IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 202300205
Danielle E. DEREMER, Private First Class (E-2) U.S. Marine Corps Appellee	)	USCA Dkt. No. 25-0158/MC

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

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STATUTES AND RULES

Issues Presented

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DID THE LOWER COURT ERR HOLDING APPELLANT, AT AN INTERVIEW WHERE SHE WAIVED HER RIGHT TO COUNSEL, WAS ENTITLED TO 10 U.S.C. § 1044E RIGHTS WHEN SHE WAS INTERVIEWED AS A SUSPECT?[1]

II.

DID THE LOWER COURT ERR FINDING THE INTERVIEW VIOLATED APPELLANT'S DUE PROCESS RIGHTS, AND FINDING THE STATEMENT INVOLUNTARY UNDER MIL. R. EVID. 304?

III.

DID THE LOWER COURT ERR HOLDING THAT SUPPRESSION IS AN APPROPRIATE REMEDY FOR A VIOLATION OF 10 U.S.C. § 1044E?

IV.

DID THE LOWER COURT ERR BY AFFIRMING APPELLANT'S CONVICTION FOR MALINGERING DESPITE HOLDING HER CONFESSION TO NCIS SHOULD HAVE BEEN SUPPRESSED?

[1] Although the United States filed as Appellant and this Court ordered the Appellant to file a Brief, the Judge Advocate General (JAG) of the Navy certified issues identifying the accused as Appellant. For consistency with the certified issues, the United States refers to the accused as "Appellant" in this Brief.

Statement of Statutory Jurisdiction

Appellant was sentenced to a bad conduct discharge and reduction to E-1. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 866(b)(3). On May 5, 2025, the Judge Advocate General of the United States Navy certified four Issues for review. This Court has jurisdiction under Article 67(a)(2), UCMJ.

Statement of the Case

A military judge sitting as a special court-martial convicted Appellant, contrary to her pleas, of malingering and making a false official statement, in violation of Articles 83 and 107, UCMJ, 10 U.S.C. §§ 883, 907. The Military Judge sentenced Appellant to reduction to E-1 and a bad-conduct discharge. The Convening Authority approved the findings and sentence, and the Military Judge entered the Judgment into the Record.

The lower court heard the case en banc and issued a majority published Opinion affirming the Finding of Guilty as to Charge I, setting aside the Finding of Guilty as to Charge II, and setting aside the Sentence, with a rehearing authorized. *United States v. Deremer*, No. 202300205, 2025 CCA LEXIS 46 (N-M. Ct. Crim. App. Feb. 7, 2025). There were two concurring Opinions and two dissenting Opinions. *Id*.

Statement of Facts

A. The United States charged Appellant with malingering and making a false official statement.

The United States charged Appellant with one Specification of malingering by feigning physical disablement and one Specification of making a false official statement, in violation of Articles 83 and 107, UCMJ. (J.A. 44.)

The malingering Charge stems from Appellant feigning numbness in her legs and disablement beginning on October 29, 2021. (J.A. 44, 422.)

The false official statement Charge stems from Appellant's false official statements to NCIS, made on or about November 23, 2021, in which she fabricated abusive sexual contact and assault consummated by battery allegations by another recruit. (J.A. 46, 521–57.)

B. Appellant, a recruit, complained of various leg injuries. Testing and treatment from July 2021 through November 2021 revealed the claims of injury to be unsubstantiated and medical providers recommended Appellant be separated for a condition not a disability.

Within two weeks of arriving at Marine Corps Recruit Depot Parris Island, South Carolina, in June 2021, Appellant began complaining of "bilateral lower extremity pain… despite no specific mechanism of injury," and was transferred to the Female Readiness Platoon, Support Battalion, Recruit Training Regiment. (J.A. 476, 729.) Appellant was initially dropped from recruit training due to complaints of right ankle pain. (J.A. 424.) Appellant went to medical for the ankle

pain on June 26, 2021. (J.A. 465.) Appellant's ankle was examined via radiology, which showed "no acute fracture or dislocation. Ankle mortise intact. Soft tissues are unremarkable. IMPRESSION: Unremarkable evaluation of right ankle." (J.A. 461.)

During her June 26, 2021 exam, Appellant expanded her claim of ankle pain to also claim sharp shin pain. (J.A. 465.) On July 6 and July 29, 2021, Appellant had MRIs of her left knee which showed a small contusion but no signs of internal derangement. (J.A. at 441.)

On August 11, 2021, Appellant made a new complaint of left knee pain. (J.A. 434.) Appellant underwent an MRI on the left knee which was normal. (J.A. 434.) Through August and September, Appellant alleged her conditions were improving with therapy and treatment. (J.A. 434.)

From June until October 2021, Appellant frequently met with a physical therapist, complaining of alleged ankle injury and left knee pain. (J.A. 423–24.)

On October 6, 2021, Appellant made a new claim that she dislocated her left knee, and that she had to "reduce[ ] her knee cap herself." (J.A 434.) The provider discussed separation options with Appellant. (J.A 434.)

On October 14, 2021, Appellant reported that her "symptoms were improving" but she still had pain walking. (J.A 434.) The medical provider read

Appellant the results of her MRI and spent much of the appointment "discussing pain science and separation options." (J.A 434.)

The medical provider submitted a recommendation for administrative separation for a condition not amounting to a disability and discussed it with Appellant. (J.A. 119–25, 476.) The sports medicine physician testified that there are no disability benefits associated with a command administrative separation. (J.A. 121.)

The separation recommendation noted that Appellant should be separated for a diagnosis of "'M25.562 – Pain in left knee,'" which is a condition that interferes with performance of duty but is not compensable under the veterans affairs schedule for rating disabilities. (J.A. at 476.) The separation recommendation noted that the MRIs showed "no internal derangement" and were normal, and despite physical therapy, Appellant showed no signs of improvement. (J.A. at 476.) The medical provider further recommended that separation was appropriate under Department of Defense policy that "enlisted Service members who do not demonstrate the commitment or potential for further service should be separated." (J.A. at 477.) The physician summarized that Appellant "had a very common diagnosis that had had adequate time to heal; therefore, I did not feel that it met the criteria for disability and referral to a [physical evaluation board]." (J.A. 127.)

After the recommendation for separation was submitted, on October 28, 2021, Appellant said she felt better after completing physical therapy. (J.A. 434.) However, the provider again included a recommendation for a "Condition Not Amounting to a Disability" Separation for Appellant in her medical notes. (J.A. 434.) On October 28, 2021, the provider noted that Appellant's "symptoms and story not consistent with dislocation and had no witnesses. MRI was normal. I recommend starting the CND process due to failure to progress." (J.A. 494.)

The following day, October 29, 2021, Appellant said she could not walk or stand watch. (J.A. 431.)

On October 30, 2021, Appellant reported for duty sick call, alleging bilateral leg numbness for the past two days. (J.A. 492.) Appellant claimed that she could not walk: she said she woke up for fire watch and could not feel either foot or ankle and now "cannot feel from the knee down on the Right leg and from mid thig [sic] down on the Left leg." (J.A. 492.)

Appellant underwent both cervical spine and brain MRI scans, which were reported as "unremarkable" on October 30, 2021. (J.A. at 421.) The exam results were accompanied by a provider note detailing concerns of malingering. (J.A. at 421.) Appellant was returned to Recruit Separation Platoon in a wheelchair. (J.A. at 426.)

On November 2, 2021, Appellant reported to medical complaining of weakness, inability to use her legs, and that she was losing motor control with her hands. (J.A. at 423.) The provider noted in her records that "[Appellant's] first question today was about separation and benefits." (J.A. at 423.)

On November 19, 2021, one of the medical providers noted in Appellant's medical record that he "would stress concerns for malingering disorder given timing of patient's ailment, her noted concern/inquiry into PEB/benefits not that she 'can't walk' and some physical exam findings." (J.A. at 421.)

The provider further noted that during a quad strength exam, Appellant fired her quad muscles to prevent her foot from striking the table. (J.A. at 421.) This test, along with a "Normal T-spine MRI," indicated to the provider that Appellant could have been suffering from conversion disorder, but recommended follow-up with neurology and a mental health evaluation. (J.A. at 421.)

C. <u>After coming under suspicion for malingering, Appellant claimed another female recruit sexually assaulted her.</u>

In November 2021 Appellant accused another recruit of sexually assaulting her. (J.A. 489.) On November 23, law enforcement opened an investigation which subject-titled the other female recruit and named Appellant as a "victim," and gave it case control number 23NOV21-CAPI-00096-8SMA/P. (J.A. 489.) Investigators interviewed Appellant that day about her allegations of abusive sexual contact.

(J.A. 314.) Appellant's Victim's Legal Counsel and Uniformed Victim Advocate were present in interview. (J.A. 489.)

Appellant alleged that another female recruit groped her on multiple occasions from around August to November 2021, while they were both assigned to Female Readiness Platoon. (J.A. 489.) Appellant alleged the incidents occurred in their barracks, including in the squad bay and shower. (J.A. 489.) Appellant said another recruit saw some of the incidents. (J.A. 318.)

D. NCIS investigated Appellant's allegations, closed the investigation as unsubstantiated, and notified Appellant's command, Victim's Legal Counsel, and Uniformed Victim Advocate.

Law interviewed the only recruit who claimed to have witnessed the assaults. (J.A. 318.) Initially that recruit stated that she observed some of the conduct reported by Appellant. (J.A. 318.) Other recruits were interviewed reported Appellant was lying about the assault and also about being in a wheelchair." (Appellate Ex. XII at 40.)

Law enforcement did a follow-up interview of the alleged eye witness recruit. (J.A. 291.) The recruit recanted her earlier statement and said that she never saw any of the acts of abusive sexual contact alleged by Appellant. (J.A. 288.) Instead, Appellant had told her about the alleged assaults and she believed her. (J.A. 289.) She was certain that she never saw an assault. (J.A. 294, 562.)

The recruit admitted that on several instances she saw Appellant using her legs, despite claiming to be wheelchair-bound. (J.A. 562.)

NCIS concluded that "[b]ased on the facts and circumstances gleaned from this investigation . . . probable cause existed that [Appellant's] accusations made against [the other female recruit] were false in nature." (J.A. 562.)

On December 15, 2021, law enforcement told Appellant's commanding officers and the staff judge advocate about investigation's status including that no recruits saw the alleged assaults and some recruits saw Appellant using her legs while claiming to be wheelchair-bound. (J.A. 562.) The Sexual Assault Response Coordinator and Uniformed Victim Advocate were also notified. (J.A. 562.)

Law enforcement closed the investigation because the allegations were unsubstantiated. (J.A. 562.) The final Report of Investigation for Case Control Number 23NOV21-CAPI-00096-8SMA/P was dated December 26, 2021; it stated a "separate investigation will be opened against [Appellant]." (J.A. 562.)

Victim's Legal Counsel for Appellant submitted an Affidavit stating that NCIS told him on February 9, 2022, that the case involving Appellant's allegations against the other female recruit was closed. (J.A. 951.)

E. Appellant continued to receive specialized medical testing and care from December through February, all of which indicated that she was not suffering from physical injuries. Without medical explanation, she began walking again.

In the first week of December, Appellant saw a specialist at Coastal Neurology, underwent blood work at Naval Hospital Beaufort, and went to physical therapy. (J.A. 418.)

Appellant began receiving B12 shots at the advice of neurology. (J.A. 405.) On February 1, 2022, Appellant reported to medical for a B12 shot and claimed she had no feeling from her hip to her feet. (J.A. 415.) The medical record noted that the "[s]eparation process should not be held up while undergoing" the treatment and she was considered "Fit for Full Duty for Purposes of Separation." (J.A. 406.)

The next week, during her visit for the routine B12 shot, Appellant said she was regaining feeling in her legs. (J.A. 404.) The provider noted that she "[w]as previously in wheelchair unable to walk at last visit, but today presents with walker and walking." (J.A. 404.)

Appellant's later February medical records recorded that "[Appellant] has had an extensive work-up that didn't show anything fruitful . . . she can walk now and has poor prognosis continued success at boot camp." (J.A. 408.) The medical providers deemed her complaints to be "psychogenic or psychosomatic." (J.A.

407.) Appellant was walking without assistance and without pain. (J.A. 406, 407.) Appellant was deemed fit to separate. (J.A. 407.)

F. Law enforcement opened a new investigation into Appellant for malingering and false official statements.

On February 10, 2022, law enforcement opened a new investigation, Case Control Number 10FEB22-CAPI-00013-7PMA, subject-titling Appellant. (J.A. 498.) NCIS suspected Appellant of making a false allegation of abusive sexual contact and malingering. (J.A. 498.)

G. Appellant gave a statement to NCIS after waiving her rights to counsel, including "the right to consult with a lawyer prior to any questioning" and "the right to have [her] retained lawyer and or [her] appointed military lawyer present during this interview."

Law enforcement interviewed Appellant on February 16, 2022. (J.A. 498, 601.) After obtaining Appellant's biographical data, the Agents told Appellant that she was there because they believed her allegations were false. (J.A. 606.) They told her that they received conflicting statements from all the other recruits, and were bringing Appellant back to "give [her] an opportunity to come in here and just tell me the truth about the initial statement that you made." (J.A. 607.)

The Agents advised Appellant of her Article 31b rights and Appellant gave a verbal and written waiver. (J.A. 498, 609–11.) The Agents read, and Appellant acknowledged, that she had "the right to consult with a lawyer prior to any

questioning" and "the right to have [her] retained lawyer and or appointed military lawyer present during this interview." (J.A. 610.)

Within moments of waiving her rights, Appellant said "[l]ooking back on it, I think I did make a mistake . . . what happened wasn't sexual assault, sexual abuse." (J.A. 612.) However, Appellant then claimed the acts happened as alleged. (J.A. 613–14.) Yet after being told that the other alleged witnesses did not corroborate her allegations, Appellant ultimately admitted that the other recruit did not actually touch her. (J.A. 618–19.) Appellant admitted that she lied during her first interview and did it to get the other recruit removed from the squad bay. (J.A. 618–19, 632.)

Appellant admitted she lied about her legs being inoperable and said she did not need a wheelchair. (J.A. 631–33.) Appellant admitted that when she learned she would soon be medically cleared to return to recruit training, she fabricated the claim that her legs did not work so that she would not have to return to training. (631–33.)

H. The Military Judge denied Appellant's Motion to Suppress her statements.

Trial Defense Counsel moved to suppress Appellant's February 16, 2022, statement to Agent Peters citing "law enforcement coercion, unlawful influence, and unlawful inducement." (J.A. 54.) The Military Judge denied the Motion to Suppress: taking into account Appellant's "youth and relative inexperience,"

Appellant's will was not overborne. (J.A. 79–80.) The Judge found that the agents spoke in an appropriate tone, the Appellant was well-rested, and the interview lasted only thirty-five minutes. (R. 78.) The Court ruled the clarity and tone of the rights advisement met the requirements of Article 31(b). (J.A. 78.)

I. The United States proved beyond a reasonable doubt that Appellant was malingering and that she made a false official statement when she fabricated the allegation against her fellow female recruit.

1. The United States presented the testimony of Appellant's treating physicians and specialists and medical records.

A neurologist testified that he conducted strength, sensation, reflex, and spinal fluid tests on Appellant to rule out neurological and anti-immune causes. (J.A. 219–28.) He testified that Appellant's B12 level was not the cause of her paralysis and her test results conflicted with the paralysis claim. (J.A. 224, 227.)

Another medical professionals testified her leg muscles "fired" to prevent her leg from hitting a table. (J.A. 141–42; J.A. 421.)

2. The United States presented Appellant's platoon members' testimony.

At trial, members of Appellant's platoon described Appellant walking and using her legs during the charged period when Appellant claimed to have little to no feeling or ability to use her legs. (J.A. 246–312.)

3. The United States presented the testimony of the Special Agent who interviewed Appellant and others. The United States also presented Appellant's interviews.

Law enforcement testified to Appellant's allegation of sexual abuse by another female Marine who was stationed with Appellant in Female Recruit Platoon in November 2021. (J.A. 312.) The United States admitted into evidence Appellant's first NCIS interview from November 23, 2021. (J.A. 398.) NCIS interviewed nearly a dozen witnesses, but only one claimed to have witnessed abusive sexual contact. (J.A. 312.)

The witnesses reported to the Special Agent that they believed Appellant did not need a wheelchair, which led law enforcement to question if Appellant was truthful about the sexual assault allegations. (R. 320–22.) The Agent expanded the scope of its investigation to include the malingering as it had to do with making false statements. (J.A. 321)

The Agent testified about Appellant's February 16, 2022, interview, in which Appellant admitted to fabricating the allegations. (J.A. 326–31, 334–38.)

J. The Military Judge found Appellant guilty and sentenced her.

The United States presented medical records detailing Appellant's medical treatment from June 2021 through April 2022. (J.A. 399–474.) The United States also presented Appellant's two interviews with NCIS, her service record book, the

recommendation for administrative separation, and a photo of her standing. (J.A. 397, 398, 475–79.)

The Military Judge convicted Appellant of malingering and of making a false official statement for the eight allegations she made against the other female recruit in the November interview. (J.A. 391.) The Military Judge sentenced Appellant to a bad-conduct discharge and reduction to E-1. (J.A. 396.)

Summary of Argument

Under a plain reading of the statute and the traditional demarcation between defense services and other types of legal assistance, Appellant had no right to the presence of her Victims' Legal Counsel when she was interviewed as a suspect. The lower court erred when it found Appellant had to be informed of greater rights to counsel than other accused because the suspect interview was "in connection with" her earlier false allegations of a sex-related offense. Even if she did have a right to the presence of her Victims Legal Counsel, Appellant waived it. And even if there was a violation of the statute, there was no due process violation and the lower court erred by finding the criminal procedure remedy of suppression.

Although the lower court correctly concluded that the other evidence of Appellant's malingering was overwhelming, the court erred by applying the higher constitutional standard.

Argument

I.

THE LOWER COURT ERRED IN HOLDING 10 U.S.C. § 1044E ENTITLED APPELLANT TO REPRESENTATION BY A VICTIMS' LEGAL COUNSEL AT THE SECOND INTERVIEW BECAUSE SHE WAS BEING INTERVIEWED AS A CRIMINAL SUSPECT AND NOT AS A VICTIM.

A. Standard of Review.

The scope, applicability, and meaning of a statute are matters of statutory interpretation that are reviewed de novo. *United States v. Willman*, 81 M.J. 355, 357 (C.A.A.F. 2021).

B. This Court determines the meaning of a statute from the statute's language, the context of the language, and the context of the statute as a whole.

The first step in statutory interpretation is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc*., 534 U.S. 438, 450 (2002)). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *McPherson*, 73 M.J. at 395; *accord Sager*, 76 M.J. at 161. "It is a general rule of statutory construction that if a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use

its plain meaning and apply it as written." *United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021).

"Whether statutory language is ambiguous is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. McPherson*, 73 M.J. 393, 394 (C.A.A.F. 2014) (internal citation omitted); *see United States v. States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2020) (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997)) (plain meaning "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") "When a statute is part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act in pari materia with the statute under review. *McPherson*, 73 M.J. 393 at 395 (internal citation omitted).

Plain meaning is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2020) (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997)).

Context and coherence matter for construing plain meaning. "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the

words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Food and Drug Admin. V. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132–33 (2000).

Article 6b provides rights to victims of crimes in the UCMJ. 10 U.S.C. § 1044e authorizes legal assistance from special victims counsel to crime victims. The scope of the rights and legal representation are limited.

C. The plain language of 10 U.S.C. § 1044e designates special victims counsel to victims of sex-related offenses and authorizes limited types of legal assistance; only one section authorizes representing a victim in a proceeding.

10 U.S.C. § 1044e provides the right to special victim's counsel to "victims of alleged sex-related offenses, regardless of whether the report of that offense is restricted or unrestricted." 10 U.S.C. § 1044e (2022). The relationship between a special victim's counsel and victim "in the provision of legal advice and assistance shall be the relationship between an attorney and client." 10 U.S.C. § 1044e (c).

The statute delineates the ten types of legal assistance special victim counsel are authorized to provide, and allows for "such other legal assistance as the Secretary of Defense . . . may authorize [by] regulations." 10 U.S.C. § 1044e (b)(1)–(11). Special victim's counsel are authorized to *consult* their clients "regarding potential criminal liability of the victim stemming from or in relation to

the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services." 10 U.S.C. § 1044e(b)(1) (emphasis added). "Legal *consultation and assistance*" are authorized in "connection with an incident of retaliation, whether such incident occurs before, during, or after the conclusion of any criminal proceedings, including . . . in any resulting military justice proceedings." 10 U.S.C. § 1044e(b)(10)(C) (emphasis added).

Special victim's counsel are authorized to *advise* their clients on the military justice system, including the roles and responsibilities of the trial counsel, defense counsel, and investigators, and the victim's responsibility to testify and other duties to the court. 10 U.S.C. § 1044e(b)(5) (emphasis added).

Only one subsection authorizes representation: special victim's counsel are authorized with "representing the victim at *any proceedings in connection with the reporting*, military investigation, and military prosecution of the alleged sex-related offense." 10 U.S.C. § 1044e(b)(5) (emphasis added).

D. The phrase "in connection with" is "context-sensitive," not boundless.

In *Maracich v. Spears,* 570 U.S. 48 (2013), the Court considered the limits of the phrase "in connection with." The statute at issue, the Driver's Privacy Protection Act of 1994, regulated the disclosure of personal information from state motor vehicle departments and generally prohibited disclosure. *Id.* at 52. One exception permitted disclosure for use "in connection with any civil, criminal, or

administrative, or arbitral proceeding"; lawyers used this exception to obtain personal information to solicit clients. *Id.* at 59.

The Court noted "in connection with" "was susceptible to a broad interpretation" and found it "provided little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Id.* at 59. "The 'in connection with' language . . . must have a limit." *Id.* at 60. The phrase must be interpreted "in light of their accompanying words to avoid giving the statutory exception 'unintended breadth.'" *Id.* at 63 (internal citation removed).

The Court found the necessary limitation, in part, based on that the professional responsibilities of counsel in litigation are treated separately from an attorney's solicitation of clients in case law and state bars. *Id.* at 62. Further, a limited reading of "in connection with" was "in keeping with the statutory design of the DPPA," which had a separate section governing solicitation. *Id.* at 65. Ultimately, the Court determined that "the phrase 'in connection with' litigation . . . as a matter of normal usage and common understanding, does not encompass an attorney's use of the DPPA-protected personal information to solicit new clients." *Id.* at 68.

In *Dubin v. United States,* 599 U.S. 110 (2023), the Court encountered the similarly "boundless" phrase "in relation to" when applying a federal statute prohibiting identity theft. *Id.* at 114. The Court found the phrase especially

"context sensitive." *Id.* at 119. It looked to the statute's title, aggravated identity theft, and found this supported "a reading of 'in relation to' where use of the means of identification is at the crux of the underlying criminality." *Id.* at 122.

The Court also considered the word "uses" and the other verbs in the statute—"transfers" and "possesses." *Id.* at 124. "Because 'transfer' and 'possess' channel ordinary identity theft, *noscitur a sociis* indicates that 'uses' should be read in a manner similar to its companions—which are traditionally associated with theft." *Id.* at 124.

E. The lower court erred by reading "any proceedings in connection with" overly-broadly.

1. The distinction between defense services, by law, regulation, and within 1044e, and other types of legal services limits what is "in connection with" a victim's report.

Therefore, the "in connection with" phrase of 10 U.S.C. § 1044e(b)(5), must also have a limit here. *See Maracich,* 570 U.S. at 60. The distinction between defense counsel services, Article 27, 10 U.S.C. § 827, and the victim's legal counsel statute, of 10 U.S.C. § 1044e, provides one limit. In *Maracich,* the limitation was found in the traditional separation of attorney responsibilities in litigation versus in solicitation. *Id.* at 62. But here, the distinction is greater. The demarcation between defense representation and other types of representation is traditional, deep-seated and reflected in statute, professional responsibilities, and the structure and supervision of legal services in the military.

The two types of representation are not interchangeable or overlapping—the goals, obligations, and often the professional experience of the two types of attorneys are different. There is no indication Congress intended to conflate the two, either in Court or in the mind of a victim. Like the provision of defense counsel representation, the other rights authorized a criminal accused are also in the UCMJ, a wholly different statute than 1044e. *See infra* I.G.

Further, the lower court's broad reading of representation of the "victim in any proceedings in connection with the reporting [and] military investigation . . . of a sex-related offense" overlooks that another statutory provision authorizes victim legal counsel *consultation and assistance* in any military justice proceedings connected "with an incident of retaliation," 10 U.S.C. § 1044e(b)(10)(C). And another section authorizes only consultation "regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services." 10 U.S.C. § 1044e(b)(1).

While Congress intended some engagement from victim's legal counsel on victim's criminal liability, these sections make clear that the statute limits that engagement to consultation and assistance, which does not include representation at an interrogation. Limiting representation "in connection with" a proceeding to

one in which the alleged victim remains an alleged victim, not the accused, gives these sections independent, non-overlapping meaning.

2. The title, including the "types of legal assistance authorized" limits

The phrase "the types of legal assistance authorized"—the subsection's title—is also limiting. In *United States v. Flanner*, 85 M.J. 163 (C.A.A.F. 2024), the court considered when appellant had a guaranteed right to military defense counsel. The Marine Corps Legal Support and Administration Manual gave discretionary authority to detail military defense counsel "when determined necessary," including to servicemembers pending investigation. *Id.* at 175 (*citing* Dep't of the Navy, Marine Corps Order 5800.16-V3, Legal Support and Administration Manual para. 011004 (Feb. 20, 2018)). The court found the policy permitted, but did not require, the detailing of counsel. *Id.* at 175.

Similarly, 10 U.S.C. § 1044e authorizes the existence and services of Victim's Legal Counsel to alleged victim of sex-related offenses but does not confer any additional rights on a victim—especially to any services beyond those specifically listed. Instead, the rights afforded to a victim in a criminal proceeding are in Article 6b, which is part of the Code. *See infra* I.D.1.

3. "In connection with" must be applied consistently to "reporting," "military investigation," and "military prosecution."

Finally, the "in connection with" phrase must be applied consistently to the "reporting," "military investigation", and "military prosecution" of alleged sex-related offenses. The overbreadth of the lower court's reading of "in connection with" is more evident in the extremes: If military investigators, while investigating a victim's sex-assault allegations, found that the victim had committed a murder, the inadequacy and irrelevance of victim's legal counsel representation for the murder is clear.

And as Judge Harrell's dissent notes, "it is telling that we are not faced with a claim of deprivation of Appellant's right to representation by her VLC at her court-martial" since the court-martial was 'proceeding in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense'." *Deremer*, 85 M.J. at 561. He found the "demarcation between VLC and Defense services" "obvious" and "explicitly recognized in Section 1044e." *Id*.

F. A different section of the 1044e requires only "notice of the availability of a Special Victims Counsel" before an investigator interviews a victim.

10 U.S.C. § 1044e(f)(2) states that "notice of the availability of a Special Victims Counsel shall be provided to an individual . . . before any military criminal investigator or trial counsel interviews, or requests any statement from, the

individual regarding the alleged sex-related offense." The requirement is "[s]ubject to such exceptions for exigent circumstances as the Secretary of Defense . . . may prescribe." *Id.*

The section contemplates that a victim will not always have a Victims Legal Counsel present for an interview. Rather, the victim must only know that the services of a victim legal counsel are available to them. Here, the Appellant already had Victim Legal Counsel and thus knew that the Counsel was available to her.

G. Appellant did not have a right to Victim's Legal Counsel at the second interview. At the time, Appellant was a suspect—not a victim—thus was only entitled to Defense Counsel.

1. Article 6b provides rights to victims of crimes under the Code and are limited in scope.

Article 6b, UCMJ, 10 U.S.C. § 806b, defines a victim as "an individual who has suffered direct, physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter."

The statute provides eight rights to victims of specified offenses: (1) the right to reasonable protection from the accused; (2) the right to "reasonable, accurate, and timely notice" of hearings, court-martial proceedings, and the release or escape of the accused; (3) the right not to be excluded from a public hearing except in certain circumstances; (4) the right to be reasonably heard at (certain proceedings); (5) the "reasonable" right to confer with the counsel representing the

United States at certain proceedings; (6) "the right to restitution as provided in law"; (7) the right to proceedings free from unreasonable delay; (8) the right to be treated with fairness, dignity, and respect for privacy. Art. 6b(a)(1)–(8).

The rights conferred by Article 6b are not absolute, as most are qualified by the inclusion of the term "reasonable."[2] Furthermore, the rights are not to be construed in a way that would "impair the exercise of discretion under sections 830 and 834 [charging, preferral, and referral decisions] of this title." Art. 6b(d).

2. Nothing in 1044e authorizes a special victim's counsel act as a defense counsel or provides a suspect a right to the presence of a special victim counsel when they are interviewed as a suspect by law enforcement.

Nothing in the statute authorized a special victim's counsel to provide defense services. 10 U.S.C. § 1044e. Instead, special victim counsel are authorized to consult with their clients "regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services."

The statute draws a distinction between the services a special victim counsel provides—and defense services, governed by other statutes. This distinction is

[2] "The right to be *reasonably* protected from the accused." Article 6b(a)(1). "The right to *reasonable*, accurate, and timely notice of any of the following: [public hearing; preliminary hearing; court-martial; public proceeding for clemency and parole; release or escape of accused]." Article 6b(a)(2). "The right to be *reasonably* heard . . ." Article 6b(a)(4). "The *reasonable* right to confer with the counsel representing the Government . . ." Article 6b(a)(5). (Emphasis added).

further underscored by Articles 27 and 38, 10 U.S.C. §§ 827, 838, which provide the detailing and duties of trial counsel and defense counsel but make no mention of special victims legal counsel.

Thus, while 10 U.S.C. §1044e provides victims a right to special victims counsel, the scope of the representation is limited to representing the client as a victim. When a victim may be criminally liable, the special victim counsel may only consult their clients "regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services." 10 U.S.C. § 1044e(b)(1). A special victim counsel is precluded from acting as a defense counsel when the victim is the accused in a separate investigation or proceeding.

3. *Harrington* emphasized that where multiple entities participate in courts-martial proceedings, courts must recognize the importance of maintaining the separate authorities of each as set out by Congress and the president.

"Historically, criminal trials have been an adversarial proceeding between two opposing parties—the accused and the government . . . More recently, Congress has changed the traditional paradigm by providing the victims of the accused's crimes with limited authority to participate in the proceedings." *United States v. Harrington*, 83 M.J. 408, 419–19 (C.A.A.F. 2023)(citing Crime Victims' Rights Act, 18 U.S.C. § 3771 (2018) (establishing crime victim rights in federal

courts); Article 6b, UCMJ, 10 U.S.C. § 806b (2018) (establishing crime victim rights in military justice system))(some cites and quotations removed).

"In the military justice system, victims of certain sex-related offenses and certain domestic violence offenses not only have limited rights to participate in the proceedings but may also be represented by a special victims' counsel at government expense. Special victims counsel represent the victim's interests instead of the government's." *Id*. at 419 (citing 10 U.S.C. § 1044(e)).

In *Harrington*, the Court of Appeals for the Armed Forces examined a trial counsel's participation in a victims' right to make an unsworn statement in sentencing. *Id.* at 412. The appellant was convicted of involuntary manslaughter and the parents of the victim gave unsworn statements at sentencing. *Id*. at 413. The parents were not represented by counsel, and to facilitate the unsworn statement, the trial counsel engaged in a question and answer format with the parents. *Id.* at 418.

The *Harrington* court held that the Government could not use victim statements to supplement its own arguments or misappropriate the victim's right to be heard, and that by participating in the delivery of the victim statements, the trial counsel violated those limitations. *Id*. (*citing United States v. Edwards*, 82 M.J. 239, 246 (C.A.A.F. 2022)).

The *Harrington* court adopted a bright line rule that trial counsel could not participate in the presentation of unsworn victim statements. *Id*. at 419. The court reasoned that in a military justice system which involves multiple entities participating in the proceedings, it is important to "maintain[] the separate authorities of each as set out by Congress and the President." *Id*. As unsworn victims' statements are not sentencing evidence, it is important to maintain their distinction from actual evidence presented by the trial counsel. *Id*. at 419–20.

Second, the court held that if trial counsel were allowed to facilitate victim statements, it would cede control over the substance of the statements to the government, which is impermissible under R.C.M. 1001(c)(3). *Id*. at 420. Unsworn victim statements must be attributable solely to that victim. *Id*.

Third, the court noted that Article 6b(a)(5) provides victims the right to confer with Government counsel at several stages of the proceedings, including sentencing. *Id*. However, the right to confer with trial counsel does not include the right to have trial counsel participate in the delivery of the victim's unsworn statement. *Id*.

4. Like the rights conferred under the federal Crime Victim Rights Act, Victim rights in the military are limited in procedural scope.

In *In re Wild*, 994 F.3d 1244, 1256 (11th Cir. 2021), the court considered whether a crime victim had the right to "initiate a freestanding lawsuit to enforce

her rights before the formal commencement of any criminal proceeding." The court focused on the provisions of the Crime Victim Rights Act and the congressional intent in creating rights for victims. *Id*. The court ultimately held that Congress did not intend to allow for judicial enforcement of rights under the Act before the start of criminal proceedings, and similarly did not create a private right of action to enforce victim rights before the commencement of criminal proceedings. *Id*.

In so holding, the 11th Circuit recognized that crime victims' rights are inherently and statutorily tied to a "preexisting criminal prosecution." *Id*. at 1257, 1259. This is because:

> [A]ny individual asserting rights under the CVRA must, at the very outset, demonstrate to the district court that she is a "crime victim" entitled to statutory protection. And… the court must decide whether a "federal offense" has occurred. When a prosecutor has already commenced criminal proceedings against an identifiable individual for a specific crime, that prosecutor has made at least a presumptive determination that the individual has in fact committed a "federal offense."

Id. at 1261.

The court therefore held that "[A]n individual who has been 'directly and proximately harmed' as a result of the conduct charged by the government is entitled to CVRA protection and may assert her rights in court accordingly." *Id*. If there are no preexisting criminal proceedings, then the court would have to first determine whether or not a 'federal offense' had been committed. *Id*. The court

found that such an obligation on the court would be untenable, resulting in a sort of mini trial before even a charging decision, and likely frustrating the ongoing government investigation. *Id*.

Likewise, in *Jordan v. Department of Justice*, 173 F. Supp. 3d 44, 50 (S.D.N.Y. 2016), the New York Southern District Court held that certain Crime Victim Rights Act rights apply only after the defendant is charged, convicted, or sentenced.

In *Crystal VL Rivers v. United States*, Civil Action No. 6:18-cv-00061, 2020 U.S. Dist. LEXIS 55710, *24–25 (W.D. Va. Mar. 9, 2020), the Virginia Western District Court recognized that the Crime Victim Rights Act does contemplate a victim asserting certain rights prior to the initiation of a criminal prosecution. However, those rights are limited. *Id*. at *25. For example, a crime victim has "the 'reasonable right to confer with the attorney for the Government in [her] case,'18 U.S.C. § 3771(a)(5), so long as it does not "impair the [Government's] prosecutorial discretion," *id*. § 3771(d)(6)." Therefore, the "CVRA gives victims a voice in this process, but 'they cannot dictate the manner, timing, or quantity of conferrals.'" *Id*. at *26–27, citing *Jordan*, 173 F.Supp. 3d at 51 (quoting *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008)).

While not controlling, *In re Wild*, *Jordan*, and *Crystal VL Rivers*, all support the *Harrington* court's decision to strictly construe victim rights. The intent of the

statutes is clear: to provide legal rights and legal assistance to victims of sexual offenses.

When evaluating the Crime Victim Rights Act, the above jurisdictions held that court may not expand the rights conferred to alleged victims. This Court should similarly find that a Court of Criminal Appeals cannot unilaterally—and without statutory justification—expand the rights established by 10 U.S.C. § 1044e and Article 6b.

5. When Appellant was interviewed the second time by NCIS, she was a suspect. Victim statutes Article 6b and 10 U.S.C. § 1044e did not apply to her.

Harrington emphasized that the rights afforded under 10 U.S.C. § 806b and 10 U.S.C. § 1044e are strictly construed, and courts must keep in mind the separate authorities applying to each party in a court-martial.

Here, Appellant had no claim to victim status, or any statutory rights afforded a victim, at her second interview with law enforcement. She was no longer considered a victim for investigative purposes; the investigation based on her allegations, in which she was the named victim, was determined by law enforcement to be unfounded. (J.A. 497.) In December, law enforcement told Appellant's command, the sexual response coordinator, and her victim advocate that the investigation into her allegation was closed. (J.A. 497.)

A new investigation subject-titling Appellant as the suspect was opened over a month and a half later. (J.A. 498.) Law enforcement in the second interview told Appellant she was suspected of lying about sexual assault allegations and her medical conditions, and properly advised her. (J.A. 498, 609–10) Appellant knowingly and voluntarily waived her right and provided a statement. (J.A. 601–34.)

Law enforcement did not violate Appellant's rights to counsel. This Court should not extend 10 U.S.C. 1044e's coverage to this case, in which Appellant was ultimately convicted for falsely claiming to be a victim. Appellant was not a victim at the time of the second interview; she had no right to a Victim's Legal Counsel at all—let alone that Counsel's presence at a suspect interview.

II.

THE LOWER COURT ERRED IN FINDING THE SECOND INTERVIEW VIOLATED APPELLANT'S DUE PROCESS RIGHTS, AS APPELLANT KNOWINGLY AND VOLUNTARILY WAIVED HER RIGHT TO COUNSEL.

A. Standard of review.

Voluntariness of a confession is a conclusion of law reviewed de novo. *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (citation omitted). Appellate courts review a military judge's denial of a motion to suppress evidence for an abuse of discretion. *See United States v. Chatfield*, 67 M.J. 432,

437 (C.A.A.F. 2009). An abuse of discretion occurs when a military judge's decision is based on clearly erroneous findings of fact or incorrect conclusions of law. *Id*.

B. Appellant was interrogated as a suspect. As a suspect, her right to counsel came from the Fifth Amendment, Article 31b, and Mil. R. Evid. 305.

1. Servicemember rights are limited to those provided by the Constitution, the Code, and the Manual. The Fifth Amendment, Article 31(b) and Mil. R. Evid. 305 confer rights to protect a suspect against self-incrimination. The Sixth Amendment right to counsel does not attach until preferral of charges.

Service members have no rights beyond the "panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (C.A.A.F. held lower court erred when it sua sponte decided mistrial warranted based on "military due process" right to have panel of members "who have all heard and seen the same material evidence," and Sixth Amendment right to have all members view a witness' demeanor, when none such rights exist in the plain language of the Manual).

"No person… shall be compelled in any criminal case to be a witness against himself…" U.S. Const. Amend. V.

A suspect must be warned prior to custodial questioning "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford

an attorney one will be appointed to him prior to any questioning if he so desired." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *accord United States v. Tempia*, 37 C.M.R. 249, 255 (C.M.A. 1967) (*Miranda* applies to military).

"In the military, the Sixth-Amendment right to counsel does not attach until preferral of charges." *United States v. Harvey*, 37 M.J. 140, 141 (C.A.A.F. 1993) (citation and quotations omitted).

"No person subject to this chapter may interrogate, or request any statement from an accused or 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." Art. 31(b), 10 U.S.C. § 831(b); Mil. R. Evid. 305(c)(1)(A–C) (no required warning of right to counsel during interrogation).

Article 31(b), UCMJ, 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." *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018) (internal citation removed).

"Article 31 contains no custodial limitation and the requirement to provide warnings plainly extends to persons subject to the Uniform Code." *United States v. Moreno*, 36 M.J. 107 (C.A.A.F. 1992).

2. Appellant had no right to counsel during her second interview. Appellant has not claimed the interview was custodial, and there is no legal authority for a blanket, anticipatory invocation of Fifth Amendment rights. Regardless, Appellant waived her right to counsel.

a. Courts consider whether there is a formal arrest or restraint or freedom of movement to the degree associated with formal arrest to determine whether an interview is custodial.

The "*Fifth Amendment Right to Counsel*" applies when "a person suspected of an offense and subjected to custodial interrogation requests counsel." Mil. R. Evid. 305(c)(2) (emphasis in original). Then, any statement made "is inadmissible against the accused unless counsel was present for the interrogation." *Id.*

"'Custodial interrogation' means questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way." Mil. R. Evid. 305(b)(3).

"[T]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (internal quotation marks and citation omitted).

b. Appellant never claimed her interview was custodial, and it was not. Regardless, she waived or forfeited the issue by failing to raise it at trial.

An appellant's failure to raise a possible ground for suppression in either a written motion or the suppression hearing is treated as waiver. *United States v. Smith*, 78 M.J. 325 (C.A.A.F. 2019).

Appellant never claimed the interview was custodial. (Appellate Ex. I at 98–102, Appellate Ex. XI.) Appellant's failure to raise this issue bars her from contesting it now on appeal.

c. There is no legal authority for a blanket, anticipatory invocation of rights.

In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Court noted that it has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Id.* at 182, n.3. Some federal courts have interpreted the decision to mean an accused can invoke their Fifth Amendment rights when interrogation is imminent. *See e.g., United States v. Grimes*, 142 F.3d 1342, 1348 (11th Cir. 1998) ("*Miranda* rights may be invoked only during custodial interrogation or when interrogation is imminent.")

Appellant's interview as a suspect was not "imminent" when Victim's Legal Counsel included the invocation in the Notice of Representation. Appellant had no Fifth Amendment right to counsel during the February 2022 interview, but even if

she had, she could not rely on a months-old invocation that occurred before she was a suspect.

3. Waiver of the right to counsel must be both (1) voluntary and (2) knowing and intelligent. The United States need only show waiver by a preponderance of the evidence.

"Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right. . . ." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). This "depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* (internal quotations and citation omitted).

"Voluntariness of consent and knowing waiver are two distinct and 'discrete inquiries.'" *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (quoting *Edwards*, 451 U.S. at 484).

4. Voluntariness turns on whether an accused's will was overborne. Under *Brisbane*, courts evaluate the characteristics of the accused and the details of the interrogation.

"Voluntariness turns on whether an accused's 'will has been overborne.'" *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)).

To determine voluntariness, the court evaluates "both the characteristics of the accused and the details of the interrogation." *United States v. Brisbane*, 63

M.J. 106, 114 (C.A.A.F. 2006) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Factors within these categories include: (1) an appellant's youth; (2) lack of education or low intelligence; (3) advice to the appellant of his constitutional rights; (4) length of detention; (5) repeated and prolonged nature of the questioning; (6) use of physical punishment such as deprivation of food or sleep; and (7) amount of time between the interrogations. *Id*.

Lies, threats, or inducements are not determinative of involuntariness. *See Freeman*, 65 M.J. at 455–56 ("After all, as the '*Miranda* rules were issued to counter-balance the psychological ploys used by police officials to obtain confessions,' the presence of those ploys could hardly be considered to per se result in an involuntary confession.").

5. Appellant's interview was voluntary because her will was not overborne.

In *Lewis*, the appellant was a junior enlisted in his early twenties with a high school education and six years of military service. 78 M.J. at 453. His General Technical (GT) score was ninety-two. 78 M.J. at 453. The court found that this combination of attributes "[did] not raise any serious red flags" with regard to the defendant's ability to voluntarily confess again after an initial unwarned confession. *Lewis*, 78 M.J. at 453.

In *Freeman*, the interrogators lied to the appellant about the evidence that they had and threatened to turn his case over to civilian authorities if he did not

cooperate in an interrogation that lasted nearly ten hours. 65 M.J. at 454. However, the court found the confession voluntary. *Id.* 456–57. The court considered that appellant was twenty-three-year-old E-4 at the time of questioning, not mentally impaired or of below average-intelligence, was advised of rights and waived them, did not complain about the process or ask for an attorney, did not ask to stop the interview, had breaks during interrogation, and was neither physically harmed nor threatened with such harm, and prepared written statement himself. *Id.*

Here, Appellant was an eighteen-year-old E-2 with a high school education, and scores of 95 on her General Technical Test and 47 on the Armed Forces Qualification Test, both average scores. (J.A. 76.) Like the *Lewis* appellant, Appellant's combination of attributes does not raise concerns about the voluntariness of her confession. 78 M.J. at 453.

Moreover, Appellant had experience with law enforcement interviews. After Appellant's November 2021 sexual assault allegation against another female recruit, she was assigned a Uniformed Victim Advocate and Victim's Legal Counsel to advise and assist her for that investigation. (J.A. 76.)

During the February interview, the conversation was friendly. (J.A. 77.) The Special Agent told Appellant that she would get a chance to talk, but he had to say some things first. (J.A. 77.) The Agent told her that after witness interviews,

the Agents suspected Appellant was being dishonest about the sexual assault allegations and her medical issues requiring a wheelchair. (J.A. 77.) The Agent gave the rights advisement. (J.A. 78.) Appellant acknowledged that she understood. (J.A. 78.) Appellant indicated she wanted to continue the conversation and signed the waiver. (J.A. 78.)

Appellant's interview lasted approximately thirty-five minutes. (J.A. 78.) The Military Judge specifically found that "the conditions of the rights advisement… were not coercive in any way," even considering the "youth and relative inexperience of [Appellant]." (J.A. 79.)

In sum, like in *Freeman,* Appellant was advised of her rights and waived them. Her interview was short and non-coercive. (J.A. 397); 65 M.J. at 454.

6. Appellant's waiver was knowing and intelligent. Appellant was properly advised of her Article 31b rights, including her right to a defense attorney.

"[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed consequences* of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) (emphasis original).

Because Appellant was of at least average maturity and intelligence and her personal characteristics indicate she was able to understand her situation, she

provided a knowing and intelligent waiver when she spoke to NCIS investigators in February. But Appellant also had more knowledge than most: presumably, the Victim's Legal Counsel provided "legal consultation regarding potential criminal liability . . . in relation to the circumstances surrounding the alleged sex-related offense" before this February interview." *See* §1044e(b)(1).

Appellant's waiver was knowing and intelligent. The Military Judge did not abuse his discretion in admitting the interrogation. (J.A. 80.)

C. The lower court improperly found that a violation of 10 U.S.C. § 1044e is a due process violation.

1. The lower court erred when it found "questioning the alleged victim . . . without affording counsel reasonable opportunity to be present" was a due process violation because the Supreme Court rejected such a claim in *Moran*.

In *Moran v. Burbine*, 475 U.S. 412 (1986), the Court considered whether investigators' conduct violated the appellant's due process rights. *Id.* at 432. After appellant was arrested, family arranged for a public defender to represent him. The public defender's office called the station where appellant was held, notified them appellant was represented, and received assurance that appellant would not be interrogated until the next morning. *Id.* But the interrogation happened that night, before appellant could speak to counsel. *Id.*

The appellant received *Miranda* warnings, but was not told that he was represented and counsel had tried to reach him. The lower court found the

"deliberate or reckless" police conduct undermined the validity of appellant's waiver and suppressed the confession. *Id.* at 422.

The Supreme Court determined that Appellant's Fifth Amendment rights were not violated. *Id.* at 422. The prophylactic *Miranda* warnings covered his right to counsel and he waived them. *Id.* at 421, 425. Voluntariness was not at issue as the police did not use physical or psychological pressure to elicit the statements. *Id.* at 421. Information about appellant's lawyer and his attempted contact "would have been useful to respondent" and "perhaps [may have] affected his decision to confess," but the Constitution does not require that "the police supply a suspect with a flow of information to calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422 (internal citation removed).

Police culpability in failing to inform appellant about his attorney's phone call had no bearing on the validity of the waiver because "the state of mind of the police is irrelevant" to appellant's decision. *Id.* at 423. The police's treatment of the attorney was also irrelevant: "a rule that focused on how police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda's* mission and its only source of legitimacy." *Id.* at 425.

Finally, the practical problems of expanding *Miranda's* reach to appellant's situation counseled against it. *Id.* *Miranda's* "ease and clarity of application"

would be undermined and replaced with uncertainty, such as the extent to which the police would be accountable for knowing an accused has counsel. *Id.* at 425. Instead, the Court rejected any expansion of *Miranda* "to require the police to keep the suspect abreast of the status of his legal representation." *Id.* at 427.

No Sixth Amendment precedent to appellant's situation, as adversarial judicial proceedings were yet to be initiated. *Id.* at 431. "The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequence of his own candor." *Id*. at 429.

Finally, the Court addressed whether the police conduct was "so offensive as to deprive him of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment." *Id.* at 432. The Court held "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." *Id.* at 434.

2. The lower court erred when it found "questioning the alleged victim . . . without affording counsel reasonable opportunity to be present" was a due process violation because the *Finch* court rejected it as a Sixth Amendment claim.

In *United States v. Finch*, 64 M.J. 118 (C.A.A.F. 2006), the appellant was represented by civilian counsel for the incident that formed the basis for which he was later charged. *Id*. at 122. A military investigator knew appellant was

represented but interviewed him anyway without contacting his attorney. *Id.* The court found there was no Fifth or Sixth Amendment right to attorney notification, and Mil. R. Evid. 305, which had once contained the notification requirement, had been amended to remove it. *Id.* at 124. Accordingly, the statement was properly admitted. *Id.*

3. The lower court erred in finding a due process right to the Victim's Legal Counsel's presence, and in finding the "talismanic recitation" of the standard rights warning inadequate.

Here, the lower court found fault with the police conduct—resulting in a due process violation—because it deprived "counsel reasonable opportunity to be present." *Deremer*, 85 M.J. at 554. But *Moran* and *Finch* preclude such reasoning: the rights protected by rights warnings (*Miranda* in *Burbine* and Article 31b and *Miranda* here) belong to the Appellant, not her attorney. *See Moran*, 475 U.S. at 423, 425, 429. Regardless, the subjective intentions of the police and any culpability in their behavior toward counsel are irrelevant to the inquiry.

And the majority overlooks that in *Finch*, the appellant had a civilian attorney—certainly that civilian attorney was "authorized" to represent him—which is all that 1044e provides Appellant here. Yet the *Finch* court found no violation of the appellant's rights when military investigators did not provide counsel "reasonable opportunity to be present." 64 M.J. at 125.

Further, the lower court here found that "talismanic recitation" of Article 31b rights did not adequately inform Appellant of her rights—rendering her statement involuntary. *Id.* This proposition, too, was rejected by *Moran*. Rights warnings are effective because law enforcement know what information must be provided an accused to ensure a confession is voluntary. *Moran,* 475 U.S. at 425. Law enforcement do not need to give all the information that ultimately may be relevant to an accused's decision. *Id.*

The lower court's opinion creates a litany of legal uncertainties *Moran* sought to prevent—including to what extent law enforcement are responsible for knowing whether an accused has legal representation, who would receive modified warnings, and whether an appellant could ever waive the presence of counsel outside that counsel's presence. The questions are especially vexing here as victims who make restricted reports are eligible for victim legal counsel representation. 10 U.S.C. §1044e(f) (3). And the result would be a multi-tiered system of rights depending on an accused's status a victim at some point in time. *See Deremer*, 85 M.J. at 564 (Harrell, J.) (concurring and dissenting in part) (accusing majority of reviving *McOmber* only for a specific and arbitrary subset of victim-accused).

4. The Court erred by creating a due process protection beyond those provided in the Constitution, Uniform Code, and Rules for Courts-Martial or other Executive enactments.

Appellant did not have a right under 10 U.S.C. § 1044e, to have her Victim's Legal Counsel present at a NCIS interview where she was a suspect. *See* supra Section I. As discussed supra Section I.B., Appellant was interrogated as a suspect. As a suspect, her right to counsel came from the Fifth Amendment, Article 31b, and Mil. R. Evid. 305. Her suspect rights to counsel were respected and adhered to, and she knowingly and voluntarily waived her right to counsel at the February interview.

The majority opinion violates the *Vazquez* rule that this Court has been applying for more than a decade that holds that "servicemembers [do not] enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

D. The majority and Judge Gross in concurrence err in finding a due process violation based on violations of a statute or instruction.

In *United States v, Evans*, 75 M.J. 302, 303 (C.A.A.F. 2016), the appellant was not read his Article 31b rights when he was interrogated by his supervisor. *Id.* at 304. The interrogation was, however, non-custodial and voluntary. *Id.* at 305–06. The court clarified that "the mere fact that Article 31(b), UCMJ, rights have a constitutional analog does not change the means by which those rights are

ultimately conferred—that is, by statute—nor does it otherwise convert those statutory rights into constitutional rights." *Id.*

Here, the lower court found a violation based on Appellant's statutory right to a Victim's Legal Counsel, but characterized the error as a due process violation and applied the constitutional error test. *Deremer,* 85 M.J. at 555. But the lower did not explain why a violation of Appellant's statutory right to a Victim's Legal Counsel is different—and a due process violation—than an appellant's right to Article 31(b) warnings—which this Court has not analyzed as a due process violation. *See Deremer,* 85 M.J. at 555; *Evans*, 75 M.J. at 306.

Judge Gross found regulatory violations of the right to counsel, based on Department of Defense Instruction 5505.18 (victim communications "will be communicated through the assigned . . . VLC") and Marine Corps Order 5800.16-V4 (communication "requires notice to the detailed VLC" and no other entity may determine VLCO eligibility). *Id*. at *18-22. But he relied on a 1975 C.M.A. case applying common law principles to find a fraudulent enlistment that deprived the court-martial of jurisdiction to try the appellant. *Id*. at *22–23. And he relies on a *per curiam* 1980 C.M.A. case that found, without explanation, that failure to follow a regulation requiring a search authorization to be in writing made exclusion of the evidence appropriate. *Id*. at *23. But in light of *Vazquez* and

Evans, the concurrence erred in determining violations of these instructions amounted to a due process error warranting suppression.

The majority erred in finding constitutional error in a criminal proceeding based on its expansive reading of a non-criminal statute—where extant criminal statutes and rules regarding defense counsel representation already occupy the field. It should, instead, have found that Appellant waived the right to counsel and the statement was properly admitted.

III.

10 U.S.C. § 1044E DOES NOT PROVIDE FOR REMEDIES IF THE STATUTE IS VIOLATED. THEREFORE, THE LOWER COURT ERRED IN HOLDING THAT SUPPRESSION—A REMEDY TO BE SPARINGLY APPLIED IN CRIMINAL CASES— IS APPROPRIATE HERE, WHERE NO STATUTORY OR REGULATORY TEXT CONTEMPLATES SUCH A REMEDY.

A. Standard of Review.

The scope, applicability, and meaning of a statute are matters of statutory interpretation that are reviewed de novo. *United States v. Willman*, 81 M.J. 355, 357 (C.A.A.F. 2021).

B. 10 U.S.C. § 1044e does not authorize suppression as a remedy, nor do any regulations or rules of evidence.

This Court applies the standard principles of statutory construction when construing Military Rules of Evidence and Rules of Court-Martial. *United States*

v. Mellette, 82 M.J. 374, 377 (C.A.A.F. 2022) (citing *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019)).

Neither statute allows for suppression of a statement even if obtained in violation of Article 6b or 10 U.S.C. §1044e.

C. The lower court erred in holding that suppression is an appropriate remedy under 10 U.S.C. § 1044e, when neither the statute nor regulations provide for suppression.

The lower court rejected Appellant's rights waiver, reasoning that Section 1044e provides additional rights. 85 M.J. 546. By suppressing the statement, the majority judicially created a remedy that Congress declined to provide; Congress did not envision criminal courts to be involved in enforcing Section 1044. *See id. Deremer*, 85 M.J. at 30 (Holifield, C.J. dissenting in part). The majoritylooked to Mil. R. Evid. 304 and created an exclusionary rule-like remedy for the Section 1044 violation. *Id*.

But in creating its own remedy for any 1044e error, the majority decision engaged in making policy. The two dissents, and concurrence by Judge Gross, point to overreach in the majority opinion. Furthermore, as Chief Judge Holifield points out, if the majority is "creat[ing] a remedy of exclusion of evidence—one not found in the relevant statute, but only by analogy to a debatably related rule of evidence—we should at least apply the same balancing test found in the judicially-created exclusionary rule applicable to illegal searches." *Id*. at *30. The majority

did not apply a balancing test, thereby creating and implementing an exclusionary rule that "has no deterrent value and simply provides a windfall to Appellant." *Id*.

This Court should find that the language of 10 U.S.C. § 1044e is clear and unambiguous—it does not provide for suppression as an appropriate remedy—and therefore the lower court erred.

IV.

THE LOWER COURT DID NOT ERR BY AFFIRMING APPELLANT'S CONVICTION FOR MALINGERING AS THE UNITED STATES HAD OVERWHELMING EVIDENCE OF APPELLANT'S GUILT OF THE MALINGERING CHARGE. IF THE LOWER COURT ERRED, IT WAS ONLY BY APPLYING THE CONSTITUTIONAL TEST FOR PREJUDICE.

A. Standard of Review.

When an Article 31(b) violation occurs without a corresponding violation of the Fifth Amendment the appropriate test for prejudice is the non-constitutional test for prejudice—found in *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). *United States v.* Evans, 75 M.J. 302, 303 (C.A.A.F. 2016). When an Appellant's Fifth Amendment rights are violated, courts analyze whether the error was harmless beyond a reasonable doubt. *Id.* at 303, 305 (citing *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006)).

B. The lower court did not err in affirming Appellant's conviction for malingering but applied the wrong test. The evidence was sufficient to convict her, even if her second statement to NCIS had been suppressed.

In *Evans*, the appellant was not read his Article 31b rights when he was interrogated by his supervisor. *Id.* at 304. The interrogation was non-custodial and voluntary. *Id.* at 305–06. The court clarified that "the mere fact that Article 31(b), UCMJ, rights have a constitutional analog does not change the means by which those rights are ultimately conferred—that is, by statute—nor does it otherwise convert those statutory rights into constitutional rights." *Id.* The test for non-constitutional prejudice therefore applied. *Id.* at 305.

Here, the lower court found a violation based on Appellant's statutory right to a Victim's Legal Counsel, but characterized the error as a due process violation and applied the constitutional error test. *Deremer,* 85 M.J. at 555. But the lower did not explain why a violation of Appellant's statutory right to a Victim's Legal Counsel is different—and a due process violation—than an appellant's right to Article 31(b) warnings—which this Court has not analyzed as a due process violation. *See Deremer,* 85 M.J. at 555; *Evans*, 75 M.J. at 306.

1. Appellant's statement did not have a substantial influence on the Findings—the United States was able to provide eyewitness testimony from other recruits and medical providers, as well as medical records to prove the malingering Charge beyond a reasonable doubt. But even under the constitutional test for error, the United States met its burden with extensive testimony and medical records.

Here, as the claimed violation is a statutory one, the Court should have tested for prejudice under the *Kerr* test. "This Court evaluates claims of prejudice from an evidentiary ruling by weighing four factors: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *United States v. Hall*, 66 M.J. 53 (C.A.A.F. 2008) (*citing United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citation omitted)). But even under the constitutional error test, any error in admitting the interrogation was harmless beyond a reasonable doubt. *See United States v. Anderson*, 68 M.J. 378, 384 (C.A.A.F. 2010) ("Because [a]ppellant raises a due process argument, our test for prejudice must be whether the challenged action was harmless beyond a reasonable doubt").

The United States admitted Appellant's February 16, 2022, interview into evidence at trial. (Pros. Ex. 2.) However, that interview was brief, cumulative, and insignificant when compared to the strength of the United States' case, which included: (1) Appellant's November statement to NCIS—in which she made the false statements and had the presence of her Victim's Legal Counsel and

Uniformed Victim Advocate; (2) fifteen witnesses for the United States, including medical providers, an NCIS special agent, and recruits and platoon staff who were eye-witnesses to the charged misconduct, (R. 172–786); (3) Appellant's own extensive medical records demonstrated that her injuries were feigned and that Appellant was repeatedly fabricating injuries in order to avoid duty and obtain benefits, (Pros. Ex. 3; Pros. Ex.5; Pros. Ex. 7); and (4) photographs of Appellant standing, despite her claims to be unable do so (Pros. Ex. 6). Further, the United States' closing argument distinctly divided discussion of the two Charges and the evidence for each. (J.A. 355–91.)

In contrast, the Appellant's case was weak. Appellant did not call any witnesses or present any evidence and rested immediately following the United States' case. (R. 787.) Appellant instead relied on arguing that the United States did not satisfy its burden of proof. (R. 825.) The alleged error had no substantial influence on the Findings, and was harmless beyond a reasonable doubt.

2. NCIS was already pursuing leads as to eye-witnesses and medical records to prove the Charges beyond a reasonable doubt.

The inevitable discovery doctrine under Mil. R. Evid. 311(c)(2) is a variation of the independent source rule. *United States v. Eppes*, 77 M.J. 339, 347 (C.A.A.F. 2018). It applies when the prosecution establishes by a preponderance of the evidence that "*when the illegality occurred*, the government agents

possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Hoffmann*, 75 M.J. 120, 125 (C.A.A.F. 2016) (emphasis in original). "The doctrine may apply where it is reasonably to conclude officers would have obtained a valid authorization had they known their actions were unlawful." *Eppes*, 77 M.J. at 347.

In *United States v. Blair*, N.M.C.M. 86 4041, 1987 CMR LEXIS 492 (N-M.C.M.R. July 6, 1987), the appellant argued that it was error for the trial court to admit testimonial evidence from two witnesses whose identity only became known to law enforcement due to his illegally obtained confession. The United States disagreed, arguing that the two witnesses' identities were made known to law enforcement through a third witness's statement which was completely independent of the appellant's confession. *Id*. at *5. The court agreed with the United States, finding that the two pivotal "witnesses' identities were established by evidence independent of appellant's illegally obtained confession" and therefore the testimony was properly admitted. *Id*. at *7.

This case is similar to *Blair* because at the time of Appellant's statements, law enforcement was interviewing a number of other witnesses. And while Appellant herself identified some witnesses, she did so primarily in her first

interview during which she had a Victim's Legal Counsel present. Furthermore, even if Appellant had not identified any witnesses, the pool of people that could potentially have information was narrowed and readily identifiable as those Recruits who were in Recruit Separation Platoon at the time of the alleged actions. Even if Appellant had made no statements whatsoever, NCIS would have identified and interviewed the recruits of the platoon, and would have ultimately gotten the same witness statements. Additionally, Appellant's medical records are a completely independent source of information which law enforcement would have had access to–and in fact did have access to– regardless of any statements by Appellant. The discrepancies in the medical records would have also led law enforcement to certain witnesses without any statements by Appellant.

The Military Judge did not abuse his discretion in denying the Motion to Suppress. However, even if he did, there was no prejudice to Appellant as more than sufficient evidence to convict could have and was identified by law enforcement independently of Appellant's statements.

C. To the extent Appellant requests a review of the factual sufficiency of the malingering Charge, this Court should deny it.

Appellant's certified Assignment of Error appears to be a request for this Court to conduct a factual sufficiency review of the malingering Charge. As this Court recently held in *United States v. Csiti*, No. 24-0175/AF (C.A.A.F. 2025), it

"does not have statutory authority to review the factual sufficiency of the evidence."

Conclusion

The United States respectfully requests this Court reverse the lower court's majority Opinion, and affirm the Findings and Sentence as adjudged.

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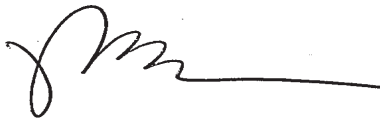

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