Article 31(b), Tempia-Miranda, and the Military Defendant

ABSTRACT

When military servicemembers in North Carolina who are suspected of a crime make inculpatory statements to their military superiors, and are tried in a military tribunal, they are both statutorily and constitutionally protected against the dangers of involuntary self-incrimination resulting from the military's inherently coercive atmosphere. When those same servicemembers make incriminating statements to military superiors who are not commissioned officers and are later tried in a North Carolina Criminal Court, they are left vulnerable by North Carolina's rule that assigns law enforcement equivalency only to commissioned officers with the authority to order servicemembers into arrest or confinement under military regulations.

This Comment, which concludes with a recommendation that North Carolina adopt a rule fashioned after the more effective rule applied by military courts, begins with an overview of the historical evolution of servicemembers' rights against self-incrimination from the early years of the republic to the United States Court of Military Appeals's ruling in United States v. Tempia *extending* Miranda*'s protections to servicemembers. This Comment next considers North Carolina's rule in* State v. Davis*—discussing the majority's reasoning and highlighting deficiencies. Finally, this Comment proposes a new rule that would ensure servicemembers are adequately protected.*

INTRODUCTION

On August 18, 2011, Army Specialist Christopher Blackett and his roommate, Army Private First Class Sebastian Gamez, were arrested on charges of first-degree murder and disposing of a corpse.[1] The soldiers' arrests followed statements they made to Blackett's Section Sergeant, Lavern Sellers, and later to their Company First Sergeant, Rebecca Schlegelmilch, regarding the shooting death of their seventeen-year-old next-door neighbor, Vincent Carlisle.[2] Blackett's spontaneous confession to Sellers precipitated the search for the teenager,[3] whose body was found

1. Arrest Report, State v. Blackett, Nos. 11CRS53885, 11CRS53880, 13CRS425 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) [hereinafter Blackett Arrest Report]; Arrest Report, State v. Gamez, Nos. 11CRS53886, 11CRS05388, 13CRS000424 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) [hereinafter Gamez Arrest Report]. Blackett and Gamez were arrested at Fort Bragg, N.C. and transported to Harnett County, where they were then charged. Blackett Arrest Report, *supra*; Gamez Arrest Report, *supra*. While bond for both was set at $100,000.00 on the disposing of a corpse charge, both were held without bond on the murder charges. Blackett Arrest Report, *supra*; Gamez Arrest Report, *supra*.

2. *See* Interview by Rodney S. Jackson with Rebecca Schlegelmilch, Company First Sergeant, U.S. Army (Aug. 18, 2011) (transcript on file with Campbell Law Review) [hereinafter Schlegelmilch Interview].

3. *Id.* Blackett's initial confession was to Sellers, who had been assigned to transport Blackett to base legal services on another matter. *See* Interview by Donald E. Harrop with Lavern Sellers, Section Sergeant, U.S. Army (Oct. 6, 2011).

in a wooded field just inside the Harnett County line.[4] Following their initial statements to Sellers and Schlegelmilch, Blackett and Gamez also made statements about the shooting to deputies with the Harnett County Sheriff's Department and later the Cumberland County Sheriff's Department.[5] After law enforcement discovered Carlisle's body, the Harnett County District Attorney secured grand jury indictments against both Blackett and Gamez.[6]

Largely relying on the North Carolina Court of Appeals decision in *State v. Davis*,[7] Blackett and Gamez filed motions to suppress certain unwarned, incriminating statements, including those made to Sergeant Sellers and First Sergeant Schlegelmilch, asserting that the statements were obtained in violation of *Miranda v. Arizona*.[8] In *Davis*, the North Carolina

4. *See* Application for Search Warrant at Attachment #2, State v. Gamez, Nos. 11CRS53886, 11CRS05388, 13CRS000424 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review).

5. Blackett and Gamez lived as roommates in Cumberland County, N.C., but the victim's body was located just across the county line in Harnett County. *Id.* Law enforcement officials from both counties were originally involved in the investigation because it was initially unclear whether the shooting had occurred in Cumberland or Harnett County. *See* Prosecution Report, State v. Gamez, Nos. 11CRS53886, 11CRS05388, 13CRS000424 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review).

6. Blackett and Gamez were indicted on charges of murder, concealing the death of a person, first-degree kidnapping, and conspiracy to commit first-degree kidnapping. Indictment, State v. Blackett, No. 11CRS53885 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Blackett for murder); Indictment, State v. Blackett, No. 11CRS53880 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Blackett for concealing the death of a person); Indictment, State v. Blackett, No. 13CRS00425 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Blackett for first-degree kidnapping); Indictment, State v. Blackett, No. 16CRS00652 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Blackett for conspiracy to commit first-degree kidnapping); Indictment, State v. Gamez, No. 11CRS53886 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Gamez for murder); Indictment, State v. Gamez, No. 13CRS00424 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Gamez for first-degree kidnapping); Indictment, State v. Gamez, No. 11CRS53881 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Gamez for concealing the death of a person); Indictment, State v. Gamez, No. 16CRS00651 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) (indicting Gamez for conspiracy to commit first-degree kidnapping).

7. State v. Davis, 582 S.E.2d 289 (N.C. Ct. App. 2003).

8. Miranda v. Arizona, 384 U.S. 436 (1966); Amended Motion to Suppress Statements Made by Defendant to His Military Superiors and Subsequently Made to Law Enforcement, State v. Blackett, Nos. 11CRS53885, 11 CRS53880, 13CRS425 (N.C. Super. Ct., Harnett Cty. 2016) (on file with Campbell Law Review) [hereinafter Blackett's Motion to Suppress]; Motion to Suppress Statements Made by Defendant, State v. Gamez, Nos. 11CRS53886, 11CRS05388, 13CRS000424 (N.C. Super. Ct., Harnett Cty. 2016).

Court of Appeals held that the defendant, a marine corps private, was subjected to custodial interrogation under *Miranda* when he made incriminating statements to his Platoon Commander, Marine Corps Chief Warrant Officer (CW3) Kenneth Lee Brown.[9] In reaching this determination, the *Davis* Court stated that, "[T]he trial court was required to determine whether defendant's statements were the result of 'questioning initiated by law enforcement officers after [defendant had] been taken into custody or otherwise deprived of his freedom of action in any significant way.'"[10] Based upon its understanding of Brown's authority under the Uniform Code of Military Justice (UCMJ), the court concluded that CW3 Brown was a law enforcement official within the meaning of *Miranda.*[11] According to the court—and contrary to Brown's testimony—Brown was a commissioned officer who possessed the authority under military regulations to order those under his command into arrest or confinement.[12] The court reasoned that such authority was "sufficient to invoke the protections of *Miranda*."[13]

The rule in *Davis*, if strictly construed, limits *Davis*'s applicability to cases where a commissioned officer with the authority to arrest or confine conducts questioning. Blackett's and Gamez's reliance on *Davis* was problematic because neither Sergeant Sellers nor First Sergeant Schlegelmilch were commissioned officers possessing the authority to order an inferior into arrest or confinement.[14] The distinction between the facts of Blackett's and Gamez's cases and the facts in Davis serves as the impetus for this Comment.

When servicemembers commit crimes, their first statements are often to their military superiors. This reality raises the questions of whether and under what circumstances unwarned, incriminating statements made by servicemembers to military superiors are the product of custodial interrogation under *Miranda* and *United States v. Tempia*[15] and, thus, must be excluded from a criminal trial. Blackett's and Gamez's cases are illustrative of the circumstances under which a servicemember's incriminating statements made to military superiors might be used against that servicemember in a criminal case prosecuted by civilian authorities.

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9. *Davis*, 582 S.E.2d at 289.

10. *Id.* at 295 (quoting State v. Gaines, 483 S.E.2d 396, 405 (N.C. 1997)).

11. *Id.*

12. *Id.* at 295 n.1.

13. *Id.* at 295.

14. Schlegelmilch Interview, *supra* note 2.

15. Miranda v. Arizona, 384 U.S. 436, 436 (1966); United States v. Tempia, 16 C.M.A. 629 (1967). This Comment will collectively refer to these two seminal cases as *Miranda-Tempia*.

Furthermore, they demonstrate how a general lack of understanding regarding military rank and corresponding authority, as provided under the UCMJ, might result in the erroneous reliance of a military defendant on *Davis*'s authority when challenging the admissibility of incriminating statements made to a military superior.

Blackett forewent a hearing on his motion and entered into a plea agreement with the Harnett County District Attorney on August 23, 2016.[16] An order denying Gamez's motion was entered on January 4, 2017.[17] Whereas *Davis* demonstrates a lack of understanding by the court regarding military rank, authority, and culture, Blackett's and Gamez's motions to suppress demonstrate an equal lack of understanding on the part of their defense about how *Davis* operates.[18] This, in turn, raises the question of whether the reasoning applied in *Davis* establishes a reliable rule for future defendants who will look to that decision in support of their motions to suppress statements made to their military superiors. Would the application of military law under Article 31 provide civilian courts with a more easily ascertainable and inherently fairer standard upon which to base their determination of whether a servicemember's rights were violated?

Military servicemembers assigned to duty stations within North Carolina, like Blackett and Gamez, exist within two separate environs. The first is the United States Armed Forces, which have distinct rules for conduct and behavior and whose regulations provide protections against self-incrimination under Article 31 of the UCMJ[19] and *Tempia*.[20] The second is civilian society, in which the United States Constitution provides protections against self-incrimination under the Fifth Amendment as articulated by the Supreme Court of the United States in *Miranda*.[21] The

16. Paul Woolverton, *Former Fort Bragg Solder To Be Locked Up at Least 29 1/2 Years for Teen's Death*, FAYETTEVILLE OBSERVER (Aug. 23, 2016), https://perma.cc/ZRW5-WFQX. Blackett pleaded guilty "to second-degree murder, conspiracy and kidnapping . . . ." *Id.* On October 23, 2016, Christopher Blackett committed suicide in his cell at Lanesboro Correctional Institution. Ames Alexander, *NC Prisons Hit With the Year's Sixth Inmate Suicide*, CHARLOTTE OBSERVER (Oct. 24, 2016), https://perma.cc/C8EM-2RA3.

17. Order Denying Motion, State v. Gamez, Nos. 11CRS53886; 11CRS05388; 13CRS000424 (N.C. Super. Ct., 2016) (Harnett Cty.). Following the denial of his motion, Gamez also entered into a plea agreement with the state, though the details of the plea are unknown. The ADA handling the cases expects Gamez to appeal the ruling on his motion. Email from Donald E. Harrop, Harnett Cty. Assistant Dist. Att'y, to author (Feb. 22, 2017) (on file with author).

18. Blackett's Motion to Suppress, *supra* note 8.

19. 10 U.S.C. § 831 (2012).

20. *Tempia,* 16 C.M.A. 629

21. Miranda v. Arizona, 384 U.S. 436 (1966).

overarching issue that this Comment addresses occurs at the intersection of these two environs.

Writing for the *Davis* Court, Judge Geer stressed the importance of considering "the realities and necessities of military life" when determining whether a servicemember has been subjected to custodial interrogation within the meaning of *Miranda*.[22] Ironically, the court ultimately adopted a rule that applies *Miranda*'s protections only when a servicemember has made statements to a superior who is also a commissioned officer. This oversight leaves servicemembers such as Blackett and Gamez, who make statements to superior non-commissioned officers, unprotected against the inherently coercive atmosphere that pervades the military environment.

This Comment seeks to determine whether *Davis* represents the best means of protecting servicemembers against involuntary self-incrimination while leaving both the military's interests in maintaining order and discipline and the government's interests in prosecuting criminal offenders intact. If it does not, then what is the most effective means to preserve all interests simultaneously? To that end, Part I provides an overview of the historical evolution of the rights afforded to servicemembers as related to the right against unwarned self-incrimination. Next, Part II presents the North Carolina Court of Appeals's application of *Miranda* protections in *Davis*. Finally, Part III evaluates the *Davis* Court's application of the rule extending *Miranda* to servicemembers and presents an alternative approach. This Comment concludes with a recommendation that North Carolina courts look to the rules and teachings of their military counterparts to determine whether a soldier's rights have been violated, thus avoiding a misapplication of the law due to a lack of understanding of military society and culture.

I. ARTICLE 31, *MIRANDA*, AND *TEMPIA*: THE END TO DRUMHEAD JUSTICE

Today, military servicemembers enjoy the same constitutional protections in criminal prosecutions as civilians. However, this was not always the case. Prior to the adoption of the UCMJ, the Articles of War and the Articles for the Government of the Navy "constituted the code of criminal law and criminal procedure for the Armed Forces."[23] From April 10, 1806 until the mid-twentieth century, the military system of justice in the United States Army was governed by the 101 Articles of War enacted

22. State v. Davis, 582 S.E.2d 289, 293 (N.C. Ct. App. 2003).

23. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 17 (1965).

by the 1st Congress.[24] The system, which endured virtually unchanged in the United States for nearly a century and a half,[25] was based upon earlier British and Roman systems that were designed to promote obedience, discipline, and morale within the ranks.[26] Likewise, the Articles for the Government of the Navy (Naval Articles) were predicated upon the British Naval Articles of 1749.[27]

As they worked toward developing the system of laws that would eventually govern the nation, the founding fathers were mindful of the vastly differing objectives of military and civilian societies with respect to criminal law.[28] Where criminal law in civilian societies "secure[d] to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all[,]"[29] military criminal law was imbued with the higher purpose of maintaining morale and discipline within the fighting forces.[30] As highlighted in a 1948 report printed for the use of the United States Senate Armed Services Committee:

> The difference between a military and a civilian organization was recognized in the fifth amendment of the Constitution, which specifically excepts from its guaranty of indictment by a grand jury "cases arising in the land and naval forces." By judicial interpretation the same exception has been held applicable to the guaranty of jury trial recognized in the sixth amendment. *This exception was considered so obvious by the founding fathers that it did not call forth a single word of discussion as it passed through the first session of the First Congress.*[31]

Between 1912 and 1920, Congress undertook to revise the 1806 Articles of War, most notably adding Article of War 25, which was a

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24. *Articles of War (1912–1920)*, LIBR. CONGRESS, https://perma.cc/Q62N-5MHD.

25. *See* Morgan, *supra* note 23, at 18.

26. *See* STAFF OF S. COMM. ON ARMED SERVICES, 80TH CONG., COURTS MARTIAL LEGISLATION: A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575); AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY (H.R. 3687; S. 1338) 2–5 (Comm. Print 1948) [hereinafter COURTS MARTIAL LEGISLATION] (surveying the historical basis for the military system of discipline).

27. Morgan, *supra* note 23, at 18.

28. COURTS MARTIAL LEGISLATION, *supra* note 26, at 2.

29. *Id.* at 3.

30. *See id.* at 5 (recounting General Eisenhower's appearance before the House Armed Services Committee on July 15, 1947, in which the General described the need for harsher punishments for soldiers than for civilians based upon the primary purpose of military justice).

31. *Id.* at 3 (emphasis added).

statutory protection against self-incrimination.[32] However, no significant changes were made to the military system of justice until World War II.[33] In 1948, the United States Congress undertook the comprehensive revision of the Articles of War under the Elston Act,[34] which added a paragraph to Article of War 24.[35] The 1948 amendment added teeth to the 1920 Article's prohibition against self-incrimination by (1) expressly forbidding the use of coercion in any form, (2) excluding from evidence any statement obtained through the use of coercion, and (3) requiring that the accused be advised of his rights before making any statement.[36] It read as follows:

> The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial.[37]

Like the Army's Articles of War, the Naval Articles underwent several revisions while remaining largely true to their British progenitors.[38] Unlike their Army counterparts, however, the Naval Articles never provided protections equivalent to those codified in the amended Article of War 24.[39] As World War II neared its conclusion, and in response to "discussions and criticisms of the justice systems of the Army and Navy,"[40] both the Navy Department and the Secretary of War appointed independent committees to evaluate their respective military justice systems.[41] The next twenty years saw a burgeoning recognition of the need for change in military justice. Legislative and jurisprudential changes gradually extended constitutional and statutory protections against self-incrimination to

32. Captain Frederic I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 3 (1976). The military right against self-incrimination existed in some form by 1862. *Id.* at 2.

33. *See Articles of War (1912–1920)*, *supra* note 24; Morgan, *supra* note 23.

34. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. 2, 62 Stat. 604, 627–44; *see also The Elston Act (1948)*, LIBR. CONGRESS, https://perma.cc/G5SA-H478.

35. Act of June 24, 1948 § 214, 62 Stat. at 631; Lederer, *supra* note 32, at 5.

36. Lederer, *supra* note 32, at 5.

37. *Id*.

38. *See* Morgan, *supra* note 23, at 18.

39. Lederer, *supra* note 32, at 6.

40. COURTS MARTIAL LEGISLATION, *supra* note 26, at 1.

41. *Id.*

servicemembers.[42] By 1966, Article 31 of the UCMJ gave servicemembers statutory protection against self-incrimination, while the *Miranda* and *Tempia* decisions provided constitutional safeguards.

A. Article 31

In 1947, the United States Armed Forces were unified under the Department of Defense and the First Secretary of Defense, James Forrestal.[43] In 1948, in response to a request by the Senate Armed Services Committee,[44] Forrestal convened a committee headed by Assistant General Counsel to the Secretary of Defense Felix E. Larkin to draft a uniform code of military justice that would combine and supersede the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard.[45] The new UCMJ would be "uniformly applicable in all its parts to the Army, the Navy, the Air Forces, and the Coast Guard in time of war and peace."[46] Further, it "would provide full protection of the rights of persons subject to the code without undue interference with appropriate military discipline and the exercise of appropriate military functions."[47] While the UCMJ drafted by the Forrestal committee would be a "complete repudiation" of the existing system of military justice, it would not be modeled after "a system designed to be administered as the criminal law is administered in a civilian criminal court."[48]

A draft of the bill, proposed by the Forrestal committee to "unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard and to enact and establish a Uniform Code of Military Justice," was submitted to the House of Representatives on February 8, 1949.[49] The bill, having passed both houses of Congress with very few changes from its draft

42. The Subcommittee on Constitutional Rights of the Committee on the Judiciary noted a "perceptible trend in the Federal courts toward greater judicial protection for the American Servicemen." STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS, S. COMM. ON THE JUDICIARY, 88TH CONG., CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL III (Comm. Print 1963); *see generally* Felix E. Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7, 7 (1965).

43. *Military Justice Fact Sheets*, U.S. MARINE CORPS, https://perma.cc/QXD2-76Y3.

44. Larkin, *supra* note 42.

45. Morgan, *supra* note 23, at 22.

46. Letter from James Forrestal, Sec'y of Def., to Sam Rayburn, Speaker of the House of Representatives (on file at Univ. of Minn.) [hereinafter Forrestal Letter].

47. Morgan, *supra* note 23, at 22.

48. *Id.*

49. H.R. 2498, 81st Cong. (1st Sess. 1949).

form,[50] took effect in 1951.[51] Included in the newly enacted UCMJ was Article 31, entitled "Compulsory self-incrimination prohibited."[52] Today, Article 31 of the UCMJ provides:

> (a) No person *subject to this chapter* may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person *subject to this chapter* may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person *subject to this chapter* may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.[53]

The purpose of Article 31, which predated the Supreme Court's ruling in *Miranda* by some 15 years, was to "avoid impairment of the constitutional guarantee against compulsory self incrimination."[54] This protection was necessary "[b]ecause of the effect of superior rank or official position upon one subject to military law . . . ."[55] In a military setting, "the mere asking of a question under certain circumstances is the equivalent of a command. A person subjected to these pressures may rightly be regarded as deprived of his freedom to answer or to remain silent."[56]

While Article 31(a) implements the "privilege against compulsory self-incrimination,"[57] Article 31(b), which prohibits questioning without

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50. Larkin, *supra* note 42, at 11.

51. *See* James F. Falco, Comment, United States v. Tempia: *The Questionable Application of* Miranda *to the Military*, 13 VILL. L. REV. 170, 175 (1967).

52. 10 U.S.C. § 831 (1956).

53. 10 U.S.C. § 831 (2012) (emphasis added). The provisions of Article 31 apply to all who are subject to the Code and not only Commissioned Officers or those having the power to order another into arrest or confinement under the UCMJ. *See id.*

54. United States v. Brown, 38 M.J. 696, 698 (A.F.C.M.R. 1993) (quoting United States v. Gibson, 3. C.M.A. 746, 752 (1954)).

55. *Gibson*, 3 C.M.A. at 751.

56. *Id.* at 752.

57. United States v. Evans, 75 M.J. 302, 305 (C.A.A.F. 2016).

warning, "is a statutory precursor to *Miranda* warnings."[58] It "provides members of the armed forces with *statutory* assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked."[59] Based upon the statutory language, Article 31(b) protections arise only when a person subject to the UCMJ is suspected or accused of an offense and is questioned by someone also subject to the Code.[60] However, military courts also require Article 31(b) warnings be given by civilian investigators in two distinct situations: (1) when civilian and military authorities are cooperating in their individual active investigations to the extent that the investigations have effectively merged,[61] and (2) when a civilian investigator acts on behalf of the military.[62] The Article 31 protections apply even when a servicemember is merely suspected of a crime; he must be informed of the crime of which he is suspected as well as his right against self-incrimination.[63] Furthermore, Article 31 rights must be communicated to the subject even if he is not in custody at the time of the questioning.[64]

In the 1981 case of *United States v. Duga*, the Court of Military Appeals prescribed a two-prong test for determining whether Article 31 rights apply in a given situation.[65] Under that test, military courts considered "whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation."[66] In a 2014 decision, the United States Court of Appeals for the Armed Forces rejected the subjective second prong of *Duga* and announced that, "Article 31(b) . . . warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected."[67] Because the protections extended by Article 31 are

58. *Id.* at 304–05.

59. *Id.* at 305 (emphasis in original) (quoting United States v. Swift, 53 M.J. 439, 445 (C.A.A.F. 2000)).

60. *See* United States v. Baird, 851 F.2d 376, 383 (D.C. Cir. 1988).

61. *Id.* (citing United States v. Kellam, 2 M.J. 338, 341 (A.F.C.M.R. 1976)).

62. *Id.*

63. *Id.*

64. *Id.* (citing United States v. Foley, 12 M.J. 826, 831 (N-M. C.M.R. 1981)).

65. United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

66. *Id.*

67. United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnote omitted) (citing U.S. v. Cohen, 63 M.J. 45, 49 (C.A.A.F. 2006)).

statutory, rather than constitutional, and because its protections occur at a lower threshold than those afforded under *Miranda*,[68] not every Article 31(b) violation will be accompanied by a violation under *Miranda.*[69]

B. Miranda v. Arizona

On June 13, 1966, the Supreme Court of the United States announced its landmark decision in *Miranda v. Arizona*,[70] where it proscribed the prosecution's use of a criminal defendant's statements obtained during a custodial interrogation unless certain procedural safeguards had been employed to ensure that the defendant's Fifth Amendment privilege against self-incrimination had not been violated.[71] The decision, which changed the face of criminal prosecution in the United States, was born in part from the Court's concern with the atmosphere surrounding incommunicado police interrogation, which the court described as an "inherently compelling pressure[]" that undermines the privilege against self-incrimination.[72] The court further cautioned that no statement obtained from a defendant can be "truly the product of free choice" without adequate safeguards against compulsion.[73] To that end, *Miranda* requires that law enforcement clearly inform persons in custody of their *Miranda* rights before interrogating them—"unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it . . . ."[74]

Since the Supreme Court's 1966 decision, constitutional jurisprudence has established that *Miranda* attaches only when a person is subjected to custodial interrogation.[75] In other words, two elements must be met before *Miranda* is applicable: (1) the defendant must be "in custody," and (2) the

68. United States v. Santiago, 966 F. Supp. 247, 262 (S.D.N.Y. 2013) ("The military sets an extremely low threshold triggering Article 31—no custody required, no accusation required, mere suspicion is sufficient to trigger the requirement of warnings . . . .").

69. *See* United States v. Evans, 75 M.J. 302, 306 (C.A.A.F. 2016).

70. Miranda v. Arizona, 384 U.S. 436 (1966).

71. *See id.* at 444.

72. *See id.* at 467.

73. *See id.* at 457.

74. *Id.* at 444. A suspect subject to custodial interrogation must be informed of his right to remain silent and that any statement he makes can be used against him in court should he choose to waive that right. *Id.* Furthermore, a subject should be informed of his right to have an attorney present at questioning and that an attorney will be provide for him if he cannot afford an attorney. *Id.* at 444–45.

75. State v. Patterson, 552 S.E.2d 246, 253 (N.C. Ct. App. 2001) (citing State v. Gaines, 483 S.E.2d 396, 404 (N.C. 1997)).

questioning must meet the legal definition of "interrogation."[76] As to whether a person was in custody, the court must determine "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest."[77] Interrogation is any practice "that the police should know [is] reasonably likely to elicit an incriminating response from the suspect."[78] "By custodial interrogation, [courts] mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[79]

When the Court announced its decision in *Miranda,* it might not have contemplated the decision's application to the questioning of servicemembers in a military setting.[80] In introducing the issue before the Court at the outset of his majority opinion, Chief Justice Warren wrote, "[W]e deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation . . . ."[81] This declaration was a precise statement of purpose. It also cannot be ignored that Warren was well aware of Article 31 and its parallel application in armed forces criminal procedure at the time of the opinion.[82] Yet, Warren noted no deficiencies in that Article.[83] In fact, in stressing that "[t]he limits [the Court has] placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement,"[84] Warren referenced the successful balance that had been achieved in other jurisdictions, including military tribunals whose interrogation rules under

76. *See* Rhode Island v. Innis*,* 446 U.S. 291, 300 (1980).

77. State v. Davis, 582 S.E.2d 289, 295 (N.C. Ct. App. 2003) (quoting State v. Buchanan, 543 S.E.2d 823, 828 (N.C. 2001)).

78. *Innis*, 446 U.S. at 301.

79. Berkemer v. McCarty, 468 U.S. 420, 428 (1984) (quoting *Miranda*, 384 U.S. at 444).

80. *See* Falco*, supra* note 51. "In *Miranda,* the Supreme Court invited Congress to enact safeguards for this privilege. Manifestly, the Court was not concerned with existing legislation, article 31, other than as an exemplar, but was instead imposing restrictions on civilian law enforcement officials because of the lack of legislative activity in the civilian area under scrutiny." *Id.* at 175 (footnote omitted).

81. Miranda, 384 U.S. at 439.

82. *See id.* at 489. "Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him." *Id.* (citing 10 U.S.C. § 831(b) (1964)).

83. *See Miranda*, 384 U.S. at 489.

84. *Id.* at 481.

Article 31 required the exclusion of certain unwarned statements.[85] The Court's pronouncement that the warnings must be given "unless other fully effective means are devised to inform accused persons of their right[s],"[86] paired with its reference to the UCMJ as an exemplar of the successful application of such means, supports the proposition that *Miranda* likely left military law untouched.

At first blush, any debate over *Miranda*'s applicability to the armed forces might seem like a tilt with windmills—after all, *Miranda*'s protections serve to enhance those afforded servicemembers under the UCMJ, do they not? The simple answer is "yes" in cases tried in military tribunals where admissions not excluded under *Miranda* might still be excluded under Article 31. However, when this question is considered in the context of cases like Blackett's and Gamez's, where servicemembers who have made incriminating statements to military superiors are tried in a civilian tribunal, *Miranda*'s deficiencies are exposed.

As applied by the *Davis* court, *Miranda* protections are only afforded to servicemembers whose statements are made to a person who has the authority under the UCMJ to order another into arrest or confinement.[87] Servicemembers whose statements were made to military superiors who do not possess the requisite authority under *Davis*, or who were not in custody within the meaning of *Miranda*, are left largely unprotected because the *Davis* rule does not contemplate those situations. Rather than relying on *Miranda* to protect servicemembers against self-incrimination, a rule based upon Article 31 would serve as a bulwark against the types of violations envisioned by Congress in enacting the UCMJ.[88]

Despite the *Miranda* Court's apparent acceptance of the UCMJ as sufficiently protecting servicemembers from violations of their Fifth Amendment right against self-incrimination, the Department of the Air Force was not taking any chances. Immediately following promulgation of the *Miranda* decision, the Department "directed all *Air Police* agencies to comply with its mandate until the question could be resolved [by the United States Court of Military Appeals]."[89] The prescient Air Force, who notably does not appear to have extended the same mandate to questioning by military superiors who were not Air Police, did not have to wait long.

85. *See id.* at 489.

86. *Id.* at 444.

87. *See* State v. Davis, 582 S.E.2d 289, 295 (N.C. Ct. App. 2003).

88. *See* Falco, *supra* note 51.

89. United States v. Tempia, 16 C.M.A. 629, 631 n.1 (1967) (emphasis added).

C. United States v. Tempia*: The Extension of Miranda to the Military*

On June 14, 1966, the day after the *Miranda* decision was handed down,[90] the general court-martial of Airman Third Class Michael L. Tempia—which would culminate in the Court of Military Appeals's extension of *Miranda* to the military—was commenced.[91] Tempia was charged with "taking indecent liberties with females under the age of sixteen, in violation of Uniform Code of Military Justice, Article 134, 10 USC § 934" after making "obscene proposals" to three girls at the base library.[92] The girls left the library and reported Tempia's conduct to their parents who, in turn, contacted the base police.[93] The girls, one girl's parent, and the Air Police returned to the base library and found Tempia in a reading room.[94] Tempia voluntarily accompanied officers to the Air Police office, where he was informed of his Article 31 rights and that he had the option to consult with legal counsel.[95] Upon informing officers that he wanted an attorney, the interview was terminated, and Tempia was immediately released.[96]

Prior to his arrest, Tempia spoke with Air Police on two additional occasions, each time receiving warnings as required under Article 31 of the UCMJ.[97] During the second interview, Tempia informed officers that he had not yet spoken with counsel.[98] The officers sent Tempia to speak with the Staff Judge Advocate, who advised Tempia of his Article 31 rights and told Tempia that, while he could secure a civilian lawyer at his own expense, he would not be provided military counsel unless charges were brought against him.[99] Upon returning to the Air Police office for the third interview, Tempia was again informed of his Article 31 rights and his right to consult legal counsel.[100] After declining to consult with counsel, Tempia confessed to the Air Policemen.[101]

At trial, Tempia sought to have his confession excluded based on *Miranda*'s command that a person subject to interrogation be informed that

90. Falco*, supra* note 51, at 172.
91. *Id.; see also Tempia*, 16 C.M.A. at 631.
92. *Tempia*, 16 C.M.A. at 631.
93. *Id.* at 632.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 632–33.
98. *Id.* at 632.
99. *Id.*
100. *Id.*
101. *Id.* at 632–33.

he will be provided counsel prior to any interrogation.[102] The general court-martial rejected Tempia's motion[103] and ultimately sentenced him to a "bad-conduct discharge, forfeiture of all pay and allowances, confinement at hard labor for six months, and reduction [in grade]."[104] Tempia's conviction was affirmed by intermediate appellate authorities.[105] It was subsequently certified to the United States Court of Military Appeals on the following issue: "Was the board of review correct in its determination that the accused's pretrial statement was properly received in evidence?"[106] The Navy Judge Advocate General filed an amicus curiae brief opposing the application of *Miranda* to Tempia's case.[107] The Navy "urged that military law is in nowise affected by constitutional limitations and, in consequence, that the principles enunciated in *Miranda v. Arizona* . . . do not apply."[108] The prosecution argued on different grounds. It "[c]onced[ed] the application of the Constitution" but urged that "the Supreme Court has no supervisory power over military tribunals."[109] The Court of Military Appeals rejected the Navy's argument, holding that both military and civilian jurisprudence demonstrate conclusively that the Constitution's protections apply with full force to military personnel.[110] The Court likewise dismissed the prosecution's contention, explaining that the government had misconstrued the Supreme Court's jurisdiction in *Miranda* as deriving from that Court's "supervisory authority over the administration of criminal justice"[111] rather than its power as the ultimate arbiter of constitutional law.[112]

In its opinion, the *Tempia* court expressly rejected the notion that Article 31 alone is sufficient to ensure servicemembers the constitutional

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102. Miranda v. Arizona, 384 U.S. 436, 474 (1966); *Tempia*, 16 C.M.A. at 633; Falco, *supra* note 51, at 172.

103. *Tempia*, 16 C.M.A. at 633. The court's opinion states that Tempia's motion was overruled at trial but does not provide the basis. *Id.*

104. *Id.* at 631.

105. *Id*.

106. *Id.* (text changed from all-uppercase font to ordinary font).

107. *Id.* at 633.

108. *Id.*

109. *Id.*

110. *Id.* at 633–35. The court noted that constitutional protections applied to servicemembers except where the Constitution itself "excluded [servicemembers either] directly or by necessary implication." *Id.* at 634 (quoting United States v. Culp, 14 C.M.A. 199 (1963)).

111. *Id.* at 635.

112. *See id.*

right against self-incrimination.[113] By quoting verbatim the *Miranda* Court's summary of the procedures to be followed by law enforcement during the custodial interrogation of a suspect,[114] the *Tempia* court made clear its acceptance of *Miranda*'s full mandate as applicable to military interrogees.[115] Accordingly, servicemembers were not only statutorily entitled to warnings against self-incrimination under Article 31 of the UCMJ, but they were also constitutionally entitled to the right to counsel warnings required under *Miranda*.[116]

When servicemembers are interrogated without having received the requisite *Miranda-Tempia* warnings, their statements cannot be received into evidence in a military tribunal.[117] While Tempia was repeatedly warned of his right to remain silent and that his statements could be used against him, he was not adequately informed of his right to have counsel, as required under *Miranda*.[118] In fact, Tempia was told that he would *not* be provided counsel, which led the court to rule that his confession was inadmissible[119] and to overturn his conviction.[120]

By 1967, Article 31, along with *Miranda* and *Tempia*, ensured that servicemembers being tried on criminal charges in military tribunals were protected against making unwarned inculpatory statements without the advice of counsel.[121] These authorities, however, only addressed situations in which servicemembers were tried by military courts. Therefore, they offered minimal guidance for servicemembers like Blackett and Gamez, whose statements were made to military superiors but who were prosecuted in civilian courts. Thus, civilian criminal courts were left to develop constitutionally sound protocols to ensure servicemembers' rights against self-incrimination were protected in such circumstances. The North Carolina Court of Appeals announced its procedure in *State v. Davis.*[122]

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113. *Id.* at 637. "Turning to the views of our dissenting brother, we cannot agree that the procedures heretofore employed in the armed services are the equivalent of the interrogation rules laid down in *Miranda* . . . ." *Id.* at 639.

114. *Id.* at 636 (citing Miranda v. Arizona, 384 U.S. 436, 444–45 (1966)).

115. *Id.* at 636–37.

116. *Miranda*, 384 U.S. at 473.

117. *See Tempia*, 16 C.M.A. at 639.

118. *Id.* at 636–37. Tempia was not told that counsel would be provided if he was indigent. *Id.* at 637.

119. *Id.* at 638.

120. *Id.* at 640.

121. *See* 10 U.S.C. § 831 (2012); *Miranda*, 384 U.S. at 437; *Tempia*, 16 C.M.A. at 639.

122. *See generally* State v. Davis, 582 S.E.2d 289 (N.C. Ct. App. 2003).

II. *STATE V. DAVIS*: SERVICEMEMBERS' RIGHTS AGAINST SELF-INCRIMINATION IN NORTH CAROLINA

In *State v. Davis*, the North Carolina Court of Appeals applied the test established by *Miranda* and its progeny but modified it slightly to encompass questioning by a military superior in a military setting.[123]

A. The Facts Underlying the Court's Ruling in Davis

On June 1, 2001, Marine Corps Private Robert Anthony Davis was convicted of first-degree murder and first-degree kidnapping for the killing of Milton Williams.[124] Davis, who was stationed at Twentynine Palms in California, believed that his victim had raped his wife, Latoya Davis (Latoya).[125] Before going on leave to North Carolina, Davis boasted to a fellow marine, Anthony Knight, that "he was going to beat the crap out of a guy for raping his wife."[126] After arriving in North Carolina, Davis went to the bakery where Williams worked and left word with Williams's coworker that he was in town.[127]

Eventually, Davis approached Williams in a Pantry convenience store, claimed his car was broken down, and asked Williams for a ride.[128] Latoya, who was following behind Williams and Davis, pulled beside Williams's car, at which time Davis asked Williams whether he knew who she was.[129] Williams reached under the seat of his car in response to Davis's question, and Davis shot Williams, according to Davis's cousin, to whom Davis confessed.[130] Before returning to California, Davis also confessed details of the shooting to two people who later testified about those admissions.[131]

On March 24, 1999, two days before an arrest warrant for Davis was issued,[132] Davis's mother called Davis, who had returned to his duty station in California, to inform him that North Carolina sheriff's deputies were on their way to arrest him.[133] Davis then informed his sergeant, Howard

123. *See generally id.*

124. *Id.* at 291–92.

125. *Id.* at 291; Gary D. Robertson, *Former Marine's Conviction Upheld,* STAR NEWS ONLINE (May 21, 2003), https://perma.cc/U2DA-4BV9.

126. *Davis*, 582 S.E.2d at 291.

127. *Id.*

128. *Id.* at 292.

129. *Davis*, 582 S.E.2d at 292.

130. *Id.*

131. *Id.*

132. *Id.* at 300 n.4.

133. *Id.* at 293.

Crosby, that he needed to contact an attorney, but he did not tell him why.[134] Crosby took Davis to speak with his Platoon Sergeant, Lieutenant Scott Cavenaugh, to request permission to leave his duty station.[135] Crosby and Cavenaugh then escorted Davis to speak with his Platoon Commander, Chief Warrant Officer Kenneth Lee Brown.[136] Cavenaugh gave Brown an overview of his discussion with Davis, and Brown asked Davis whether he was involved.[137] Davis's initial response was that he was "sort of" involved in the murder.[138] Brown then asked Davis, "Well, are you involved or not involved? Yes or no question."[139] Davis then confirmed to Brown that he was involved and further explained that, while he did not know Williams, he believed Williams had raped his wife.[140] Davis expressed that he did not want to talk about the matter further; he was then allowed to make a phone call.[141]

B. The Davis *Court's Analysis*

For the crimes of first-degree murder and first-degree kidnapping, Davis received consecutive sentences of life imprisonment followed by a term of seventy-three to ninety-seven months incarceration.[142] When Davis appealed his conviction, he asserted, among other things, that his *Miranda* rights had been violated when the trial court "refused to suppress [his] statements" to Brown.[143] To determine whether Davis had been subjected to custodial interrogation by Brown, the North Carolina Court of Appeals determined whether Davis's statements resulted from "questioning initiated *by law enforcement officers* after [he] had been taken into custody or otherwise deprived of his freedom of action in any significant way."[144] In concluding that Davis's constitutional rights had been violated and that his statements to Brown should have been suppressed, the court held that (1) Davis had been subjected to questioning by a law enforcement officer, and

134. *Id.* at 292.
135. *Id.* at 292–93.
136. *Id.* at 293.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. Defendant-Appellant's Brief at 1, *Davis*, 582 S.E.2d 289 (No. 02-401).
143. *Id.* at 16.
144. *Davis*, 582 S.E.2d at 295 (emphasis added) (quoting State v. Gaines, 483 S.E.2d 396, 405 (N.C. 1997)).

(2) Davis, when being questioned, was in custody within the meaning of *Miranda.*[145]

In answering whether Davis had been subjected to questioning by a law enforcement officer when questioned by his military superior, the North Carolina Court of Appeals asked whether Chief Warrant Officer Brown possessed authority that was analogous to that of a civilian law enforcement official.[146] According to the court, for a defendant's military superior to be considered a "law enforcement officer" within the meaning of *Miranda*, the military superior must be a commissioned officer, possessing the authority to order the defendant into arrest or confinement under Article 9 of the UCMJ.[147] Under the UCMJ, "An enlisted member may be ordered into arrest or confinement by any *commissioned officer* by an order, oral or written, delivered in person or through other persons subject to this chapter."[148] In *Davis,* despite Brown's testimony that he did not possess the requisite authority, the court found that Brown "was both a commissioned officer and Platoon Commander" with the authority to order Davis's arrest.[149] Upon those findings, the Court concluded that Brown's authority was analogous to that of a law enforcement officer and, thus, "sufficient to invoke the protections of *Miranda.*"[150]

As to the second question, whether Davis was in custody at the time of the challenged statements, the court admonished that such a determination can be made "only by reviewing the expectations governing Marines."[151] To that end, the court asked whether, under the totality of circumstances, a reasonable Marine in the same position as Davis "would have believed that his freedom of movement was limited to the same degree as a formal arrest."[152] The majority concluded that, under the facts of the case, "a reasonable Marine would have believed that he was required to answer the questions of his commanding officer and that he was not free to leave until he had done so."[153]

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145. *Id.* at 295–97.

146. *See id.* at 295.

147. *Id.*; *see also* 10 U.S.C. § 809 (2012).

148. 10 U.S.C. § 809 (emphasis added).

149. *Davis*, 582 S.E.2d at 295.

150. *Id. See also* Commonwealth v. McGrath, 495 A.2d 517, 526 (Pa. 1985) (holding that defendant was questioned by law enforcement officers when the superior officers who questioned him were commissioned officers with the authority to order his arrest under Article 9 of the UCMJ).

151. *Davis*, 582 S.E.2d at 296.

152. *Id.* at 295.

153. *Id.* at 296.

In reaching its holding as to the question of custody, the *Davis* court relied on three cases: *United States v. Tempia*,[154] *United States v. Shafer*,[155] and *Commonwealth v. McGrath.*[156]

In *Tempia,* in which the Court of Appeals for the Armed Forces announced the applicability of *Miranda* to military criminal proceedings, that court held the defendant was in custody within the meaning of *Miranda* when he (1) had been formally arrested by military law enforcement on the statements of his victims, (2) was released to seek the assistance of counsel, and (3) was summoned by the military Office of Special Investigations specifically for interrogation.[157] In so holding, the court highlighted the differences between military and civilian culture, stating: "In the military, unlike civil life, a suspect may be required to report and submit to questioning quite without regard to warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action."[158] Because Tempia had been "clearly summoned for interrogation" and subject to punishment under the UCMJ had he failed to comply, the court held that Tempia was in custody within the meaning of *Miranda*.[159]

In *Shafer*,[160] the United States District Court for the Northern District of Ohio held that soldiers in the Ohio National Guard, who had already

154. United States v. Tempia, 16 C.M.A. 629, 639 (1967).

155. United States v. Shafer, 384 F. Supp. 486 (N.D. Ohio 1974).

156. Commonwealth v. McGrath, 495 A.2d 517 (Pa. 1985).

157. *Tempia*, 16 C.M.A. at 636.

158. *Id.*

159. *Id.*

160. While the *Davis* court did not rely upon *Shafer* in determining whether Brown was a law enforcement official within the meaning of *Miranda,* State v. Davis, 582 S.E.2d 289, 299 (N.C. Ct. App. 2003), it is interesting to note that the *Shafer* court drew an analogy between the circumstances under which Article 31 warnings arise and the facts of its case to determine whether the "law enforcement official" requirement under *Miranda* had been met:

> "We have determined that if the request for a statement is made in the 'course of official interrogation' by a law enforcement officer or by a person with disciplinary authority over the accused, Article 31 is applicable." Thus a request for a statement in the course of an official investigation by a person with authority over the accused is sufficient to trigger the need for Article 31 warnings which are the military cognate of the *Miranda* warnings. *That is precisely the situation* [*here*]. Thus [the guardsmen] were entitled to be advised of their *constitutional rights* prior to making any such statement.

Shafer, 384 F. Supp. at 490 (emphasis added) (quoting United States v. Fisher, 21 C.M.A. 223 (1972)). A more recent case, *United States v. Santiago,* misconstrued the *Shafer* court's analogy as actual reliance on the absence of Article 31 warnings in excluding the

admitted to firing their weapons during a shooting incident at Kent State University, were in custody for purposes of *Miranda* when they were (1) taken to a gymnasium annexed to the campus police and (2) asked to complete written statements describing their actions during the shooting indecent.[161] The court reasoned, as did the *Tempia* court, that "'custody' of military personnel does not require the same restraints as in civilian life" and can occur "when there has been some assumption of control over their movements."[162] Like the servicemember in *Tempia*, the Ohio guardsmen were ordered to report for the purpose of giving a statement that would later be used against them.[163] Therefore, the *Shafer* court held that they were in custody within the meaning of *Miranda*.[164] Similarly, in *McGrath*, the Supreme Court of Pennsylvania upheld a lower court's ruling that a marine was in custody under *Miranda* when he was "ordered to report for questioning by his Commanding Officer, had to stand at attention before several of his superiors, [and] speak only when spoken to . . . ."[165]

The *Tempia*, *Shafer*, and *McGrath* courts each decided the question of custody by giving specific regard to the legal authority of the individuals conducting the interrogation, as well as the other circumstances of the case. The North Carolina Court of Appeals followed suit in *Davis*, stressing that "a reasonable Marine [in Davis's position] would have believed that he was required to answer the questions of his commanding officer and that he was not free to leave until he had done so."[166] Giving substantial weight to Brown's authority as the defendant's commanding officer, the court held that Davis was in custody within the meaning of *Miranda.*[167] In so holding, the court considered that Davis had not voluntarily subjected himself to questioning, that Davis was not at liberty to leave Brown's office without permission, and that Brown had directly questioned Davis about his

handwritten statements and, thus, rejected the *Shafer* court's ruling. 966 F. Supp. 2d 247, 259–60 (S.D.N.Y. 2013).

161. *Shafer,* 384 F. Supp. at 487.

162. *Id.* at 489.

163. *Id.* at 490.

164. *Id.*

165. Commonwealth v. McGrath, 495 A.2d 517, 524 (Pa. 1985). The lower court considered testimony by the defendant that "he believed that if he did not tell the *Captain* about the shooting incident he would go to jail for not obeying an order." *Id.* at 520 (emphasis added). "When it was pointed out that Captain Gaskin's words were not an order, McGrath replied: 'Well, as a private, anything an *officer* says to you, it's—I consider it—I considered an order at the time.'" *Id.* (emphasis added). McGrath also referred to the fact that he had no social interaction with officers as a basis for his perception. *Id.*

166. State v. Davis, 582 S.E.2d 289, 296 (N.C. Ct. App. 2003).

167. *See id.* at 296–97.

involvement in the murder.[168] Interestingly, the court appeared to also rely on its affirmative response to the first prong of the two-prong test—whether Brown was a law enforcement officer within the meaning of *Miranda*—to support its conclusion that Davis was in custody.[169]

III. THE PROBLEMS WITH NORTH CAROLINA'S APPLICATION OF THE RULE EXTENDING *MIRANDA* TO SERVICEMEMBERS AND THE WAY FORWARD

A common thread can be identified among *Davis*, *Tempia*, *Shafer* and *McGrath*—an implicit mandate to consider the military context in determining whether a servicemembers' rights against self-incrimination has been violated.[170] While some jurists may interpret the purpose of considering the military context strictly as an added layer of protection for the soldier, others will construe it as an admonition to seek balance between protecting the constitutional rights of the servicemember and respecting the needs of the military. As applied by the *Davis* majority, the jurisprudential imperative to consider the military context[171] signifies what may be the greatest challenge faced by civilian courts in applying constitutional protections to servicemembers seeking to exclude unwarned statements made to military superiors. This is because judges must examine military rank and military culture—in all their complexity— in order to consider military context.

In her concurring opinion in *Davis*, Judge Wanda Bryant highlighted the inadequacy of the majority approach and suggested an alternative approach—that the court apply the same rules adopted by the military to determine when a military superior must give Article 31 and/or *Miranda* warnings before questioning a subordinate.[172] While this Comment ultimately endorses an approach based on the concurring opinion, the two will be discussed in greater detail below.

A. The Majority Approach: Complicated, Narrow, and Short-sighted

Ultimately, the *Davis* court's application of the traditional *Miranda* test is problematic for several reasons. First, the court's reliance on

168. *Id.* at 295–96.

169. *See id.*

170. *See id.* at 293–95; United States v. Tempia, 16 C.M.A. 629, 636 (1967); United States v. Shafer, 384 F. Supp. 486, 489 (1974) ("Thus it is necessary to translate the terms of *Miranda* into a military context so as to effectuate their meaning."); *McGrath*, 495 A.2d at 523.

171. *See Davis,* 582 S.E.2d at 293–95.

172. *Id.* at 299 (Bryant, J., concurring).

military authority to determine whether a military superior is a law enforcement officer within the meaning of *Miranda* unnecessarily requires jurists to understand the complex structure of military rank and authority. Second, the *Davis* rule is unduly narrow: it only encompasses factual scenarios in which the suspect's superior is also a "commissioned officer," leaving servicemembers such as Blackett and Gamez unprotected. Third, the court's substantial reliance on Brown's authority in determining that Davis was "in custody" within the meaning of *Miranda* ignores the many scenarios in which a military superior might question his subordinates for other than disciplinary reasons.

1. Davis *Unnecessarily Requires Jurists to Understand Complex Military Concepts*

The *Davis* court's examination of military authority to determine whether a military superior is a law enforcement officer requires jurists to analyze relationships beyond their grasp. This, in turn, could result in the misconstruction of a military superior's authority and, consequently, the misapplication of *Miranda*'s exclusionary rule. On its surface, the two-prong *Davis* rule seems straightforward: (1) a commissioned officer who (2) possesses the authority to order his subordinate into arrest or confinement is a law enforcement official within the meaning of *Miranda.*[173] However, careful consideration of the *Davis* court's analysis reveals the deceptively complex nature of the rule.

In *Davis,* the court disregarded Chief Warrant Officer Brown's statement that he did not possess the authority to order an individual into arrest or confinement.[174] The court posited that Brown "was referring to the ability to perform a physical arrest, a power lodged in the Military Police, and was not addressing his authority under the Code of Military Justice to order a person's arrest or confinement."[175] Referring to Article 9, the court relied only on that portion addressing the authority of "commissioned officers,"[176] supporting the idea that the court did not fully understand military rank and authority. The remainder of Article 9(b), which the court left unquoted, provides, "A commanding officer[177] may authorize *warrant officers* . . . to order enlisted members of his command

173. *Id.* at 295.

174. *See id.* at 295 n.1.

175. *Id.*

176. *See id.*; 10 U.S.C. § 807(b) (2012).

177. "The term 'commanding officer' includes only commissioned officers." 10 U.S.C. § 801(3).

or subject to his authority into arrest or confinement."[178] In its discussion, the court neither referred to this provision nor provided any basis for its finding that Brown possessed Article 9(b) authority.[179]

Article 7 of the UCMJ, governing apprehension, is also instructive in understanding the distinctions between rank and authority in the armed forces.[180] "Apprehension" is the term used by the armed forces to describe "the taking of a person into custody."[181] Article 7(b) permits apprehension when persons authorized under the Code develop "reasonable belief that an offense has been committed and that the person apprehended committed it."[182] Article 7(c) enumerates those categories of officers who may apprehend persons subject to its authority and, like Article 9, notably distinguishes "commissioned officers" and "warrant officers."[183] This distinction suggests that where the Code intends to include "warrant officers" in a specific grant of authority, that category of officer would be named.

2. The Davis *Rule is Unduly Narrow and May Fail to Provide Adequate Protection*

Whether the court's determination of Brown's authority was ultimately, if accidentally, correct in the *Davis* case, the rule in *Davis* is limited to cases in which a commissioned officer questions an inferior. Consequently, Blackett's and Gamez's reliance on the rule in *Davis* would

178. *Id.* § 809(b) (emphasis added). A Warrant Officer is commissioned by the President of the United States after attaining the rank of CW2. *Id.* § 571(b). This, of course, raises the question of whether the commission conferred upon a Chief Warrant Officer has the effect of also conferring upon him the same degree and type of authority possessed by a "Commissioned Officer" within the meaning of the UCMJ, and specifically whether he has the authority to order a soldier into arrest or confinement. In *Davis*, a Marine Platoon Commander, CW3 Brown, testified that he did not have that authority. *See Davis*, 582 S.E.2d at 295 n.1. Further, the fact that a WO1 does not receive such a commission adds another layer of analysis regarding the military context that must be conducted by the civilian courts. 10 U.S.C. § 571(b). Military regulations consistently distinguish between "commissioned officers" and "warrant officers," thereby supporting the conclusion that, while warrant officers may receive a commission, they do not possess the same authority as commissioned officers under military regulations. *See* 10 U.S.C. §§ 741–742; U.S. DEP'T OF ARMY, ARMY REGULATION 135-100: APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS OF THE ARMY (1994); U.S. DEP'T OF ARMY, ARMY REGULATION 600-20: ARMY COMMAND POLICY (2014) [hereinafter ARMY REGULATION 600-20].

179. *Davis*, 582 S.E.2d at 295.

180. 10 U.S.C. § 807.

181. *Id.* § 807(a).

182. *Id.* § 807(b).

183. *Id.* § 807(c).

have brought them no relief because their statements were made to two non-commissioned officers, Sergeant Sellers and First Sergeant Schlegelmilch. While a commissioned officer may either deliver an order of arrest or confinement through a noncommissioned officer (NCO)[184] or authorize an NCO to order an enlisted member of his command into arrest or confinement, the NCO does not possess independent authority to order someone under his or her charge into arrest or confinement.[185] An NCO's authority is merely an extension of that possessed by the authorizing commissioned officer.[186] Furthermore, an NCO may issue only "minor nonpunitive, corrective actions as found in AR 27–10" and does not possess the authority to issue non-judicial punishment under Article 15 of the UCMJ.[187] Moreover, given an NCO's limited authority with regard to punishments, arrests, and confinements, as compared to that of a

184. Noncommissioned Officers (NCO) are part of the NCO support channel that complements the chain of command. NCOs are responsible for assisting the chain of command in accomplishing the following:

> (1)Transmitting, instilling, and ensuring the efficacy of the professional Army ethic.
>
> (2) Planning and conducting the day-to-day unit operations within prescribed policies and directives.
>
> (3) Training of enlisted Soldiers in their MOS as well as in the basic skills and attributes of a Soldier.
>
> (4) Supervising unit physical fitness training and ensuring that unit Soldiers comply with the weight and appearance standards of AR 600-9 and AR 670-1.
>
> (5) Teaching Soldiers the history of the Army, to include military customs, courtesies, and traditions.
>
> (6) Caring for individual Soldiers and their Families both on and off duty.
>
> (7) Teaching Soldiers the mission of the unit and developing individual training programs to support the mission.
>
> (8) Accounting for and maintaining individual arms and equipment of enlisted Soldiers and unit equipment under their control.
>
> (9) Administering and monitoring the Noncommissioned Officer's Development Program, and other unit training programs.
>
> (10) Achieving and maintaining courage, candor, competence, commitment, and compassion.

ARMY REGULATION 600-20, *supra* note 178, at 2-18(a)(1)–(10).

185. *See* 10 U.S.C. § 809.

186. *Id*.

187. ARMY REGULATION 600-20, *supra* note 178, at 2-18(c)(3). "Nonjudicial punishment is a disciplinary measure more serious than the administrative corrective measures . . . but less serious than trial by court-martial." JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 1b (2016). Nonjudicial punishment may include: corrective custody; forfeiture of pay; reduction in grade; extra duties; restriction to specified limit, etc. *Id.* at ¶ 5(1)(A)–(B).

commissioned officer, an NCO's authority is not analogous to that of a civilian law enforcement officer.

Because the rule articulated by the *Davis* court contemplates only scenarios in which a defendant has made inculpatory statements to a co*mmissioned officer*, its strictures fall short of providing adequate protections to all military defendants tried in civilian courts.

3. The Court's Substantial Reliance on Brown's Authority Ignores the Many Scenarios in Which a Military Superior Might Question his Subordinates for Other Than Disciplinary Reasons

As noted above, in making its determination that Davis was in custody when speaking to Brown, the court relied heavily on Brown's position of authority over Davis. In fact, in addressing nearly every other factor to be considered, the court referenced Brown's authority. In her concurring opinion, Judge Bryant criticized the majority's analysis as being deleterious to the soldier-commanding officer relationship and ignoring "the reality that military officers perform many different roles: they are not always disciplinarians."[188]

While it is reasonable for courts to consider commissioned officers' and military law enforcement officials' authority to compel a soldier to follow orders, courts should also recognize that the heightened expectations of discipline, good order, and obedience within the military do not equate to arrest. If that were the case, soldiers would find themselves in a persistent state of custody upon entering military service. Military society is specialized and separate from that of civilian society and imposes daily constraints on freedoms that are unknown to civilians. Thus, civilian courts should be mindful that what they view as tantamount to arrest might be viewed as a natural constraint of military service by a marine. In *Davis*, for example, the Marine defendant was required to ask permission of his Platoon Sergeant, Lieutenant Cavanaugh, before leaving his duty station to make a phone call.[189] It was arguably reasonable to expect that the marine would be required to provide an explanation for his request. The defendant told his superiors that he had received a phone call from his mother informing him that a North Carolina police detective was headed to California to arrest him in connection with a murder.[190] Prior to this revelation, Davis's leadership did not know that Davis was suspected of a crime.[191] As articulated by Judge Bryant, under these facts, and

188. State v. Davis, 582 S.E.2d 289, 299 (N.C. Ct. App. 2003) (Bryant, J., concurring).

189. *Id.* at 292–93.

190. *Id.* at 293.

191. *Id.*

considering the factors used in determining whether a servicemember is in custody—specifically whether he was summoned for interrogation—a reasonable servicemember in Davis's position would not have believed himself to be under formal arrest or its equivalent.[192]

As the above discussion illustrates, the rule in *Davis* is at once too narrow, too broad, and unnecessarily complex. It is too narrow because it fails to extend *Miranda*'s protections to servicemembers who make incriminating statements to superiors who are not commissioned officers. This failure creates a loophole that may allow statements otherwise inadmissible in a military tribunal to be used against a military defendant in a civilian court of law. It is too broad because the court's substantial reliance on a military superior's authority to determine whether a defendant was in custody under *Miranda* effectively expands custody to encompass all interactions between commissioned officers and their inferiors. It is unnecessarily complex in that is requires the court to decipher military culture, rank, and authority in order to apply its strictures.

B. The Concurring Approach: A Guidepost to a Better Rule

In her concurring opinion, Judge Bryant highlighted the incongruity between the majority's command that the military context be considered and its application of civilian law.[193] She further stressed that the majority opinion will have the effect of "creating what amounts to a limited 'soldier-commanding officer' privilege, whereby no statement given by a member of the armed forces to a commanding officer would be admissible in a civilian court absent *Miranda* warnings."[194] Bryant urged, "The better rule is that a superior officer need only give the appropriate warnings to someone under his command that he suspects has committed an offense and when the questioning is for [law enforcement or] disciplinary purposes . . . ."[195]

While the rule advanced by Judge Bryant—which is presently applied by military tribunals under Article 31(b) of the UCMJ[196]—only addresses the overly broad aspect of *Davis*, it hints at the remedy for *Davis*'s other flaws. As noted above, Article 31(b) is a statutory provision crafted specifically to protect servicemembers against compulsory self-

192. *Id.* at 299–300 (Bryant, J., concurring).
193. *Id.* (Bryant, J., concurring).
194. *Id.* at 299 (Bryant, J., concurring).
195. *Id.* (Bryant, J., concurring).
196. 10 U.S.C. § 831(b) (2012).

incrimination in a military setting.[197] Thus, from its inception, the statutory rule has incorporated the military context, thereby eliminating the need for civilian courts to tailor tests established by *Miranda* and its progeny to situations in which servicemembers were questioned by their military superiors. The Military Rules of Evidence require that any person subject to the Code who is required to give Article 31 warnings first inform a would-be interrogee of the basis of the accusation against him.[198] Further, such a person must also inform the "accused or suspect" of his right to remain silent and that any statement may be used against him in court.[199]

Under a test based upon the provisions of Article 31, the *Davis* court wouldn't have needed to inquire into the specific authority of Chief Warrant Officer Brown because Brown, as a military officer, was subject to the UCMJ.[200] The UCMJ requires any person subject to the Code to provide its warnings before questioning a person suspected of a criminal offense.[201] Whether a person is subject to the Code is a good deal more easily ascertainable than the specific authority possessed by a superior under the UCMJ. Likewise, since Article 31 applies to all members of the military, a test based upon its provisions would not exclude military superiors who are not "commissioned officers" as does the *Davis* test.[202] Furthermore, the military courts presume at least a disciplinary purpose when a military superior questions a defendant.[203] Thus, the need for determining whether a person's authority renders his position tantamount to a civilian law enforcement official can be eliminated through the application of the test described below.

The Court of Military Appeals has recognized that Article 31 and *Miranda* rights are distinct in their origins and that both serve to protect servicemembers.[204] As noted by the *Evans* court, Article 31 warnings are statute-based and occur at a lower threshold than do their *Miranda* counterparts.[205] In identifying two distinct categories of Article 31

197. United States v. Brown, 38 M.J. 696, 698 (A.F.C.M.R. 1993); *see* Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-examining the "Officiality Doctrine*," 150 MIL. L. REV. 1, 3 (1995) (explaining that Congress's motivation in creating Article 31(b) was to "eliminate the unique pressures of military rank and authority from military justice.").

198. MIL. R. EVID. § 305(c).

199. *Id.* §§ 305(c)(2)–(3).

200. 10 U.S.C. § 831.

201. *Id.*

202. State v. Davis, 582 S.E.2d 289, 295 (N.C. Ct. App. 2003).

203. United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000) (quoting United States v. Good, 32 M.J. 105, 108 (C.M.A. 1991)).

204. United States v. Evans, 75 M.J. 302, 304–05 (C.A.A.F. 2016).

205. *Id.* at 303.

violations—"(a) purely statutory [and] (b) statutory . . . that also present a constitutional violation"[206]—that court also offers civilian criminal courts a roadmap to applying constitutional analysis where servicemembers have made incriminating statements to military superiors, military police, or agents of military police. As the *Evans* court explained, Article 31 warnings must be given whenever a person subject to the Code questions or interrogates a person accused or suspected of an offense.[207] Article 31 offenses rise to the level of *Miranda* when the statutory requirement for warnings has been met *and* the interrogee is in custody at the time of the questioning.[208] To determine whether a suspect was in custody at the time of questioning, military courts consider: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which the questioning occurred[;] and (3) the length of the questioning."[209]

Evans offers North Carolina two approaches for revising its current rule under *Davis*. First, it could adopt *Evans* in full, thus requiring the exclusion of any statement that would otherwise be excludable in a military court—whether under Article 31 or *Miranda-Tempia*. This approach would offer a lower threshold for exclusion of inculpatory statements and would conversely offer servicemembers the greatest level of protection against the dangers of self-incrimination. Second, the North Carolina courts could adopt only *Evans*'s *Miranda* rule. While this approach would offer less protection than the first, it would fill *Davis*'s loophole by subjecting all military superiors to *Miranda*'s strictures, rather than just commissioned officers. The second approach would also simplify North Carolina's *Miranda* analysis by substituting the current inquiry into a military superior's rank and authority with one question: Is he subject to the UCMJ?

Because the court ultimately declined to overturn Davis's conviction on a finding of harmless error,[210] it is doubtful that even the adoption of the full Article 31 analysis laid out in *Evans* would have provided him any relief. However, the same cannot be said for Blackett and Gamez, who were left unprotected under North Carolina's current law. Under *Evans*'s Article 31 analysis, because both Sergeant Sellers and First Sergeant Schlegelmilch were subject to the UCMJ, the inquiry would have been simply whether Blackett and Gamez were accused or suspected of an offense at the time of questioning. Because Blackett's initial confession to

206. *Id.* at 305.

207. *Id.*

208. *Id.* at 305–06.

209. *Id.* at 306 (alteration in original) (quoting United States v. Chatfield, 67 M.J. 432, 438 (C.A.A.F. 2009)).

210. State v. Davis, 582 S.E.2d 289, 293 (N.C. Ct. App. 2003).

Sergeant Sellers was made spontaneously and not in response to questioning by Sellers, that statement would be admissible under *Evans.* However, Blackett's subsequent statements to First Sergeant Schlegelmilch would likely be excluded because Sellers had already informed Schlegelmilch of Blackett's confession by the time of that questioning, such that she had reason to suspect Blackett of a crime. The same applies to Gamez because, at the time of his questioning, Blackett had already implicated him in the shooting; thus, the NCOs had reason to suspect him of a crime. Under *Evans*'s *Miranda* analysis, because Sellers and Schlegelmilch were subject to the UCMJ, the traditional law enforcement prong of *Miranda* would be disposed of without significant discussion. The question of custody would be answered under *Evans*'s second prong and without regard for the questioner's authority. If the court determined that Blackett and Gamez were in custody during the various instances of questioning by their military superiors, then *Miranda* would apply.

CONCLUSION

In the majority opinion, penned by Judge Geer, the *Davis* court articulated the need to consider the military context.[211] In the end, by filtering military factors and considerations through the lens of civilian law, the court failed to heed its own admonition to consider the military context. The UCMJ does not control where a servicemember is being tried in a civilian court of law.[212] Consequently, North Carolina courts have no obligation to apply its exclusionary rule. That said, the superior knowledge and wisdom of the military courts with regard to military matters cannot be denied.[213] Congress, in recognition of the pressures and coercive impact of questioning by a military superior, saw fit to pass legislation that extended greater protections to servicemembers than the Supreme Court extended to civilians in *Miranda*. North Carolina courts should take notice.

Allowing military superiors to question their charges in violation of Article 31, knowing that such a violation would prevent admission of such statements in a military tribunal but be admissible in civilian court so long as they did not rise to the level of a *Miranda* violation, would represent a great injustice to the American soldier. Because the UCMJ and military jurisprudence provide civil courts the tools with which to efficiently and fairly gauge the coercive impact of questioning of a defendant by a military superior and to determine whether a defendant's constitutional rights have

211. *See* State v. Davis, 582 S.E.2d 289, 293–95 (N.C. Ct. App. 2003).

212. *See* 10 U.S.C. § 831 (2012); United States v. Santiago, 966 F. Supp. 2d 247, 259 (S.D.N.Y. 2013).

213. *See generally* United States v. Newell, 578 F.2d 827 (9th Cir. 1978).

been harmed, civil courts should look to their opposite numbers in the military for guidance. By incorporating *Evans*'s teachings into its *Miranda* jurisprudence, North Carolina could simultaneously correct the loophole left in *Davis* and simplify its current *Miranda* analysis as applied to servicemembers who make statements to military superiors. In this way, the military's interests in maintaining order and discipline remain undisturbed, while the servicemember's constitutional rights are protected.

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