Cara's death. Yuma Police Department detectives arrived soon after at Nancy's home, and Cardwell agreed to go to the Yuma police station to be interviewed by a Yuma detective. During the interview, Cardwell recounted that while Barbara was at work, Cara "pooped on the floor," and he "smacked her on the butt for it." When the detective asked Cardwell how Cara died, Cardwell answered, "I really don't know, she seemed fine ... she was just fussy more than normal when I was trying to put her to bed." Cardwell later explained the only thing he "regretted was when [he] smacked her on the butt" after he "got upset with her[.]"

*2 ¶9 A few days later, Dr. Greg Hess, the chief medical examiner for Pima County and a forensic pathologist, conducted Cara's autopsy. Dr. Hess noted she had ten subscalp bruises and many more bruises on her body. Dr. Hess concluded Cara's cause of death was a "subdural hemorrhage due to blunt force head trauma." Dr. Hess declared Cara would have died "relatively rapidly" after the impact. He also asserted that any of the head bruises could have caused the fatal hemorrhage. Dr. Hess believed Cara's facial burns were either chemical burns or scald burns from hot water.

¶10 On May 22, NCIS agents interviewed Cardwell at the Yuma police station. After Cardwell read and signed an "Article 31(b) Waiver" form, which contains the military's version of the constitutional-rights advisory required by *Miranda v. Arizona*, 384 U.S. 436 (1966), he agreed to answer questions. Cardwell told the agents: (1) when he saw that Cara had an accident, he looked at her and said, "are you freakin serious"; (2) he then "yanked" Cara toward him, grabbed her, put her over his leg, and "smacked" her behind; (3) she "lost her mind" when he did so, experiencing one of her worst "temper tantrums"; (4) he told her that he was sorry for yanking her; (5) her reaction resembled someone who had just been "sucker punched"; and (6) she sustained her fatal injuries "under [his] watch." On a scale of one to ten, with ten being the highest, he described his anger level when he spanked Cara as a seven. Cardwell asserted neither Barbara nor his neighbors harmed Cara, and no intruders entered his house that night.

¶11 NCIS agents again interviewed Cardwell on May 26. After signing another Article 31(b) Waiver, Cardwell repeated his earlier accounts that he spanked Cara after she accidentally defecated on the floor. In this interview, at the agent's request, he

demonstrated how hard he yanked Cara by grabbing and pulling the agent's arm. Cardwell's force surprised the agent. An agent asked Cardwell to describe on a scale of one to ten, with ten being the highest, the likelihood that his actions caused Cara's fatal injuries, and Cardwell answered that he would "probably say a nine." Cardwell explained he "never yanked her that hard and she'd never had a reaction as that to anything [he'd] done before[.]" Cardwell believed she might have sustained a "coup" injury, meaning a "contusion on the brain close to that side of the impact."

¶12 Military prosecutors charged Cardwell under the Uniform Code of Military Justice with three specifications of murder and one specification of manslaughter. In the court-martial proceedings, the military court granted Cardwell's motion to suppress the statements he made to law-enforcement officers during the three interviews, finding (1) the officers violated Article 31(b) of the military code, 10 U.S.C. § 831(b), at the May 19 interview, and (2) Cardwell's statements were involuntary. The military prosecutors then dismissed the charges without prejudice.

¶13 A Yuma County Grand Jury next indicted Cardwell on one count of second-degree murder, a class one felony. Before trial, Cardwell unsuccessfully moved to suppress the statements he gave in the interviews. During trial, the superior court (1) denied Cardwell's motion to dismiss based on a lack-of-jurisdiction claim; and (2) precluded him from calling two expert witnesses: John Weil, a retired Marine Colonel, and Randy Papetti, an attorney.

¶14 At trial, the State introduced the expert testimony of Dr. Carole Jenny, a practicing physician, professor of pediatrics, and director of a fellowship program specializing in child-abuse pediatrics. Based on her review of the medical records, autopsy report, interviews, and a May 18 video of Cara, Dr. Jenny opined Cara "died of abusive head trauma," meaning "head trauma that occurs for infants and young children that is inflicted by another rather than an accident." Dr. Jenny said Cara suffered "a very severe fatal brain injury associated with multiple impact sites to her head" resulting from "severe blows." She noted Cara looked normal in the May 18 video. Dr. Jenny described the bruises on Cara's scalp as "new," caused by "direct impact to the skull," and in "very unusual places for kids to get accidental bruises." She confirmed Cara's facial burns matched bleach burns. And although Dr. Jenny independently reached her conclusions, she agreed with Dr. Hess's autopsy findings.

*3 ¶15 Cardwell's defense theory was that Cara sustained the fatal injuries from a short, accidental fall in her bedroom that night. And that Cara may have suffered from a bleeding disorder which contributed to her death. Cardwell called Dr. Evan Matshes, a physician and forensic pathologist, as an expert witness. Dr. Matshes agreed Cara "died of blunt head trauma" and explained "[t]he two possibilities are that it was intentional or that it was not intentional." He agreed Cara suffered "multiple blows to her head that showed up in the form of bruises across her scalp" and "a large fresh subdural hematoma." Dr. Matshes testified that "[s]ubdural hemorrhages can be the result of a short fall," but it "is a rare event" for a child to be "killed by a short fall." Dr. Matshes asserted Cara would have died within within 30 to 60 minutes after suffering the trauma.

¶16 Dr. Matshes determined the marks on Cara's face were chemical burns and they "occurred at or around the time of death." The burns could have been "sinister," but Dr. Matshes did not "rule out" the possibility that the burns were caused by Cara's own vomit. Nor did he exclude the possibility that "the deliberate act of someone throwing a caustic chemical" caused the burns.

¶17 Cardwell also called Dutch Johnson, a forensic biomechanical engineer specializing in "reconstructing injuries and deaths that are associated with criminal cases." Johnson explained that various studies showed children had died from short falls less than three feet. He offered no opinion on how Cara hit her head or how she died.

¶18 The jury found Cardwell guilty as charged. The jury also found that Cara was under 12 years old and that the State had proven two aggravating circumstances ("aggravators"): (1) Cara suffered physical and emotional harm, and (2) Cardwell was in a position of trust. The superior court sentenced Cardwell to life imprisonment with the possibility of release after serving 35 years. Cardwell appealed, and we have jurisdiction under Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 13-4031, and -4033(A).

## DISCUSSION

### I. Separation of Powers

¶19 Cardwell contends the State's prosecution of his crime violated Arizona's separation-of-powers doctrine. In support, he cites a 2005 "Law Enforcement Agreement and Understanding" ("Agreement") between Yuma Base and Yuma County and City that authorized military authorities to investigate and prosecute serious felonies committed on the base, arguing the county attorney's prosecution invaded the military's jurisdiction. We review *de novo* whether "the State of Arizona has jurisdiction concurrent with the United States over federal lands situated within the State of Arizona." *State v. Galvan-Cardenas*, 165 Ariz. 399, 401 (App. 1990).

¶20 The State of Arizona generally has jurisdiction to prosecute crimes committed within its territorial borders. *State v. Vaughn*, 163 Ariz. 200, 203 (App. 1989); *see* A.R.S. § 13-108(A)(1). Once the State carries its "initial burden of proving that the offense occurred within this state[,]" the burden shifts to the defendant to prove the federal government possesses exclusive jurisdiction over the charged offense. *State v. Verdugo*, 183 Ariz. 135, 138 (App. 1995). "The federal government can acquire exclusive jurisdiction over state land in any one of three ways: (1) by purchase of land from a state, (2) by a cession of jurisdiction to the United States by a state after statehood, or (3) by an affirmation of exclusive jurisdiction to the United States prior to a state's admission to the Union." *Vaughn*, 163 Ariz. at 203. "The United States also acquires exclusive jurisdiction over land located within the boundaries of a state to which the United States holds title where there is a cession of jurisdiction by the state *and* an acceptance of jurisdiction by the United States." *Id.*

*4 ¶21 Cardwell first raised this argument when he moved to dismiss the indictment during trial, arguing there, as he does here, that the Agreement vested jurisdiction "solely and exclusively with the military courts-martial." In denying the motion, the superior court found that (1) the Agreement "cannot divest the State of Arizona" of jurisdiction and (2) even if "the Board of Supervisors could divest the State of Arizona of jurisdiction[,] ... [the Agreement] specifically includes a prosecution for this offense to be conducted by the county attorney's office."

¶22 Cardwell does not challenge the superior court's denial of his dismissal motion. Thus, he has waived any claim of error in that ruling. *See* *State v. Carver*, 160 Ariz. 167, 175 (1989) (abandoning and waiving unargued claims). This alone dooms his argument, given the court's finding that the Agreement authorized the county attorney's prosecution of his crime.

¶23 Even so, Cardwell has not shown exclusive federal jurisdiction. For the first time in the reply brief, Cardwell cites *State v. Willoughby*, 181 Ariz. 530 (1995), proposing that the State must prove jurisdictional facts beyond a reasonable doubt. Because this argument addresses points made in the State's answering brief, we will consider it. *See* Ariz. R. Crim. P. 31.10(c).

¶24 The defendant in *Willoughby* was convicted of premeditated first-degree murder and conspiracy to commit several felony offenses, including murder. 181 Ariz. at 532–33. The evidence presented a jurisdictional question because the defendant was "charged with an offense only part of which is alleged to have taken place in Arizona: the fatal blow and the death occurred in Mexico, and only acts of preparation allegedly took place in Arizona." *Id.* at 536. So "[t]o prosecute and convict Defendant for first-degree murder in Arizona, the state had to prove that acts of premeditation were committed in Arizona." *Id.*

¶25 The supreme court in *Willoughby* considered "who properly resolves jurisdictional facts in a criminal case and by what standard." *Id.* at 535. It concluded that, when jurisdictional facts are in conflict, "Arizona's territorial jurisdiction must be established beyond a reasonable doubt by the jury." *Id.* at 538. But when "the jurisdictional facts are undisputed, as in almost all cases, the court may decide the issue." *Id.* A defendant challenging jurisdiction must, therefore, first identify a conflict in

jurisdictional facts before the burden shifts to the State to prove jurisdiction beyond a reasonable doubt to the jury. *See id.* at 538–39.

¶26 At trial, Cardwell did not present evidence of a factual conflict on the jurisdictional issue. Instead, he expressly conceded that the state and military prosecuting agencies had concurrent jurisdiction over his case. The superior court was therefore not required to submit the jurisdictional question to the jury.

¶27 Nor is there merit to Cardwell's claim that military and state prosecutors engaged in improper forum shopping. "Under the 'dualsovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute." *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *State v. Poland*, 132 Ariz. 269, 276 (1982) (same rule). And the county attorney's prosecution similarly did not constitute a "horizontal appeal." *See Powell-Cerkonery v. TCR Mont. Ranch Joint Venture, II*, 176 Ariz. 275, 278–79 (App. 1993) (improper horizontal appeals involve decisions of the same court and occur when a party unjustifiably seeks a second trial judge to reconsider the first trial judge's decision in the same matter). We find no separation-of-powers violation.

**II. Autopsy Photograph**

*5 ¶28 Cardwell next challenges the superior court's admission of "unduly gruesome" autopsy photographs of Cara's face. We review the court's ruling for abuse of discretion. *State v. Morris*, 215 Ariz. 324, 339, ¶ 69 (2007).

¶29 When determining whether the superior court erred in admitting photographs, reviewing courts consider the following factors: (1) "the photograph's relevance," (2) "its tendency to inflame the jury," and (3) "its probative value compared with its potential to cause unfair prejudice." *Id.*

¶30 A photograph "is relevant if it aids the jury in understanding any issue in dispute." *State v. Amaya-Ruiz*, 166 Ariz. 152, 170 (1990). Any photograph of a deceased victim in a murder case is relevant "because the fact and cause of death are always relevant in a murder prosecution." *State v. Anderson*, 210 Ariz. 327, 340, ¶ 39 (2005). Yet gruesome photographs may not be introduced solely to inflame the jurors. *State v. Gerlaugh*, 134 Ariz. 164, 169 (1982). Photographs of a deceased victim may be relevant to show the nature and location of an injury, show or explain testimony, corroborate the evidence, determine the degree of a crime, or support the State's theory of the case. *Anderson*, 210 Ariz. at 339–40, ¶ 39.

¶31 Here, the superior court denied Cardwell's motion to preclude a series of autopsy photographs depicting Cara's face, finding they were relevant and admissible to establish the events that occurred the night of Cara's death. Cardwell disputed both the cause and manner of Cara's death. The jury heard detailed testimony from medical experts about the nature of Cara's injuries and their likely causes. The autopsy photographs depicted her injuries and helped the jury evaluate the expert testimony in light of Cardwell's disputes. The court acknowledged—and we agree—that the photographs were disturbing to look at and "prejudicial in a way." But we agree with the court that the potential for prejudice did not outweigh the photographs' probative value. We find no abuse of discretion.

**III. Suppression Motions**

¶32 Cardwell next argues the superior court should have excluded all statements he made to investigators during their interviews, claiming "three distinct legal avenues of analysis" required suppression: (1) analysis under military code Article 31; (2) application of collateral estoppel under *Crosby-Garbotz v. Fell*, 246 Ariz. 54 (2019); and (3) traditional voluntariness analysis. We address each argument in turn.

¶33 "We review the denial of a motion to suppress evidence for an abuse of discretion, considering only the evidence presented at the suppression hearing and viewing the facts in the light most favorable to sustaining the trial court's ruling." *State v. Wilson*, 237 Ariz. 296, 298, ¶ 7 (2015); *see also* *State v. Moran*, 232 Ariz. 528, 531, ¶ 5 (App. 2013) (deferring to the trial court on credibility findings). We review legal and constitutional issues *de novo*. *State v. Huerta*, 223 Ariz. 424, 426, ¶ 4 (App. 2010).

**A. Article 31 Argument**

¶34 The military court's suppression ruling concluded that the Yuma detective should have given Cardwell an Article 31(b) warning at the May 19 interview. Because the detective failed to give an Article 31(b) warning at the May 19 interview, the military court found all of Cardwell's later statements involuntary. On appeal, Cardwell argues the superior court should have likewise suppressed his statements based on the same reasoning.

***6** ¶35 Article 31(b) provides "technical warning requirements similar to those prescribed in *Miranda*." *United States v. Steward*, 31 M.J. 259, 263 (C.M.A. 1990) (internal footnote omitted). "The protections of Article 31(b) are broader than *Miranda* warnings in that a suspect must receive warnings even if the suspect is not in custody." *United States v. Baird*, 851 F.2d 376, 383 (D.C. Cir. 1988); *see also United States v. Rogers*, 47 M.J. 135, 136 (C.A.A.F. 1997) (comparing Article 31(b) requirements with *Miranda*). Evidence obtained in violation of Article 31(b) is excluded from any "trial by court-martial." 10 U.S.C. § 831(d).

¶36 Federal courts have strictly construed Article 31 to apply *only* to evidence in court-martial trials and have refused to expand its reach to civilian-court proceedings. *See* *United States v. Santiago*, 966 F. Supp. 2d 247, 258–59 (S.D.N.Y. 2013) (holding "Article 31 does not apply to a trial in a civilian court" and collecting cases). State courts have similarly refused to suppress evidence in civilian trials based on an Article 31(b) violation. *See* Maj. Michael J. Davidson, *The Effect of the Military's Article 31 Rights Warning Violations in Federal and State Courts*, 44 Fed. Law. 22, 24–26 (Aug. 1997) (collecting state court cases and observing that "the limited number of state courts to address this issue ... have held that a violation of Article 31 does not require the suppression of a defendant's statements" in civilian trials).

¶37 Cardwell has identified no case in which a civilian court excluded evidence in a civilian trial based on a violation of Article 31. Rather, he contends the NCIS and Yuma police investigations "merged," citing two military court-martial cases: *United States v. Swift*, 38 C.M.R. 25 (1967) and *United States v. Grisham*, 16 C.M.R. 268 (1954). But neither *Swift* nor *Grisham* address the application of Article 31 protections in civilian proceedings. *See* *Swift*, 38 C.M.R. at 29–30; *Grisham*, 16 C.M.R. at 270–71. Article 31(b) does not require suppression here.

**B. Collateral Estoppel**

¶38 Cardwell next argues the superior court erred by denying his request to hold the State collaterally estopped from "relitigating" the military court's suppression ruling. We review his claim *de novo*. *Crosby-Garbotz*, 246 Ariz. at 56, ¶ 9.

¶39 Collateral estoppel does not apply to successive state and federal prosecutions because "the parties in the two cases are not the same." *United States v. Ricks*, 882 F.2d 885, 890 (4th Cir. 1989). "Collateral estoppel is an ingredient of the fifth amendment protection against double jeopardy," *State v. Nunez*, 167 Ariz. 272, 276 (1991), but double-jeopardy is not implicated when separate sovereigns prosecute a defendant for the same conduct. *See* *Gamble*, 139 S. Ct. at 1964; *Poland*, 132 Ariz. at 276. The superior court did not err.

**C. Voluntariness**

¶40 Finally, Cardwell argues his statements were involuntary because "there was inherent compulsion in the manner in which the interrogations were conducted." Cardwell relies on the language in the military court's suppression ruling, as though the

superior court had no discretion to reach different conclusions than the military court. But the superior court "rendered [its suppression] decisions without knowing what happened in the court-martial case." In any case, we will not consider the military court's ruling because it was not submitted as evidence at the suppression hearing. *See Wilson*, 237 Ariz. at 298, ¶ 7 ("considering only the evidence presented at the suppression hearing").

*7 ¶41 We review the admission of a defendant's statements to police for abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25 (2006). A finding of voluntariness "will be sustained absent clear and manifest error." *State v. Poyson*, 198 Ariz. 70, 75, ¶ 10 (2000).

¶42 "Only voluntary statements made to law enforcement officials are admissible at trial," and a "defendant's statement is presumed involuntary until the state meets its burden of proving that the statement was freely and voluntarily made and was not the product of coercion." *State v. Boggs*, 218 Ariz. 325, 335, ¶ 44 (2008). Statements are involuntary when there is "coercive police conduct" and a "causal relation between the coercive behavior and [the] defendant's overborne will." *Id.* at 336, ¶ 44. Courts examine the "totality of the circumstances surrounding the confession" to decide whether the defendant's will was overborne. *State v. Lopez*, 174 Ariz. 131, 137 (1992); *see also State v. Hatfield*, 173 Ariz. 124, 126 (App. 1992) (listing factors—including the accused's age and intelligence level, the length of detention, and whether the accused received a constitutional-rights advisory—to assess whether the accused's will was overborne).

¶43 Cardwell asserts his military status and training caused his will to be overborne. But the court rejected this assertion and partially denied Cardwell's motions after considering the conflicting evidence presented by the State and Cardwell during a four-day hearing. Nothing on this record overcomes our deference to the court's credibility determinations or its other factual findings. Nor does Cardwell's general assertion that the interviewers exploited his emotionally "fragile state" to render his statements involuntary. *See Hatfield*, 173 Ariz. at 126 ("In Arizona, confessions have been found to be voluntary notwithstanding the use of psychological tactics and interviewing techniques that play upon a defendant's sympathies."). And Cardwell's waiver of his rights at the May 22 and 26 interviews suggests that his statements were voluntary. *State v. Patterson*, 105 Ariz. 16, 17–18 (1969); *see also State v. Naranjo*, 234 Ariz. 233, 238, ¶ 7 (2014) ("A knowing and intelligent waiver of *Miranda* rights occurs when the suspect understands those rights and intends to waive them."). We find no abuse of discretion.

**IV. Abusive-Head-Trauma Testimony**

¶44 Cardwell next argues the superior court violated Arizona Rule of Evidence ("Rule") 704 by admitting, against objection, Dr. Jenny's testimony that the cause of Cara's death was "abusive head trauma." He argues Dr. Jenny's opinion constituted an impermissible legal conclusion. We review the admission of expert testimony for abuse of discretion. *State v. Bernstein*, 237 Ariz. 226, 228, ¶ 9 (2015).

¶45 An expert's testimony "is not objectionable just because it embraces an ultimate issue." Ariz. R. Evid. 704(a). Yet "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Ariz. R. Evid. 704(b). Under Arizona law, expert witnesses may testify that a child victim's injuries resulted from abuse. *See State v. Poehnelt*, 150 Ariz. 136, 150 (App. 1985) ("[e]xpert testimony to establish that injuries were intentional and not accidental [is] admissible").

*8 ¶46 Dr. Jenny did not improperly opine on Cardwell's guilt or *mens rea*; she testified that she had no opinion on who caused Cara's injuries. Her testimony thus merely suggested that "a child of tender years found with a certain type of injury has not suffered those injuries by accidental means, but rather is the victim of child abuse." *State v. Moyer*, 151 Ariz. 253, 255 (App. 1986). Such testimony is typically admissible because it is "not an opinion by a doctor as to whether any particular person has done anything." *Id.* For that reason, the admission of Dr. Jenny's abusive-head-trauma opinion did not violate Rule 704.

¶47 Cardwell also suggests Dr. Jenny's testimony should have been excluded under Rule 703 because her reports purportedly contained errors, she relied on unsworn statements, she did not personally speak with or interview any individual with firsthand knowledge of the case, and she exhibited no doubts about her cause-of-death opinion. But Cardwell fails to explain how any of his general complaints violate Rule 703, nor does he provide supporting authority for any such claims. Because Cardwell has not adequately developed his argument in a manner permitting review, he has waived his Rule 703 claim. *See State v. Thompson*, 252 Ariz. 279, 300, ¶ 84 (2022) (waiving undeveloped, conclusory arguments).

**V. Preclusion of Defense Witnesses**

¶48 Cardwell next asserts the superior court improperly precluded witnesses Weil and Papetti. We review such evidentiary rulings for abuse of discretion, *Ellison*, 213 Ariz. at 129, ¶ 42, and will "affirm on any basis supported by the record." *State v. Wassenaar*, 215 Ariz. 565, 577, ¶ 50 (App. 2007).

**A. Preclusion of Weil**

¶49 More than a year before trial, Cardwell filed a notice of intent to present expert testimony from Col. John Weil, a retired Marine colonel and judge advocate general. The notice contained Weil's contact information but did not summarize his testimony or his qualifications. Cardwell did not provide any other information about Weil's proposed testimony or otherwise supplement his initial disclosure before trial.

¶50 During trial, the superior court held multiple hearings on whether to allow Weil's testimony. At the first hearing, Cardwell explained Weil would "testify to military culture and the issues surrounding [the] renewed motion for voluntariness." Finding the voluntariness issues had "already been litigated and been decided," the court precluded Weil from testifying on related topics. The court declined ruling on the rest of Weil's proposed testimony until it held an evidentiary hearing during which Weil could testify. At the evidentiary hearing, Weil recounted his experience in the Marine Corps and explained the purpose of his testimony was to assist the superior court in its voluntariness determination. The court precluded Weil's testimony, reasoning the proposed testimony "would be confusing to the jury and would confuse the issues as to voluntariness of the defendant's statements."

¶51 The superior court did not err by precluding Weil from testifying, given that his opinions merely addressed the admissibility of Cardwell's statements. *See* A.R.S. § 13-3988(A) (before a "confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness"). Because Weil could not help the jurors determine an issue of material fact, his testimony was not relevant. *See* Ariz. R. Evid. 702 (permitting expert-opinion testimony when it "will help the trier of fact to understand the evidence or to determine a fact in issue").

**B. Preclusion of Papetti**

***9** ¶52 Two months before trial, Cardwell disclosed his intent to call Papetti as an expert witness. A few weeks later, the State objected to relevancy of Papetti's testimony and claimed Cardwell had not responded to the State's requests for its scope, Papetti's CV, and his written reports. Cardwell eventually disclosed Papetti's CV and a general summary of his proposed testimony several days after trial began but did not provide his opinions.

¶53 During trial, the superior court addressed the State's objection. The prosecutor argued preclusion was appropriate because Cardwell ignored multiple requests to disclose Papetti's testimony. Cardwell countered there was "no discovery issue" and asserted Papetti should be allowed to "testify as to legal and medical conclusions." The court sanctioned Cardwell's disclosure violation by precluding Papetti.

¶54 Defendants must disclose the names of all potential trial witnesses no later than 40 days after arraignment or within 10 days after the State's disclosure, whichever occurs first. Ariz. R. Crim. P. 15.2(d)(1). For experts who do not prepare a written report, defendants must also disclose a "summary of the general subject matter and opinions on which the expert is expected

to testify[.]" Ariz. R. Crim. P. 15.2(c)(2)(C). Arizona Rule of Criminal Procedure 15.7 authorizes courts to sanction parties for disclosure violations, including the failure to timely disclose witnesses. *Naranjo*, 234 Ariz. at 242, ¶ 30.

¶55 A sanction must be proportional to the disclosure violation, *State v. Payne*, 233 Ariz. 484, 518, ¶ 155 (2013), and preclusion should be imposed only when less stringent sanctions do not accomplish the "ends of justice." *State v. Smith*, 123 Ariz. 243, 252 (1979). Before precluding a witness, courts must consider: "(1) how vital the precluded witness is to the proponent's case; (2) whether the witness's testimony will surprise or prejudice the opposing party; (3) whether bad faith or willfulness motivated the discovery violation; and (4) any other relevant circumstances." *Naranjo*, 234 Ariz. at 242, ¶ 30 (citation omitted). Preclusion is permissible "when a party engages in willful misconduct, such as an unexplained failure to do what the rules require." *Id.* at 242, ¶ 34 (citation omitted).

¶56 Cardwell's failure to properly disclose Papetti warranted imposing a sanction. And Cardwell has not shown Papetti was vital to his case, given that he does not articulate any specific testimony he sought to elicit from Papetti. *Id.* at 242, ¶ 30. If Cardwell sought to elicit legal-causation conclusions from Papetti, such testimony is inadmissible. *See State v. Sosnowicz*, 229 Ariz. 90, 97, ¶ 25 (App. 2012). Cardwell's late and incomplete disclosure, after trial had started, prejudiced the State. *See Naranjo*, 234 Ariz. at 242, ¶ 30; *Wells v. Fell*, 231 Ariz. 525, 528, ¶ 13 (App. 2013) ("The underlying principle of disclosure rules is the avoidance of undue delay or surprise.") (cleaned up). And even assuming Cardwell did not act in bad faith, he gives no explanation for his dilatory conduct. The court did not abuse its discretion in precluding Papetti.

**VI. Evidentiary Rulings**

¶57 Cardwell also asserts the superior court violated Rule 404(b) by admitting propensity evidence: (1) Cardwell's written statements in a notebook; (2) testimony recounting Cardwell's criticism of Barbara's parenting approach; (3) testimony about an incident when Cardwell punched a wall while arguing with Barbara; and (4) testimony that Cara "ran away from [Cardwell] when he would go to pick her up." We review evidentiary rulings for abuse of discretion. *Ellison*, 213 Ariz. at 129, ¶ 42.

**A. Notebook Entry**

***10** ¶58 Soon after getting married, Cardwell and Barbara began disagreeing over parenting styles and how to discipline Cara. To improve their communications, Cardwell bought a notebook in which they would write to one another about those issues and other marital matters.

¶59 At trial, over Cardwell's relevance objection, the superior court admitted one of his notebook entries. But contrary to Cardwell's assertion, the superior court admitted his written statements as an opposing party's statement under Rule 801(d)(2). And on appeal, Cardwell does not challenge the Rule 801(d)(2) ruling, thereby waiving that issue. *See Carver*, 160 Ariz. at 175. We find no error.

**B. Criticism of Barbara**

¶60 During an exchange about Cardwell's criticisms of her parenting Barbara testified:

> Q: But do you remember around what times, like what events that -- that he made those comments?
>
> A: Sometimes when he would come home, she would see him and run towards me and she would just want me to hold her, so I would hold her and I'd play with her and he would be like you baby her too much.

¶61 Cardwell did not object at the time, but now protests this testimony. We review for fundamental error only. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018). Cardwell never explains how the admission of the brief, vague comments during

several weeks of trial testimony amounted to fundamental, prejudicial error. *See* *Ellison*, 213 Ariz. at 133, ¶ 62 (rejecting fundamental-error claim when the challenged testimony was brief and not relied on in closing argument); *see also* *State v. Cruz*, 218 Ariz. 149, 166, ¶ 102 (2008) (finding defendant "failed to show that the snippet of [other-act] testimony rendered his trial fundamentally unfair"). And the testimony was cumulative to Cardwell's statements that Barbara was an overprotective mother who did not discipline Cara sufficiently. *See* *State v. Moody*, 208 Ariz. 424, 455, ¶ 121 (2004) (no fundamental error when the challenged evidence was cumulative to other properly admitted evidence).

**C. Wall-Punching Incident**

¶62 Before trial, the superior court denied the State's Rule 404(b) request to introduce testimony that Cardwell had "punched a hole in the wall during an argument" with Barbara. The State complied with the court's order on direct examination of Barbara. On cross-examination, defense counsel's questioning suggested that Cardwell would merely "stop talking" during arguments and he had never "laid hands" on her even though she had "pushed him a few times." The prosecutor then argued the defense had opened the door to the wall-punching incident. The superior court agreed and permitted the State to introduce rebuttal testimony from Barbara about Cardwell's wall-punching act.

¶63 On appeal, Cardwell does not argue the superior court erred by finding he had opened the door to the wall-punching incident's admission as rebuttal evidence. Having abandoned any such challenge, his claim fails. *See* *Carver*, 160 Ariz. at 175.

**D. Cara's Behavior**

¶64 Cardwell next challenges the admission of evidence that Cara would run away from him when he tried to pick her up. He supports his claim with two record citations, but those citations refer us only to the superior court's preliminary rulings on the admissibility of the proposed testimony. Because he identifies neither the challenged testimony's content nor where the statements were ultimately admitted into evidence, his argument is waived. *See* *Carver*, 160 Ariz. at 175; *cf.* *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 326, ¶ 2 n.2 (App. 1998) ("Judges are not like pigs, hunting for truffles buried in [the record.]") (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

**E. Limiting Instruction**

*11 ¶65 Finally, Cardwell complains the superior court erroneously denied his request to give the jurors an other-act limiting instruction. *See* RAJI (Criminal) Stand. 24 (5th ed. 2019). But the court did not have to give such an instruction because no other-act evidence was admitted under Rule 404(b). *Cf.* *State v. Ferrero*, 229 Ariz. 239, 244, ¶ 23 (2012) (courts must grant a request to give a limiting instruction when other-act evidence has been admitted).

**VII. Alleged Sentencing Errors**

¶66 Cardwell challenges his sentence on two grounds, asserting the superior court (1) considered an improper aggravator in imposing his sentence, and (2) violated *Blakely v. Washington*, 542 U.S. 296 (2004) by sentencing him without the necessary specific jury finding. Because Cardwell did not object on these grounds in the superior court, he has forfeited review absent fundamental, prejudicial error. *Escalante*, 245 Ariz. at 140, ¶ 12.

**A. Asserted Improper Aggravator**

¶67 Cardwell argues the superior court unlawfully considered the harm-to-the-victim aggravator because it was an element of his conviction, and the State may not use an element of the crime as an aggravating factor. But he relies on two provisions—

§§ 13-701(D)(1) and -701(D)(2)—that the State did not rely on. The State noticed, and the jury found, the harm-to-the-victim aggravator under § 13-701(D)(9).

¶68 And Cardwell is incorrect that the maximum possible sentence he faced was 20 years. The legislature has identified certain "dangerous crimes against children" and set forth sentencing provisions for such crimes. As relevant here, "[A] person who is at least eighteen years of age ... who is convicted of ... second degree murder of a minor who is under twelve years of age, may be sentenced to life imprisonment." A.R.S. § 13-705(C). The jury convicted Cardwell of second-degree murder against a victim younger than twelve. The court did not need to rely on an aggravator to impose a life sentence on Cardwell.

**B. Blakely Claim**

¶69 Lastly, Cardwell argues the superior court improperly enhanced his sentence as a dangerous crime against children because the jury did not determine whether his conduct focused on Cara. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose based solely on the facts reflected in the verdict or admitted by the defendant *Blakely*, 542 U.S. at 301–03.

¶70 Cardwell did not raise this issue in the superior court, so we review for fundamental error. *Escalante*, 245 Ariz. at 140, ¶ 12. Even if the absence of a specific, separate jury finding on this point constitutes fundamental error, his claim still fails because he does not assert any resulting prejudice. *See State v. Thompson*, 252 Ariz. 279, ¶ 58 (2022) (rejecting a fundamental error challenge, when a defendant failed to articulate how such error prejudiced him because the defendant bears the burden of establishing such prejudice).

## CONCLUSION

¶71 We affirm Cardwell's conviction and sentence.

**All Citations**

Not Reported in Pac. Rptr., 2022 WL 4075333

**End of Document**

Appendix B: Arizona Supreme Court, Denial of Discretionary Review, April 5, 2023.

# Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

April 5, 2023

**RE: STATE OF ARIZONA v JARED CARDWELL**
Arizona Supreme Court No. CR-22-0235-PR
Court of Appeals, Division One No. 1 CA-CR 21-0181
Yuma County Superior Court No. S1400CR201600404

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 4, 2023, in regard to the above-referenced cause:

**ORDERED: Petition for Review = DENIED.**

Tracie K. Lindeman, Clerk

TO:
Alice Jones
Kaitlin Marie Amos
Amy M Wood
tkl

Appendix C: Memorandum of Understanding Between
MCAS-Yuma and Yuma County Attorney,
December, 30, 2005.

# LAW ENFORCEMENT AGREEMENT AND UNDERSTANDING

1. Purpose. The purpose of this agreement is to delineate an understanding between the subscribing officials as representatives of the Marine Corps Air Station, Yuma, Arizona, (hereinafter referred to as MCAS), the Yuma County Sheriff's Office for Yuma County, Arizona (hereinafter referred to as the YCSO), the Yuma County Attorney's Office (hereinafter referred to as the County Attorney's Office), City of Yuma, Arizona Police Department (hereinafter referred to as the YPD), and the City Prosecutor for the City of Yuma, Arizona (hereinafter referred to as the City Prosecutor) relating to:

   a. Investigation and prosecution of offenses which occur on MCAS, to include the Air Station proper and the 16th Street/Avenue "B" Military Housing Area and those portions of the Barry M. Goldwater Range managed by MCAS (hereinafter referred to as the BMGR).

   b. The reporting of certain types of offenses and injuries.

   c. Arrests effected by the YCSO and the YPD on MCAS property.

   d. Nothing herein shall be inferred or understood as limiting in any way the authority of the Naval Criminal Investigative Service (hereinafter referred to as the NCIS) to pursue such investigations as are not specifically contemplated hereby but are properly contained in investigative charter as pronounced by the Secretary of the Navy Instruction 5520.3.

2. Policy. MCAS, the County Attorney's Office, YCSO, the City Prosecutor and the YPD recognize the proper administration and discipline of the Armed Forces require that, ordinarily, offenses committed by military personnel on MCAS be investigated and prosecuted by the military. However, there may be occasions when such offenses should be investigated and prosecuted by Arizona civil authorities. It is obvious that inflexible rules to determine this responsibility are not feasible where there is proprietary or concurrent military and state jurisdiction. The procedures set forth herein are intended to make the investigation and prosecution of offenses more expeditious and efficient while giving appropriate consideration to the requirements of the Armed Forces, the policies of the civil government, and other matters of mutual interest. This agreement does not apply to offenses cognizable only under the Uniform Code of Military Justice (hereinafter referred to as the UCMJ), nor does it apply to investigations for administrative or security purposes.

3. Jurisdiction Areas. This Agreement of Understanding addresses responsibilities for the investigation and prosecution of offenses committed on MCAS, to include the 16th Street/Avenue "B" Military Housing Area and the BMGR and offenses committed outside MCAS as described in 4.b. below.

4. Investigations. The following shall apply to determine whether MCAS, YCSO, the YPD or other appropriate Federal or State Law Enforcement Agencies will conduct a particular investigation:

a. Offenses Committed on MCAS (to include 16th Street/Avenue "B" Military Housing Area and the BMGR).

(1) Traffic Enforcement.

(a) MCAS shall be primarily responsible for traffic control, enforcement of station traffic regulations and investigations of motor vehicle accidents.

(b) Problems or difficulties encountered in traffic enforcement involving civilians may be referred to the appropriate civilian agency by MCAS.

(2) Other Misdemeanor Offenses.

(a) As used herein, a misdemeanor offense is an offense punishable under the laws of Arizona by confinement of 6 (six) months or less. A.R.S. 13-707.

(b) Investigations of misdemeanor offenses shall be first conducted by the military. If a suspect is not subject to the UCMJ, investigative jurisdiction shall be referred to the YPD and the City Prosecutor or YCSO and the County Attorney after the military purpose in conducting the investigation has been satisfied.

(c) This provision shall not restrict MCAS from enforcement of applicable environmental laws and other applicable Federal laws and regulations on the BMGR.

(3) Felonies.

(a) As used herein a felony is an offense punishable by the laws of the State of Arizona by confinement of one year or more. A.R.S. 13-701.

(b) The NCIS is responsible for the investigation of felonies, unless it is ascertained that:

(i) The suspect is not subject to the UCMJ; or

(ii) The circumstances surrounding the incident or complaint fully justify presumption that the unknown suspect is not subject to the UCMJ; or

(iii) In cases covered by either (i) or (ii) of the above, investigation by the NCIS shall be limited to preliminary and/or exigent matters, pending notice to YPD or YCSO and the County Attorney's Office of the incident.

(c) In cases where it is determined that the victim is a civilian, the NCIS shall notify YPD or YCSO and the County Attorney's Office of the offense. Other than as regards notice to YPD and the County Attorney's Office, the status of the victim is irrelevant herein.

(d) The NCIS shall provide reports to the YPD or YCSO, if requested in writing by YPD or YCSO. Provision of copies of all reports of investigations is a matter of cooperation and mutual interest. It is further understood that any inquiries by the news media concerning incidents occurring on MCAS, the BMGR, and the 16th Street/Avenue "B" Military Housing Area shall be referred to the MCAS Public Affairs Office.

b. Offenses Committed Outside MCAS.

(1) The YPD or YCSO, as appropriate, is responsible for the initial investigation of offenses committed outside MCAS. However, when it appears that a military member suspect may be subject to prosecution under the UCMJ, the YPD or YCSO shall notify the MCAS Provost Marshal Office (hereafter PMO) of the incident and afford MCAS the opportunity to enter into the investigation. Thereafter the investigation shall be conducted as provided in Section 4.a. (3) above.

(2) Investigations initiated by the military on the basis of related on-base criminal conduct may be pursued by the military off MCAS to the extent that the military interest dictates.

(3) It is understood that no state has the power or right to interfere with the Federal Government in the proper performance of its authorized functions. Federal supremacy dictates that, among other things, the YPD or the YCSO may not arrest and detain for trial any member of the Armed Forces for alleged violations of Arizona law done in a lawful performance of his official duties or done pursuant to lawful orders.

c. Offenses Against the United States.

(1) Notwithstanding other provisions of Section 4a and 4b above, when it appears that an offense involves fraud against the United States or damage to or misappropriation or larceny of United States property or any violations of the criminal laws of the United States, the investigation shall be conducted by the proper Federal authorities.

5. Prosecution.

a. Except as provided in Section 5.b. below, whenever an investigation of an offense involving a military suspect and civilian victim is conducted by the YPD or YCSO pursuant to Section 4.b. 1, above, any resulting prosecution will normally be conducted by the County Attorney's Office or City Prosecutor's Office. In any case under this category, the military may conduct a preliminary inquiry to provide a status report on the pending adjudication to the Director of the MCAS Joint Law Center. In the event the





[redacted]

County Attorney or City Prosecutor decline to prosecute in any case under this category, notice of that fact and the reasons therefore, shall be made in a timely manner to the NCIS or the Director of the MCAS Joint Law Center. Absent exigent circumstances or unnecessary delays by the County Attorney or City Prosecutor, MCAS shall not institute court-martial action in those cases until such notice is given.

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b. Whenever the investigation of offenses is conducted by MCAS or involves a military suspect and military victim, any resulting prosecution of a military suspect will normally be conducted by MCAS. MCAS shall notify the County Attorney's Office or the City Prosecutor's Office in all instances, except traffic offenses, wherein it does not take disciplinary action against a military member who is also subject to criminal prosecution by the County Attorney's Office or the City Prosecutor's Office.

c. If, prior to adjudication by the Arizona court in which the County Attorney's Office or the City Prosecutor's Office is conducting the prosecution of a military suspect who is also subject to prosecution for the same act under the UCMJ, MCAS determines that it is in the best interest of the military community to prosecute that person for the same act or acts before a military tribunal, MCAS may request that the County Attorney's Office or the City Prosecutor's Office waive jurisdiction in favor of a court-martial prosecution.

d. In all felony cases, as set forth in Subsection 5.a. above, which are undergoing review with a view towards prosecution in the Arizona state courts, the County Attorney's Office shall coordinate an exchange of information with the Director of the Joint MCAS Law Center. The City Prosecutor's Office shall coordinate such an exchange of information in misdemeanor cases that are potentially controversial or are of apparently paramount military interest. Cases of paramount military interest include theft or damage of military property, assaults on military superiors and disorderly conduct involving disrespect to military superiors.

e. In all felony cases, as set forth in Subsection 5.b. above, which are being prosecuted by the military, the Director of the MCAS Joint Law Center shall coordinate an exchange of information in such cases that are potentially controversial or are of apparently paramount interest to the County Attorney and City Prosecutor. Cases of local paramount interest include, but are not limited to, crimes of violence committed off MCAS by a military suspect against a military victim.

6. Reporting Offenses and Injuries.

a. Felonies discovered by MCAS.

In felony cases, which are discovered by MCAS, MCAS will promptly notify NCIS. Such notification shall be effected prior to the commencement of any investigative measures, such as subsequent crime scene examination or interrogation of suspects by MCAS.

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b. Offenses discovered by the YCSO or the YPD.

When it appears that an offense involving a military suspect has occurred and it falls within the investigative jurisdiction of the military, as set forth in this agreement, the YCSO or the YPD shall notify the MCAS PMO in a timely fashion so that an appropriate military investigation may be initiated.

c. Reporting Serious Injuries.

(1) MCAS or the Branch Medical Clinic at MCAS shall immediately report to the City YPD by telephone and within 36 hours in writing, the identities of persons involved and circumstances of each occurrence of the following categories of injuries that are treated or otherwise discovered by the personnel of MCAS or the Branch Medical Clinic at MCAS;

(a) Injuries to any person inflicted by means of a knife, gun, pistol or other deadly means in apparent violation of any law of the State of Arizona, including attempted suicide by any means; and

(b) All suspected cases of child abuse, of sexual molestation or matters within the cognizance of the State of Arizona.

(2) The YPD or YCSO shall likewise report to MCAS the identities of the persons involved and circumstances of each occurrence of the following categories of injuries that are discovered by or become known to the YPD or YCSO.

(a) Serious injuries to military personnel occurring off base; and

(b) Serious injuries to dependents of military members who reside on MCAS that occur off MCAS.

(3) With regards to these categories of injuries, it is understood that the YPD cannot order or instruct the Yuma Regional Medical Center, or any physician, to forward injury reports to MCAS. However, the YPD shall, upon written request, provide to MCAS, copies of any such injury reports that may be acquired by the YPD. YPD shall not be required to comply with such request if to do so would be unauthorized by law or detrimental to the best interest of the City.

7. Arrests on MCAS by the YCSO or the YPD.

a. When YCSO or the YPD, pursuant to a proper warrant requests the delivery of a member of the U.S. Armed Forces or a civilian aboard MCAS, delivery will be authorized except as listed below. The Provost Marshal will be the designated authority for delivery of personnel and will consult with the Director of the Joint Law Center prior to delivery of personnel. Requests for delivery of personnel shall be during normal weekday, working hours, unless immediate arrest is necessary. Delivery of personnel

will normally be done at the PMO to ensure a minimum of interference to good order and discipline.

b. In accordance with Navy regulations, delivery of members of the U.S. Armed Forces may be refused in only limited circumstances:

(1) To be retained for ongoing military prosecution.

(2) When the Commanding Officer determines that extraordinary circumstances exist which would indicate that delivery should be refused.

c. If there is a possibility a member of the U.S. Armed Forces will be transported by YPD or YCSO outside Yuma County, pursuant to Navy regulations, an agreement must be signed by an official that transportation costs back to MCAS will be paid by the transporting agency.

d. The following actions apply to the execution of routine warrants of arrest on MCAS:

(1) It is understood that warrant abstracts, teletype warrant abstracts and certified copies of warrants of arrest, are the legal equivalents of original warrants of arrest.

(2) As appropriate, the YCSO or the YPD shall telephone MCAS PMO to advise of the warrant of arrest of a military member, dependent of a military member or civilian employee located at MCAS. The information will contain the name of person to be arrested, his or her on-base location, if known, and the court charges, amount of bail and the date the warrant was issued.

(3) MCAS PMO shall ensure, when a military member is to be arrested, that the member will be ready for delivery to the arresting officer when requested. Prior to the time of the actual delivery of the military member to the YCSO or the YPD, at the direction of MCAS PMO, the YCSO or the YPD shall tender the warrant of arrest to MCAS PMO for review to establish the apparent validity thereof.

e. Before executing a routine warrant of arrest on MCAS, the YCSO or the YPD shall take the following additional actions:

(1) Check in with MCAS PMO.

(2) Once the apparent validity of the warrant is established, the arresting officer will serve it upon the arrestee once delivery has been made by MCAS PMO.

(3) Misdemeanor warrants will be executed during the normal work week during normal working hours.

8. **Release from Civil Jurisdiction and Notice of Booking.** Recognizing that the military possesses universal jurisdiction, and has the ability to prosecute offenses occurring within the County or City when a military member is involved, a military member taken into custody by either YCSO or the YPD shall be released from the detention facility holding the military member to the custody of MCAS PMO, with a copy of the arrest record, as is permissible under State law when all conditions for release of the military member, as specified by court order, have been satisfied. Further, YCSO shall promptly notify MCAS PMO whenever a military member is booked into the custody of the detention facility. Such notification will be made solely for the purpose of providing notice to MCAS of the location of its personnel, and shall not be made with malice or with the intent to affect an individual's military employment status.

9. **Patrol.**

a. MCAS PMO will periodically patrol, by marked vehicle, the 16th Street/Avenue "B" Military Housing Area a minimum of two (2) times each 24 hour period.

b. The YPD will, at their convenience, endeavor to patrol the 16th Street/Avenue "B" Military Housing Area at least one (1) time each 24 hour period.

c. The primary objective of such patrolling is to demonstrate the presence of law enforcement officials and will be conducted by MCAS PMO consistent with applicable Federal laws and regulations. Effective cooperation between military and civilian authorities is the hallmark of this agreement and nothing herein shall prevent simultaneous patrolling or prior coordinating of patrolling between the military and civilian authorities.

d. In order to ensure officer safety YCSO or YPD will, prior to entry on to the BMGR, coordinate its entry with MCAS PMO.

10. **Service of Process.** Requests for service of process on members of U.S. Armed Forces and civilians aboard MCAS will be honored and arranged expeditiously as possible. The MCAS Joint Law Center is the designated authority to coordinate requests for service of process. Requests for service of process shall be during normal weekday, working hours. YCSO or the YPD shall telephone the MCAS PMO to advise of service of civil process upon a military member, dependent of a military member or civilian employee located on MCAS. MCAS PMO will be provided with the name of the person to be served and his/her on-base location, if known. MCAS PMO shall ensure that all steps are taken to effectuate service. Service will normally take place at the MCAS Joint Law Center at the Legal Assistance Office. YCSO or YPD may request immediate service of process outside of normal weekday, working hours for Orders of Protection or Injunctions Against Harassment or matters of a similar nature. In these limited circumstances the MCAS PMO will act as the designated authority for such requests.

11. **Term.** The undersigned agree to cooperate fully in carrying out the policies and procedures set forth in the foregoing agreement which shall remain in force unless







[redacted]

otherwise amended or revoked. This agreement may be modified by mutual consent or terminated unilaterally by 30 days written notice by a subscribing official or their successor to other subscribing officials or their successors. In case of mobilization or other emergency, this agreement will remain in force only within the parties' capabilities. Commander, Marine Corps Air Station Yuma, Arizona, may cancel this agreement at any time if operational needs so require.

12. City Authority. The Yuma City Council enters into this agreement pursuant to its power to adopt intergovernmental agreements as granted in Article III, Section 13 of the City of Yuma, Arizona Charter and Arizona Revised Statutes § 11-952.

13. County Authority. The Yuma County Board of Supervisors enters into this agreement pursuant to its power to adopt intergovernmental agreements as granted in Arizona Revised Statutes § 11-952.

14. Service of Subpoena. Whenever it is necessary to secure testimony, in a court of competent jurisdiction in Yuma County, of a military member witness to an offense, without regard to whether the offense is covered by this Agreement, the County Attorney or City Prosecutor shall issue and cause to be served on the military member witness, in the manner described in Section 10, above a subpoena which will include the date, time and location of the trial and a description of the offense that is the subject of the trial. The County Attorney and the City Prosecutor are cognizant of national security issues that may arise when testimony of a military member is necessary and will use best efforts to limit questioning to only those issues relevant to the case for which the subpoena is issued.

MCAS will cooperate with the County Attorney and the City Prosecutor and will make every effort to enable expeditious and efficient service of the subpoena and to ensure the military member witness' appearance at the designated date, place and time. In the event the subpoena is not honored by the military member witness, or the County Attorney or the City Prosecutor is unable to effect service of the subpoena upon the military member witness by the date and time stated in the subpoena due to military procedures or policies, the County Attorney or the City Prosecutor may decline to prosecute offenses covered by this Agreement and will provide notice to the Director of the MCAS Joint Law Center as provided in section 5.a. above. To the extent that the subpoena is not honored by MCAS, MCAS shall notify the County Attorney or the City Prosecutor in writing of the reasons therefore.

IN WITNESS WHEREOF, the parties hereto have executed this agreement at Yuma, Arizona on this 30th day of December, 2005.

MARINE CORPS AIR STATION-YUMA

By _____
BEN D. HANCOCK
Colonel, U.S. Marine Corps
Commanding Officer
Marine Corps Air Station
Yuma, Arizona 85369

CITY OF YUMA

By _____
MARK WATSON, CITY ADMINISTRATOR

ATTEST:

CITY OF YUMA

By _____
for BRIGITTA M. KUIPER, CLERK

APPROVED AS TO FORM:

CITY OF YUMA

STEVEN W. MOORE
YUMA CITY ATTORNEY

By _____
STEVEN W. MOORE
YUMA CITY ATTORNEY

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COUNTY OF YUMA

By _____
CASEY PROCHASKA, CHAIRMAN

ATTEST:

COUNTY OF YUMA
By _____
SUE STALLWORTH, CLERK

APPROVED AS TO FORM:

JON R. SMITH
YUMA COUNTY ATTORNEY

BY _____
ROBERT PICKELS
CHIEF CIVIL DEPUTY

Effective Date: SEP 14 '20



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Appendix D: Military Ruling Suppressing Statements, March 2, 2016.

**U.S. NAVY-MARINE CORPS TRIAL JUDICIARY**
**WESTERN JUDICIAL CIRCUIT**
**GENERAL COURT-MARTIAL**

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | **COURT RULING** |
| v. | ) | **Defense Motion to Suppress (Statements of the Accused)** |
| JARED T. CARDWELL<br>Lance Corporal<br>U.S. Marine Corps | ) | 02 March 2016 |

I. Nature of the Ruling. The Defense has moved the Court to suppress all statements made by the Accused. An Article 39(a) session was held 19-20 December 2015 to address pretrial motions. The parties presented witness testimony, documentary evidence and argument on the defense motion to suppress (AE-XVI) and the government response thereto (AE-17). The court took the matter under advisement at that time and notified counsel of the court's ruling on 2 March 2016.[1]

II. Findings of Fact.

1. The accused is charged in the alternative with three specifications of murder and one specification of manslaughter in violation of the Uniform Code of Military Justice (UCMJ), Articles 118 and 119 respectively.

2. The victim in this case, C.M.M.C., is the accused's stepdaughter.

3. Beatrize Cardwell is the mother of the victim and the accused's wife.

4. Since March 2015, the victim, the accused and Beatrize Cardwell lived in base housing aboard Marine Corps Air Station (MCAS) Yuma, Arizona. They were the only people living in the residence at 1813-D De La Garza Loop, MCAS Yuma, Arizona in May 2015.

5. At 0800 on 19 May 2015, Beatrize Cardwell found the victim nonresponsive in her bedroom in the family residence and called 9-1-1.

6. When C.M.M.C. was discovered that morning, she was in the early stages of rigor mortis.

7. The accused left the residence for work at approximately 0630 on 19 May 2015, but then went to the Yuma Regional Medical Center (YRMC) at approximately 0900.

8. At approximately 0830 on 19 May 2015, Special Agent (SA) Jeffrey Ruby of the Naval Criminal Investigative Service (NCIS) was informed by NCIS SA Jessica Jurj that MCAS Fire Department personnel transported the victim to YRMC.

9. SA Ruby went to YRMC to learn more about what was going on. SA Ruby did not contact the Yuma Police Department (YPD) prior to leaving the NCIS Field Office for YRMC.

10. While at YRMC, SA Ruby had a conversation with Investigator (Inv) Robert Virgil of the Yuma County Medical Examiner's Office. Inv Virgil informed SA Ruby that the victim had been pronounced dead at 0838.

11. Inv Virgil informed SA Ruby that the victim arrived at YRMC in cardiopulmonary arrest and already had rigor mortis appearing in the body.

12. SA Ruby met the accused and his wife as they walked out of the emergency room door.

13. SA Ruby identified himself to the accused and his wife, expressed his condolences to them and requested to speak with them about how the death may have occurred.

14. In SA Ruby's experience, interviewing the parents was a very high priority to law enforcement when investigating the suspicious death of a child.

15. SA Ruby testified that he had worked "quite a few" child death cases where the parents never became suspects.

16. The YRMC emergency room doctor, Dr. Phillip Richmont, discussed the victim's death with the accused and his wife in the presence of SA Ruby.

17. Beatrize Cardwell told SA Ruby she wanted to go and inform her mother, Nancy Carreno, in person of the victim's death. Nancy Carreno is the victim's maternal grandmother and resides in the city of Yuma, Arizona. SA Ruby accompanied the

accused and his wife to Nancy Carreno's residence in a separate vehicle. Prior to leaving YRMC, a YPD police officer arrived.

18. Shortly after SA Ruby and the Cardwells arrived at Nancy Carreno's house, Sergeant Freedman, Detective Scanlan, Detective Tejeda and Detective Norred from the YPD arrived as well.

19. At approximately 1030 on 19 May 2015, SA Ruby, Sgt Freedman and the other detectives from YPD had a discussion in the alley outside Nancy Carreno's house about what investigative steps should be taken next.

20. Sgt Freedman assigned Det. Scanlan to interview Beatrize Cardwell's brother who was present at the location. Det. Scanlan was later sent to MCAS Yuma to assist SA Jurj who was processing the residence as a crime scene.

21. Sgt Freedman sent Det. Norred to accompany SA Ruby who was escorting Beatrize Cardwell to notify the victim's natural father. Det. Tejeda was assigned to interview the accused.

22. Det. Scanlan of the YPD responded to the YRMC on the morning of 19 May 2015.

23. Upon arrival at YRMC, Det. Scanlan was briefed by investigators from MCAS Yuma that the accused left the victim alone at approximately 2230 the evening prior while he went to pickup Beatrize Cardwell from work.

24. Det. Scanlan reviewed photographs of the victim's body provided by YRMC medical staff.

25. Det. Scanlan observed reddish discoloration to the left cheek of the victim's face in those photographs.

26. Det. Scanlan was informed by YRMC medical staff that the victim arrived with a core body temperature of eighty degrees.

27. Det. Scanlan eventually proceeded to the Cardwell's residence to assist SA Jurj with processing the crime scene.

28. Det. Scanlan initially spent a short amount of time at the crime scene but was called back to YPD.

29. Det. Scanlan returned to the Cardwell's residence again later on 19 May 2015 to assist SA Jurj with interviews of the Cardwell's neighbors.

30. SA Jurj asked Det. Scanlan and Det. Tejeda to interview Mrs. Dawn Kiser.

31. SA Jurj briefed Det. Scanlan on her interview of Mrs. Abigail Preston.

32. Det. Scanlan returned to the Cardwell's residence a third time on 19 May 2015. This time, Det. Scanlan brought a latent bloodstain reagent back at SA Jurj's request.

33. The decision was made that Det. Tejeda would conduct a non-custodial interview of the accused at the YPD because it was approximately a quarter of a mile away from their location at Nancy Carreno's residence.

34. The decision to conduct the 19 May 2015 interview of the accused was a joint decision of the YPD and NCIS.

35. SA Ruby overheard the YPD detectives talking to the accused about going to YPD for an interview. SA Ruby went over and told the accused that "this would be common procedure of law enforcement talking to somebody" as a way of persuading the accused to agree to the interview with Det. Tejeda.

36. While not in custody, the accused felt as if he had no choice but to accompany Det. Tejeda.

37. The accused was not placed under arrest and drove himself to the YPD for the interview with Det. Tejeda on 19 May 2015.

38. The accused drove himself to YPD for his interview on 19 May 2015.

39. Prior to leaving, SA Ruby spoke with Det. Tejeda briefly. SA Ruby did not give Det. Tejeda any advice, guidance or direction about how to conduct the interview. Nonetheless, SA Ruby did tell Det. Tejeda that he had viewed the victim's body briefly earlier that morning at YRMC and had spoken with an ER nurse. In that same conversation, Det. Tejeda told SA Ruby that he too had viewed the victim's body earlier that morning.

40. SA Ruby left with Det. Norred and Beatrize Cardwell to inform the natural father of the victim's death and arrived at the YPD approximately 90 minutes later.

41. When SA Ruby arrived at the YPD, Det. Tejeda had already begun his interview of the accused.

42. SA Ruby initially went into the monitoring room with the intent to monitor the interview by watching and listening to Det. Tejeda's interview of the accused. SA Ruby was joined by Sgt Freedman and eventually Det. Norred.

43. Technical difficulties with the equipment in the monitoring room made it so that they could see but not hear the interview as it was being conducted. Frustrated, SA Ruby and Sgt Freedman moved to a small conference table in the Investigation Bureau.

44. SA Ruby and Sgt Freedman could neither see nor hear Det. Tejeda's interview of the accused from the conference table. The conference table did however leave more room for Det. Tejeda and Det. Norred.

45. Det. Tejeda informed the accused that he was not being detained, the door to the interview room was unlocked and that the accused was free to leave at any time.

46. Det. Tejeda did not advise the accused of his Miranda rights because this was to be a non-custodial interview.

47. Det. Tejeda believed YPD would be taking the lead in this investigation based on the fact he, as a YPD detective, was interviewing the accused and, in his experience, the last person to see the victim alive is important to the case.

48. At the time of the interview on 19 May 2015, Det. Tejeda believed the victim's death was suspicious because of the bruises on the child's face, the fact she was alive the night before and the amount of decomposition reportedly present on the victim upon arrival at YRMC.

49. On 19 May 2015, Det. Tejeda took breaks during his interview of the accused. During those breaks, he would consult with SA Ruby and Sgt Freedman.

50. During these breaks, Det. Tejeda would update SA Ruby and Sgt Freedman on how the interview was going. SA Ruby would

pass information along to Det. Tejeda that SA Ruby was learning from the field as NCIS and YPD processed the crime scene at the residence and interviewed neighbors.

51. SA Ruby passed information told to him from Det. Tejeda during the interview of the accused to SA Jurj while she and the other agents and detectives were searching the Cardwell residence.

52. At the time of Det. Tejeda's interview of the accused, SA Ruby was aware that Beatrize Cardwell had been working the night before, the accused was watching the victim the night before, the accused had left the victim at home alone around 2330 to go pick-up Beatrize Cardwell from work, and Beatrize Cardwell called 911.

53. SA Ruby has dealt with a number of death investigations over the course of his law enforcement career.

54. SA Ruby believed the injuries on the victim's face definitely were suspicious.

55. SA Ruby testified that a 20-month old's death would be alarming.

56. YPD Det. Norred conducted an interview of Beatrize Cardwell on 19 May 2015 at the YPD.

57. Det. Norred shared the information learned from the interview of Beatrize Cardwell with SA Ruby who in turn relayed it to SA Jurj who was processing the Cardwell residence as a crime scene.

58. On 19 May 2015, law enforcement knew that the accused was at least one of the victim's primary caregivers.

59. From Det. Tejeda's interview of the accused on 19 May 2015, NCIS and YPD learned that the victim had been in the care of the accused alone the night before she was found nonresponsive earlier that morning.

60. SA Jurj assumed the role of NCIS case agent for this case when NCIS received the initial report of an unresponsive child found in a residence aboard MCAS Yuma on 19 May 2015.

61. SA Jurj requested a verbal command authorization for search of the Cardwell residence from the acting base commander while on her way to the residence.

62. SA Jurj's purpose in seeking authorization to search was to search for evidence that might assist in the investigation into the victim's death.

63. In support of her request for a verbal command authorization to search the Cardwell's on base residence, SA Jurj provided the acting base commander with a number of facts in support of her belief there was probable cause to believe there was evidence of a crime located therein.

64. SA Jurj told the base commander that a child was found nonresponsive in unnatural circumstances in her home, the child had been found by her mother, and that the cause of death had not yet been determined by the medical examiner.

65. Additionally, SA Jurj used some of the information communicated to her by SA Ruby in support of her request for a command authorization to search.

66. SA Jurj informed the commander that the victim's stepfather (the accused) was an active duty Marine, that the accused and the victim's mother were the other people who lived in the residence and they were the last people to see the victim alive.

67. As part of her investigation at the Cardwell's residence, SA Jurj also conducted interviews with the neighbors.

68. Lance Corporal Kyler Preston, USMC and his wife Mrs. Abigail Preston are friend and neighbors of the Cardwells whom SA Jurj interviewed.

69. On 19 May 2015, SA Jurj learned a number of things from her interviews of LCpl and Mrs. Preston.

70. Mrs. Preston had watched the victim on numerous occasions previously when the accused and Beatrize Cardwell were at work.

71. The victim had a history of vomiting, diarrhea, and headaches in the weeks prior to her death.

72. The Cardwell's were having martial problems and the accused would sleep under the bed when he and his wife were arguing.

73. When it came to the victim, the accused was the disciplinarian because Beatrize Cardwell was unwilling or unable to discipline the victim.

74. The accused had made comments on several occasions about having to be the disciplinarian.

75. There was a history of abuse of the victim in the form of spankings.

76. The accused had discussed with LCpl Preston the difficulty of raising another man's child.

77. The accused had made remarks that could be construed as suicidal when he talked about wanting to be with his deceased grandfather.

78. The accused would not allow the victim to be fed and would require the victim to eat by herself in her highchair.

79. In the weeks before her death, the Cardwells were toilet training the victim.

80. The Prestons observed bruising on the victim which the accused had explained were a result of the victim's playing in the park, falling off a ladder or from playing in the house.

81. The last time Abigail Preston saw the victim was the evening of 18 May 2015 at which time the victim appeared sleepy.

82. On 18 May 2015, the accused had called the Preston's at approximately 2300 to ask if they would watch the victim while he went to pickup Beatrize Cardwell from work. They declined.

83. SA Jurj informed SA Ruby what she had learned from her interviews of the Prestons. In turn, SA Ruby shared this information with Det. Tejeda during the course of the accused's interview.

84. On 22 May 2015, there was a meeting at YPD between special agents from NCIS and detectives of YPD in preparation for receiving the victim's autopsy results.

85. SA Jurj was present at the YPD for this meeting. SA Ruby telephoned SA Jurj who put the call on speakerphone so the other special agents and detectives could hear what was said.

86. SA Ruby informed the group that based on the autopsy results, the cause of death was "definitely" from blunt force trauma. The marks on the victim's face were not post-mortem and were believed to be some type of burns from a hot liquid or chemical. There was trauma to the victim's head and clotting on the left side of the victim's head with bruising throughout the cranial cap. There was bruising inside the lip and on the rib cage of the victim. There was no scarring to suggest the victim had swallowed a liquid. The burns to the face could have possibly happened after the head injury.

87. After receiving SA Ruby's report about the autopsy results, Det. Norred and SA Jurj discussed what investigative steps were to be taken next.

88. During that meeting, it was decided that the NCIS agents "from out of town" would interview the accused. Those agents watched the recording of the interview of the accused conducted by Det. Tejeda on 19 May 2015.

89. After they reviewed the video, SA Jurj contacted Beatrize Cardwell and asked her and the accused to come to YPD to review the autopsy results.

90. According to SA Jurj's recollection, there were approximately six special agents and detectives involved in the 22 May 2015 interview of the accused.

91. Prior to interviewing the accused on 22 May 2015, SA Jurj prepared for the interview by familiarizing herself with the accused's interview done by Det. Tejeda on 19 May 2015.

92. SA Jurj familiarized herself with that interview by speaking to Det. Tejeda and SA Ruby.

93. In his conversation with SA Jurj in preparation for the 22 May 2015 interview of the accused, SA Ruby communicated the substance of the 19 May 2015 interview of the accused conducted by Det. Tejeda.

94. SA Jurj testified that she did not review any paperwork or watch any video from the 19 May 2015 interview as

part of her preparation for the 22 May 2015 interview. SA Jurj assumed other agents involved in the investigation did.

95. SA Jurj and SA Rendon interviewed the accused on 22 May 2015 at the YPD.

96. SA Jurj began the interview by asking the accused for biographical data and advising him of his Article 31(b) rights.

97. SA Jurj documented her advice to the accused regarding his Article 31(b) rights with a written acknowledgment and waiver of those rights which the accused signed.

98. SA Jurj did not provide the accused with any cleansing warnings regarding the 19 May 2015 interview.

99. SA Jurj began her questioning at the beginning of the narrative to confirm the chronology of events as established by Det. Tejeda during his interview of 19 May 2015.

100. Per the Law Enforcement Agreement and Understanding, the YPD was involved in the investigation into the victim's death from the initial report.

101. Sgt Freedman is a supervisory detective at the YPD.

102. At approximately 0938 on 19 May 2015, Sgt Freedman responded to the YRMC after receiving a telephone call from YPD dispatch regarding a suspicious death aboard MCAS Yuma.

103. Sgt Freedman asked YPD dispatch to assign an officer and he assigned detectives to investigate.

104. Sgt Freedman traveled to the YRMC and was briefed by military investigators upon arrival regarding what was known thus far.

105. Sgt Freedman reviewed photographs of the victim's body provided by YRMC medical staff and spoke with Dr. Ridgemont about his observations of the victim.

106. Sgt Freedman proceeded from YRMC to Nancy Carreno's residence in Yuma, Arizona.

107. While at the Carreno residence, Sgt Freedman and his detectives met with SA Ruby.

108. Sgt Freedman and SA Ruby divided up the investigative work to be done amongst themselves and the personnel from each of their respective organizations.

109. Sgt Freedman sent Det. Scanlan to the Cardwell residence to assist with processing the crime scene.

110. At approximately 1119 on 19 May 2015, Sgt Freedman returned to the YPD to check-in on Det. Tejeda's interview of the accused.

111. At approximately 1528 on 19 May 2015, Sgt Freedman went to MCAS Yuma to met with SA Ruby. Sgt Freedman provided SA Ruby electronic copies of interviews conducted by Det. Norred. SA Ruby walked Det. freedman through the crime scene at the Cardwell's residence.

112. At 0900 on 20 May 2015, Sgt Freedman held a debrief meeting at the YPD with NCIS and YPD personnel involved in the investigation. During this meeting a number of additional investigative steps and the further cooperation between the two organizations were discussed.

113. On 21 May 2015, Sgt Freedman received a telephone call from SA Jurj. SA Jurj informed Sgt Freedman that NCIS would be sending three additional special agents to work on the investigation and she would coordinate with YPD for continued cooperation.

114. On 21 May 2015, Sgt Freedman was informed that, after speaking with SA Jurj, Det. Tejeda agreed to postpone an interview of the victim's grandmother until after the autopsy of the victim.

115. On 21 May 2015, Sgt Freedman made arrangements for Det. Scanlan to accompany the NCIS agent attending the autopsy. It was also agreed that NCIS and YPD would debrief again on 22 May 2015 to discuss the results of the autopsy.

116. At approximately 1141 on 22 May 2015, it was decided that NCIS would continue to lead the investigation since the prime suspect was a Marine and YPD would continue to support NCIS.

117. Sgt Freedman observed portions of the accused's interview of 22 May 2015 from approximately 2045 to until approximately 2330.

118. SA Ruby testified that it wasn't until the morning of 20 May 2015 it was determined that NCIS would take the lead in the investigation.

119. Gunnery Sergeant Jeremy P. Green, USMC, was working as a special agent with NCIS at MCAS Yuma in May 2015.

120. GySgt Green participated in the search of the Cardwell residence on 19 May 2015.

121. GySgt Green interviewed the accused on 26 May 2015 at the NCIS office aboard MCAS Yuma.

122. On 26 May 2015, the accused was in pretrial confinement.

123. GySgt Green coordinated with MCAS Yuma brig personnel to arrange for the accused to be brought to the NCIS office for the interview.

124. The decision to attempt to re-interview the accused on 26 may 2015 was a joint decision made by GySgt Green, SA Jurj and SA Ruby.

125. At the beginning of the interview on 26 May 2015, GySgt Green advised the accused of his Article 31(b) rights. The accused waived those rights.

126. The advice and waiver of the accused Article 31(b) rights was documented on a military suspect's acknowledgment and waiver of rights form which the accused signed.

127. At no time during the interview with GySgt green on 26 May 2015 did the accused express to GySgt Green invoke his right to counsel or ask for an attorney.

128. GySgt Green testified that he was never informed prior to the interview on 26 May 2015 that the accused had previously invoked his right to remain silent or requested the assistance of an attorney.

129. GySgt Green testified that as of the time of the interview on 26 May 2015, he was not aware of whether the accused had detailed counsel.

130. GySgt Brandon J. McClure, USMC, was the brig supervisor at MCAS Yuma in May 2015.

131. When new pretrial detainee or prisoner is brought into the MCAS Yuma Brig, the standard operating procedure is for a member of brig staff to telephone the defense section at the law center.

132. Additionally, any time a detainee or prisoner requests to speak with an attorney, the brig's standard operating procedure requires that they be afforded the opportunity to speak with defense counsel.

133. On 23 May 2015, a member of the brig staff called over the the defense section at the law center to inform the defense section that the accused was now in pretrial confinement and Initial Reviewing Officer (IRO) proceedings would commence.

134. The brig staff assumes that new pretrial detainees desire the assistance of counsel prior to their IRO hearings and that is why they contact the defense section at the law center automatically.

135. GySgt McClure does not recall receiving a telephone call from the accused's command representative, GySgt Sandoval, requesting that the accused be assigned a defense counsel.

136. GySgt Victor M. Sandoval, Jr. USMC, was the Marine Logistics Squadron 13 (MALS-13) command representative assigned to the accused in May 2015.

137. GySgt Sandoval visited the accused in pretrial confinement around midday at the MCAS Yuma brig on 26 May 2015.

138. During that visit, the accused informed GySgt Sandoval that he was requesting the assistance of counsel.

139. GySgt Sandoval informed GySgt McClure that the accused was requesting the assistance of counsel.

140. Additionally, GySgt Sandoval asked the MALS-13 legal clerk how to find out what counsel would represent the accused.

141. GySgt Sandoval attempted to contact Captain White, defense counsel at MCAS Yuma on the accused's behalf even though GySgt Sandoval believed the brig would be doing so as well.

142. GySgt Sandoval eventually met with Captain White at the brig and informed Captain White that the accused was requesting the assistance of counsel.

143. GySgt Sandoval also informed Captain White that Beatrize Cardwell and the accused's father, Mr. William Cardwell, had contacted him and requested an attorney on behalf of the accused as well.

144. At Captain White's request, GySgt Sandoval sent him an email on the evening of 26 May 2015 memorializing these requests.

III. Statement of Law.

In response to a timely-made defense objection to the introduction of a statement by an accused, the government must demonstrate by a preponderance of the evidence that the accused made the statement voluntarily before it may be received into evidence. M.R.E. 304(e)(1). A statement is "involuntary" for the purposes of this rule if it is obtained in violation of the Fifth Amendment, Article 31 of the UCMJ or through the use of coercion, unlawful means or unlawful inducement. M.R.E. 304(c)(3).

In accordance with Article 31(b) and M.R.E. 305(c), service members suspected of violations of the UCMJ must be informed of their various legal rights before an interrogation can be conducted by a person subject to the UCMJ. M.R.E. 305 defines an interrogation as any questioning in which an incriminating response is sought or is the reasonable consequence. See also, Rhode *Island v. Innis*, 446 U.S. 291, 301 (1980). As a result,

the protections under Article 31(b) are triggered when a person subject to the UCMJ, acting in an official capacity, and perceived as such by a suspect or accused, questions the suspect or accused for law enforcement or disciplinary purposes. *U.S. v. Rogers*, 47 M.J. 135 (C.A.A.F. 1997); *U.S. v. Loukas*, 29 M.J. 385 (C.M.A. 1990); *U.S. v. Duga*, 10 M.J. 206 (C.M.A. 1981).

Unlike the Fifth Amendment protection promulgated by *Miranda v. Arizona*, 384 U.S. 36 (1966), the fact that a military suspect is not subject to custodial circumstances is irrelevant; if the interviewing investigator suspects or reasonably should suspect the person being questioned of committing a crime, then rights warnings under Article 31(b) are required. *U.S. v. Schake*, 30 M.J. 314, 317 (C.M.A. 1990).

Recently, the United States Court of Appeals for the Armed Forces reiterated the requirement for an Article 31(b) rights advisement 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) citing *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006)

Before determining the nature of the accused's questioning, the court must first resolve the preliminary question of whether or not the "interrogator" or "questioner" of the accused was a person required to give a warning. In *Duga*, the Court of Military Appeals set forth a two-pronged test to determine whether the person asking questions qualifies as a person who should provide Article 31(b) warnings. First, the questioner must be subject to the UCMJ and acting in an official capacity in the inquiry, and secondly, the person being questioned must perceive the inquiry involved as more than mere casual conversation.

In the context of civilian law enforcement, the Court of Appeals for the Armed Forces has identified at least two situations in which Article 31 extends to civilian investigators:

> (1) When the scope and character of the cooperative efforts demonstrate "that the two investigations merged into an indivisible entity, United *States v. Swift*, 17 USCMA 227,

232, 38 CMR 25, and

(2) when the civilian investigator acts "in furtherance of any military investigation, or in any sense as an instrument of the military," *United States v. Grisham*, 4 USCMA 694, 697, 16 CMR 268; *United States v. Aau*, 12 USCMA 332, 30 CMR 332… *United States v. Quillen*, 27 M.J. 312 (C.A.A.F. 1988).

The determination of whether a person interviewed is a suspect is a question of law. *United States v. Meeks*, 41 M.J. 150, 161 (1994); Good, 32 M.J. 108 (1991). The Court of Appeals for the Armed Forces identified the standard to use in defining a suspect under self-incrimination law in *U.S. v. Muirhead*, 51 M.J. 94 (C.A.A.F. 1999). The court held that a "military judge considering the question of whether a person is a suspect uses an objective standard. The question is whether "a reasonable person would consider someone a suspect under the totality of the circumstances." Id at 96. See also, *U.S. v. Rice*, 3 M.J. 1094 (C.M.A. 1977). "The threshold question is 'Did the questioner suspect the accused of an offense?' If the answer to this initial inquiry is negative, the facts as known to the questioner at the critical time are examined and the inquiry becomes, 'Should the questioner have reasonably suspected the accused of an offense?'" *Schake*, 30 M.J. 317; "If the interrogator had reasonable grounds to suspect that the person being questioned has committed an offense, a proper warning against self-incrimination must be given." *U.S. v. Tibbetts*, 1 M.J. 1024 (C.M.A. 1976).

Furthermore, although an objective standard of review is used by the court to determine whether someone is a suspect, in some cases, a subjective test can also be appropriately considered. In *U.S. v. Turner*, 48 MJ 513, (A.C.C.A. 1998), the court noted that a "questioner's intentions are a significant factor in determining whether there is an interrogation."

Failure to give Article 31(b) warnings to a suspect or accused when such a warning is required renders the statement involuntary under M.R.E. 305(a) and therefore inadmissible evidence under M.R.E. 304(a), unless it meets certain enumerated exceptions.

"A service member's status as a suspect and the nature of the official inquiry as either law enforcement or disciplinary are ultimately legal questions." *Good*, at 108 (C.M.A. 1991) (citations omitted); *U.S. v. Meeks*, 41 M.J. 150, 161 (C.M.A.

1994). In other words, the court must make legal determinations regarding: 1) the nature of the questioning to which the accused was subjected; and 2) whether the facts at the time of the questioning indicate the accused was a "suspect" or reasonably should have been considered one.

In the event the initial statement of an accused is found to be involuntary, the court must first consider the reasons why that initial statement was involuntary in order to apply the correct legal principles in assessing the voluntariness of any subsequent statements. In *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), the Supreme Court distinguished between two classes of involuntary statements. Where a confession is obtained at a lawful interrogation that comes after an earlier interrogation in which a confession was obtained due to actual coercion, duress, or inducement, the subsequent confession is presumptively tainted as a product of the earlier one.

On the other hand, where the earlier confession was involuntary only because the suspect had not been properly advised of his or her rights to silence and to counsel, the voluntariness of the second confession is determined by the totality of the circumstances. The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession. Id. at 309-14, 105 S. Ct. at 1293-986, see *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991) and *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Further, while a cleansing warning is not legally required, its presence would assist the government in carrying its burden to show the subsequent statement was given voluntarily. *Phillips* at 81 and *United States v. Spaulding*, 29 M.J. 156, 161 (C.M.A. 1989).

In weighing the totality of the circumstances to determine whether an accused's will was overborne resulting in an involuntary statement, the court considers the characteristics of the accused and the details of the interrogation itself. A confession must be the product of an essentially free and unconstrained choice by its maker. Some of the factors to be considered include: the relative youth of the accused; lack of education or low intelligence of the accused; lack of advice to the accused regarding his or her Constitutional rights, length of detention, repeated and prolonged nature of questioning and

the use of physical punishment against the accused. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2014 (1973) internal citations omitted.

Prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The trigger for Miranda warnings is custodial interrogation. When challenged, the prosecution must establish, by a preponderance of the evidence, that a suspect waived his applicable rights. In order to prove a valid waiver, the prosecution must show: that the relinquishment of the defendant's rights was voluntary, and that the defendant had a full awareness of the right being waived and of the consequences of waiving that right.

If the accused indicates that he wishes to remain silent, the interrogation must cease. If he requests counsel, the interrogation must cease until an attorney is present. Thus, an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981)

The analysis becomes more complex in the situation where, as here, an accused indicates a desire for the assistance of counsel to authorities but subsequently makes a statement to investigators.

In light of the "different character of the military community," military courts have recognized a need to give greater "teeth" to the protections of *Miranda* and *Edwards* by imputing knowledge of an accused's request for counsel to other investigators and investigative agencies. *United States v. Goodsen*, 22 M.J. 947, 1986 C.M.R. LEXIS 2146 (C.M.R. 1986) citing to *United States v. Harris*, 19 M.J. 331, 1985 C.M.A. LEXIS 18678 (C.M.A. 1985). The court in *Goodsen* explained:

> The rationale behind imputing knowledge is clear: if the concern of Miranda and Edwards is the prevention of widespread problems of police violating fifth amendment protections, failure to impute knowledge to commanders will provide a ready conduit for bypassing Edwards. In the military context, the aperture for deviating from Edwards is particularly wide because commanders have the responsibility,

among others, to conduct a preliminary inquiry into suspected offenses committed by soldiers of their command. This inquiry may involve questioning the suspect.

*Goodsen* at 949.

IV. Conclusions of Law.

The government has failed to prove by a preponderance of the evidence that each of the accused's statements were voluntary. The court will address each in turn.

Statement of 19 May

The court finds that the investigation conducted by NCIS and YPD was an indivisible entity from the start. The government tried to argue that these were in effect separate, parallel investigations during which both agencies cooperated pursuant to the agreement in place between the military and civilian authorities in Yuma, Arizona. While NCIS and YPD were both notified of the victim's death by separate means, the evidence shows that they started cooperating from the very beginning. SA Ruby and Sgt Freedman organized and divided tasks between NCIS and the YPD and began sharing information immediately. SA Ruby escorted Beatrize Cardwell to notify her mother and the victim's natural father of the victim's death while Det. Tejeda interviewed the accused. Sgt Freedman sent Det. Scanlan to assist SA Jurj with processing the crime scene. SA Ruby later communicated information between Det. Tejeda during the 19 May interview and SA Jurj who had been interviewing neighbors. Sgt Freedman hand delivered copies of interviews to SA Ruby on the afternoon of 19 May and continued to coordinate with SA Jurj in the days that followed as additional federal agents were assigned.

While it may have been an open question to the special agents and detectives themselves on 19 and 20 May, the evidence presented paints a picture of two law enforcement agencies working together very effectively. Moreover, despite SA Ruby characterization of his role as that of a runner or a conduit of information between NCIS and YPD, he was, by virtue of his making sure information from SA Jurj in the field got to Det.

Tejeda in the interview room and vice versa, he was effectively coordinating the entire investigation from the very beginning.

Applying the objective standard to determine whether the accused was, or should have been considered a suspect, the court finds that based on all of the information made known to NCIS and then, through SA Ruby, to YPD, the accused should have been considered a suspect at the time of his interview on 19 May 2015.

The testimony of the special agents and detectives as well as their reports submitted as documentary evidence in support of the motions firmly establish a number of factors that, objectively speaking, should have told law enforcement that the accused was not just a witness but a suspect. The accused was watching the victim the night before she was found nonresponsive. As NCIS learned from interviewing the neighbors, the accused had a history of, at a minimum, difficulty in dealing with the victim. While corporal punishment is not *per se* abuse, the reports from the Prestons about bruising on the victim coupled with the bruises observed on the victim by various law enforcement agents and detectives on the morning of the 19th reasonably should have, at a minimum, raised suspicions about the accused, if not to the exclusion of other suspects.

Det. Tejeda's report regarding the interview of 19 May 2015 makes clear that as the interview progressed and he would ask the accused questions based on information fed into him by SA Jurj through SA Ruby, Det. Tejeda at least approached the interview as if he a reasonable suspicion that the accused had committed a crime. For example, Det. Tejeda asked the accused whether he (the accused) ever shook the victim or perhaps "lost control" or went "overboard." As the interview progressed, Det. Tejeda mentioned the fact the accused is young and because of that might have difficulty controlling his emotions and actions when upset. Additionally, Det. Tejeda repeatedly asked the accused to account for the bruises observed on the victim as reported by the Prestons. Det. Tejeda also asked the accused whether he would be willing to take a lie detector test about his answers. An objective reading of Det. Tejeda's report or SA Ruby's report about Det. Tejeda's interview of the accused on 19 May 2015 demonstrates that Det. Tejeda did, or reasonably should have suspected the accused of a crime in conjunction with the victim's death.

This is not to say there is evidence of bad faith or malfeasance on the part of law enforcement. To the contrary, there is no evidence of either in the record. From the evidence, specifically the testimony of SA Ruby, Det. Tejeda and SA Jurj, it appears to the court that the civilian agents construed or conflated the legal standards for rights advice in a non-custodial civilian interview and the requirements of Article 31(b). This misapprehension would not be unreasonable given the testimony of the YPD detectives that they did not have a lot of experience handling military cases. Similarly, it would not be unreasonable for the NCIS agents involved, who while having more experience with military criminal investigations, nevertheless may not be as familiar with how the requirements of Article 31(b) may be applied to civilian law enforcement - especially in a situation where, as discussed earlier, the agents and detectives themselves were not clear as to whether the investigation would ultimately be handled by the military or by the state.

Unfortunately for the government, the court is unaware of any "good faith" exception to the requirements of Article 31(b). In light of the court's findings that the investigation was an indivisible entity and the investigators should have reasonably suspected the accused of a crime based on the information made known to them as of 19 May 2015, the accused should have been advised of his Article 31(b) rights by Det. Tejeda. Absent such evidence of such advice, the court finds the accused statement to be involuntary.

Statement of 22 May

Because the accused's initial statement was found to be involuntary due to a lack of the required Article 31(b) advice, the court analyzes the voluntariness of the accused's subsequent statements using a totality of the circumstances analysis in which the earlier, unwarned statement is only a factor to be considered.

At the beginning of the interview on 22 May 2015, SA Jurj did advise the accused of his Article 31(b) rights but did not provide the accused with cleansing warnings. While cleansing warnings are not per se required, the absence of cleansing warnings on these facts weighs against admissibility.

SA Jurj prepared for the 22 May interview of the accused by getting a debrief directly from SA Ruby and Det. Tejeda on the substance of the unwarned 19 May interview. Additionally, there were at least six other agents involved in the 22 May interview and a least some, if not SA Jurj herself, prepared for the interview by watching the video of it provided by the YPD.

Moreover, law enforcement received the autopsy report earlier in the day and were ostensibly going to confront the accused armed both with what they learned about what the accused would say based on his 19 May interview as well as the autopsy results. This second interview was only three days after the first, unwarned interview and being held in the same location, YPD. The government argued that because SA Jurj began her questioning from the beginning of the narrative, she did not use the prior unwarned statement as a "jumping off point." That argument is unpersuasive. While SA Jurj may have started her questioning of the accused from the beginning of the narrative, it is clear from the evidence presented that she and the other agents involved with interviewing the accused made it a point to learn what the accused had said in his 19 May statement in order to be prepared for the 22 May interview. Her line of questioning may have begun from the beginning, but her preparation for the subsequent interview started by making sure she knew what the accused had said during his unwarned statement. The accused was effectively being called on to answer for his previous statement without knowing that statement should have been warned.

From the NCIS reports, it appears the accused was 20 years-old at the time of the interviews in May 2015. There is no evidence in the record as to the accused's education or intelligence; however, based on Det. Tejeda's report concerning the interview of 19 May 2015 and the accused's rank, the court can conclude the accused is a relatively young and immature man. There is no evidence that any sort of physical punishment was used against the accused. While not directly on point, the accused's affidavit submitted in support of the defense motion to suppress indicates the accused did not feel he had a choice about going to YPD when SA Ruby told him that he needed to go to YPD with Det. Tejeda. With regard to the length of the 22 May interview, the accused signed the Military Suspect's Acknowledgement and Waiver of Rights form at 1539 on 22 May 2015. According to Sgt

Freedman's report, the interview lasted until approximately 2330 that evening. While there is no evidence of any cleansing warning, the government did present the aforementioned Military Suspect's Acknowledgment and Waiver of Rights form signed by the accused on 26 May 2015.

On these facts and without a cleansing warning, the government has failed to prove by a preponderance of the evidence that the statement by the accused on 22 May 2015 was voluntarily made.

Statement of 26 May

Because the accused's statement of 19 May 2015 was found to be involuntary due to a lack of the required Article 31(b) advice, the court analyzes the voluntariness of the accused's subsequent statements using a totality of the circumstances analysis in which the earlier, unwarned statement is only a factor to be considered. The analysis of the 26 May 2015 statement also requires consideration of the accused's rights implicated by virtue of his being placed in pretrial confinement after his 22 May 2015 statement.

The court adopts the same analysis regarding the *Schneckloth* factors pertaining to the accused's age education and intelligence discussed above to the 26 May statement. GySgt Green conducted the 26 May interview at the NCIS office aboard MCAS Yuma after making arrangements with brig personnel to have the accused brought over. The government presented no other evidence regarding the length or circumstances of this interview. While there is no evidence of any cleansing warning, the government did present a Military Suspect's Acknowledgment and Waiver of Rights form signed by the accused on 26 May 2015 at 1529. There is no evidence of physical punishment of the accused.

What the evidence in the record does show is that the accused was questioned three times within an eight-day period and that NCIS agents who conducted the interviews on 22 and 26 may used the information gathered from the unwarned 18 May statement as part of the preparation for each interview. The record also shows that SA Jurj was directly involved in the decision to interview the accused on both 22 and 26 May. While the court was not provided the substance of either the 22 or 26

May statements by the accused, the testimony of the agents during the 39(a) session gave the court the impression that each subsequent interview of the accused was an attempt to build on the previous interview in order to gather more information from the accused. Given the dearth of evidence of *Schneckloth* factors presented by the government, the accused's relatively young age and immaturity, the court finds the government has failed to prove by a preponderance of the evidence that the accused's statement of 26 may 2015 was made voluntarily.

Imputed knowledge

Alternatively, the court would also find that the 26 May 2015 statement was taken in violation of the accused's Fifth and Fourteenth Amendment rights based on imputed knowledge.

The evidence before the court is that the accused requested the assistance of counsel through his command representative, GySgt Sandoval, around midday on 26 May 2015. GySgt Sandoval in turn had a conversation with the brig supervisor, GySgt McClure, informing him of the accused's request for counsel.

That same day, GySgt Green serving in his capacity as a special agent with NCIS, requested that the accused be brought over for an interview at NCIS. Moreover, GySgt McClure testified that according to brig procedures, they would have automatically begun the process of getting defense counsel for the accused because they work from the assumption that all new pretrial detainee desire the assistance of counsel.

The government's argument that GySgt Green began the 26 May 2015 interview by advising the accused of his rights and the accused waiving those rights is unpersuasive. As noted in an earlier opinion in the *Goodsen* case, *United States v. Goodsen*, 22 M.J. 22, 23 (C.A.A.F. 1986), even though an accused does not renew a request for counsel at the beginning of the interview, "this later conduct does not render ambiguous or inoperative the original request for counsel. Instead, once that request has been made, it retained its effect…" Internal citations omitted.

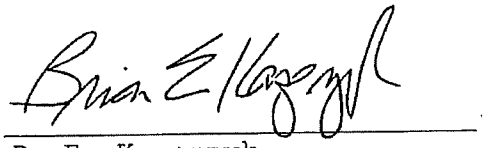
Similarly, any argument that imputing knowledge of one of the actors in this case to the others would somehow be unduly burdensome to the government is unpersuasive in light of the fact GySgt Sandoval was proactively trying to find counsel on the accused's behalf, he contacted the brig supervisor about it

directly as well as the defense section and GySgt Green coordinated directly with the brig on the very same day to have the accused brought over to NCIS. The court does not find any evidence of bad faith on any of the government witnesses; however, to refrain from imputing knowledge in this case would effectively allow the government to ignore the accused's request for counsel made the very same day.

V. Ruling.

The Defense motion to suppress all statements made by the Accused is **GRANTED**.

**So ordered this 2nd day of March 2016.**



B. E. Kasprzyk
Lieutenant Colonel
U.S. Marine Corps Reserve
Military Judge

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[i] This Article 39(a) session was held over a weekend in order to accommodate the schedules of the various counsel involved to include Captain Reed who had been detailed by the Chief Defense Counsel of the Marine Corps and was traveling from Camp Lejuene. In total, eight motions were litigated during this particular Article 39(a) session. The court informed counsel of its rulings on the other seven motions via electronic mail on 11 January 2016. The court informed counsel of its ruling on the motion to suppress via electronic mail on 2 March 2016.