IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Index of Brief

Table of Cases, Statutes, and Other Authorities

United States Code

Other Authorities

Treatises

Manual for Courts-Martial, United States (2019)

United States Court of Appeals for the Armed Forces

United States Court of Military Appeals

United States Supreme Court

Military Rules of Evidence (2019)

United States Air Force Court of Military Review

Issues Presented

I.

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] While this Court identified PFC Deremer as the "Appellee" in its orders for this case, this Brief will identify her as the "Appellant" for purposes of consistency with the wording of the Judge Advocate General of the Navy's Certificate of Review and the Government's Brief.

Statement of Statutory Jurisdiction

The sentence adjudged includes a bad-conduct discharge.[2] Accordingly, the lower court had jurisdiction pursuant to Article 66(b)(3) of the Uniform Code of Military Justice (UCMJ).[3] The Judge Advocate General of the Navy filed a Certificate for Review of the four above issues with this Court, giving this Court jurisdiction under Article 67(a)(2), UCMJ.[4]

Relevant Authorities

10 U.S.C. § 1044e, titled, "Special Victims' Counsel for victims of sex-related offenses," states in relevant part:

> **(a) Designation; purposes**.
>
> > **(1)** The Secretary concerned shall designate legal counsel (to be known as "Special Victims' Counsel") for the purpose of providing legal assistance to an individual described in paragraph (2) who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.
>
> . . .
>
> **(b) Types of legal assistance authorized.** The types of legal assistance authorized by subsection (a) include the following:
>
> > **(1)** Legal 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.
> >
> > . . .

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[2] J.A. 396.
[3] 10 U.S.C. § 866(b)(3) (2024).
[4] 10 U.S.C. § 867(a)(2) (2024).

(5) Legal consultation regarding the military justice system, including (but not limited to)— . . .

(B) any proceedings of the military justice process in which the victim may observe;

. . .

(6) Representing the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.

. . .

(8) Legal consultation and assistance—

. . .

(B) in any proceedings of the military justice process in which a victim can participate as a witness or other party;

. . .

(10) Legal consultation and assistance in connection with an incident of retaliation, whether such incident occurs before, during, or after the conclusion of any criminal proceedings, including—

. . .

(C) in any resulting military justice proceedings.

. . .

(c) Nature of relationship. The relationship between a Special Victims' Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and client.

. . .

(f) Availability of Special Victims' Counsel.

. . .

(2) Subject to such exceptions for exigent circumstances as the Secretary of Defense and the Secretary of the Department in which the Coast Guard is operating may prescribe, notice of the availability of a Special Victims Counsel shall be provided to an individual described in subsection (a)(2) before any military criminal investigator or trial counsel interviews, or requests any statement from, the individual regarding the alleged sex-related offense.

(3) The assistance of a Special Victims' Counsel under this subsection shall be available to an individual described in subsection (a)(2) regardless of whether the individual elects unrestricted or restricted reporting of the alleged sex-related offense. The individual shall also be informed that the assistance of a Special Victims' Counsel may be declined, in whole or in part, but that

declining such assistance does not preclude the individual from subsequently requesting the assistance of a Special Victims' Counsel.[5]

Military Rule of Evidence 304 states in relevant part:

Rule 304. Confessions and admissions

(a) *General rule*. If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e).

(1) *Definitions*. As used in this rule:

(A) "Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.[6]

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* states in relevant part:

5. Presumption of Validity

An interpretation that validates outweighs one that invalidates (ut res magis valeat quam pereat).

9. General Terms Canon

General terms are to be given their general meaning (generalia verba sunt generaliter intelligenda).

[5] 10 U.S.C. § 1044e (2024).
[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(a)(1)(A) (2019) [hereinafter MCM].

25. Presumption of Consistent Usage

> A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.[7]

Statement of the Case

A military judge sitting as a special court-martial convicted Appellant, contrary to her pleas, of malingering and false official statement in violation of Articles 83 and 107, UCMJ.[8] The Military Judge sentenced her to reduction to E-1 and a bad-conduct discharge.[9] The Convening Authority approved the findings and sentence, which the Military Judge entered into judgment.[10]

On February 7, 2025, the lower court set aside the guilty findings for Charge II (false official statement), affirmed the guilty findings for Charge I (malingering), set aside the sentence, and authorized a rehearing.[11] On March 18, 2025, the lower court denied Appellant's motion for reconsideration.[12] The Judge Advocate General of the Navy certified the four issues presented above for this Court's review on May 5, 2025.[13]

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[7] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 66, 101, 170 (2012) [hereinafter SCALIA & GARNER].
[8] J.A. 391.
[9] J.A. 396.
[10] J.A. 36, 39.
[11] J.A. 13.
[12] Order Den. Appellant's Mot. to Recons., *United States v. Deremer*, 85 M.J. 546 (N-M. Ct. Crim. App. Mar. 18, 2025).
[13] *United States v. Deremer*, No. 25-0158/MC, 2025 CAAF LEXIS 350, at *1 (C.A.A.F. May 5, 2025).

Statement of Facts

A. During boot camp, Appellant reported to NCIS that a female Marine in her platoon sexually abused and harassed her.

Upon graduating from high school, Appellant enlisted in the United States Marine Corps and reported to boot camp at Parris Island in June 2021 at the age of seventeen.[14]

Five months later, during boot camp, Appellant reported to the Naval Criminal Investigative Service (NCIS) that another female Marine in her platoon had sexually abused and harassed her.[15] At the NCIS interview, in the presence of her Uniformed Victim Advocate and Special Victim's Counsel (SVC), she described multiple instances of unwanted sexual touching—including in the common shower area and in the open bunk room—as well as sexually explicit remarks of a harassing nature.[16]

At the end of the interview, the lead NCIS agent told her, "I may reach out to you again, it's not likely. But what I'll do is I'll go through your VLC . . . and he'll reach out to you."[17]

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[14] J.A. 475, 488, 729.
[15] J.A. 397, 521-57.
[16] J.A. 397, 527-43.
[17] J.A. 556. SVCs in the Naval Service are called "Victim's Legal Counsel (VLC)."

B. Disbelieving Appellant's allegations, NCIS intimidated the only corroborating witness, who changed her account.

After receiving Appellant's allegations, the NCIS agent began interviewing witnesses.[18] A percipient witness corroborated Appellant's account, stating she saw the alleged assailant force Appellant to touch the assailant's naked buttocks in the shower of the squad bay and heard the assailant make sexually suggestive comments to Appellant.[19] Six other Marines from the platoon stated they did not witness any of the alleged behavior, and two of them said they did not believe Appellant because she was not always truthful.[20] When interviewed, the alleged assailant waived her rights and denied the allegations.[21]

The NCIS agent then re-interviewed the corroborating witness, advised her of her Article 31(b) rights, and told her she was suspected of conspiracy, false official statement, and obstruction of justice.[22] He told her he knew she was lying; that she could get a felony charge for lying, which could ruin her Marine Corps career; and that she had an opportunity to change her story.[23] At this point, the corroborating witness stated there was no way for her to see whether anything happened in the shower because she could not see well without her glasses on;

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[18] J.A. 318-19, 559-62.
[19] J.A. 288-89, 318, 341-42, 344, 565-66.
[20] J.A. 560-61.
[21] J.A. 583-85.
[22] J.A. 290, 323-24, 346-47.
[23] J.A. 291-92, 347.

however, she re-confirmed that she had heard the alleged assailant make a sexual comment toward Appellant.[24]

C. NCIS then re-interviewed Appellant about her allegations outside the presence of her SVC, resulting in her changing her account.

The same NCIS agent then re-interviewed Appellant about her allegations with another agent.[25] Despite his earlier assurance to Appellant, the agent intentionally did not contact Appellant through her SVC.[26] He later explained it was "NCIS policy that if the case agent develops probable cause that the victim lied, then we are to close [the sexual assault] investigation and open a perjury case against the previous victim as a subject, in which case she is no longer treated as a victim."[27]

At this second interview, before advising Appellant of her rights, the NCIS agent began questioning her prior allegations and employing various "interview techniques," including "overstat[ing] the weight of the evidence against her."[28] Among other things, he told her, "I need to hear that from you. You're only going to get one opportunity to do this and then that's it. . . . Because right now you're

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[24] J.A. 292, 348-49. Subsequently, at trial, the percipient witness gave conflicting testimony, at times admitting to lying to NCIS and at other times stating, "I just could not remember. I worded it wrong at the time." J.A. 295-96.
[25] J.A. 326, 398, 475, 601-34.
[26] J.A. 77.
[27] J.A. 77, 326-27.
[28] J.A. 327-28.

looking at lying to a federal agent, which is a big deal. That's a felony. . . . That will go on your record forever."[29]

Initially, after agreeing to waive her rights and continue the conversation, Appellant stood by her account.[30] The NCIS agent then threatened Appellant with prosecution if she did not convince him she was telling the truth, telling her, "You will be charged with something if I still think that you're lying after this. . . . Do not let that happen if that's the case."[31] He then asked, "So would it be reasonable to suggest that you did, in fact lie when you came in for the first time?" Appellant responded, "Yes, sir."[32] At this, another NCIS agent asked, "But did you make the false report or did you lie originally so that [the assailant] [could] be removed from you?" Appellant responded, "Yes, ma'am."[33]

The agents then turned their suspicions toward the wheelchair Appellant sat in, and Appellant told them she had numbness in her legs and had trouble feeling them.[34] After further questioning, Appellant said she was able to walk, but did not want to return to training while she was still injured due to the risk of re-injury.[35]

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[29] J.A. 607-08.
[30] J.A. 608-12.
[31] J.A. 398, 617.
[32] J.A. 539.
[33] J.A. 540-41.
[34] J.A. 546.
[35] J.A. 551, 553.

D. NCIS subsequently informed Appellant's SVC that Appellant had no right to his presence at the second interview about her allegations.

A week later, the Senior Trial Counsel notified Appellant's SVC that NCIS had re-interviewed Appellant about her allegations without his knowledge, which prompted the SVC to email NCIS: "I would like to know why I was not informed that she was being interviewed and given the opportunity to be present."[36] NCIS replied that Appellant "was interviewed as a subject under a CCN [case control number] different from the case wherein you were assigned as her [SVC]. As such, [Appellant] had no right to have a [SVC] present as a [SVC] is only offered to certain victims of crime."[37]

At the lower court, the Government conceded that Appellant's SVC represented Appellant continuously before, during, and after her second interview.[38]

E. The Military Judge denied Appellant's suppression motion orally from the bench.

When the Defense moved to suppress Appellant's statements to NCIS on various grounds, the Military Judge denied the motion orally from the bench.[39] Despite the six different, discrete issues raised in the motion, the Military Judge's

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[36] J.A. 958.
[37] J.A. 958.
[38] J.A. 4.
[39] J.A. 76.

ruling spans only three transcribed pages and includes just over one page of legal analysis.[40] The Military Judge's findings of fact and conclusions of law do not address four of the six issues raised in the motion, including Appellant's argument that NCIS violated her statutory right to the presence of her SVC during the second interview.[41]

Summary of Argument

This Court should find the lower court erred only in declining to set aside Appellant's conviction for malingering, due to the prejudice caused by the erroneous admission of her second NCIS interview. 10 U.S.C. § 1044e's plain language confers a right for an alleged victim who reports a sex-related offense to be notified of the availability of an SVC prior to questioning about that report and to the presence of an SVC during such questioning. Appellant's statements during her second interview were obtained in violation of that statutory right. This amounts to a Due Process violation because: (1) the statute confers a right and benefit to Appellant and is not solely for the internal regulation of government conduct; (2) the Due Process Clause is implicated because of reasonable reliance on the statutory right; and (3) Appellant suffered substantially because of the statutory violation. Thus, Appellant's statements during her second interview were

[40] J.A. 76-80, 508-19.
[41] J.A. 76-80, 508-19.

inadmissible because any statements obtained in violation of the Due Process Clause are inadmissible under Military Rule of Evidence (MRE) 304(a)(1)(A). The Military Judge abused his discretion because his ruling was devoid of any analysis of this raised issue.

Suppression of the statements is further warranted under the exclusionary rule due to the willful, intentional, and systemic efforts not only to violate Appellant's statutory rights, but to create the opportunity to isolate Appellant from her SVC to extract incriminating statements. And there is military precedent for application of the exclusionary rule to evidence obtained in violation of military regulations, which are hierarchically below statutory law. Finally, the erroneous admission of this evidence was not harmless beyond a reasonable doubt to the malingering conviction, as it bore materially on the essential element of feigning physical disablement.

Argument

I.

The lower court did not err in holding that Appellant was entitled to 10 U.S.C. § 1044e rights when NCIS re-interviewed her about her allegations.

Standard of Review

This Court reviews questions of statutory interpretation *de novo*.[42]

Analysis

A. Under 10 U.S.C. § 1044e, alleged victims have the right to have their SVC present at, and to be notified of that right prior to, interviews by military law enforcement about the alleged sex-related offense.

Congress enacted 10 U.S.C. § 1044e(c) to create an attorney-client relationship between a victim and an SVC.[43] This relationship consists of legal consultation, assistance, and *representation*.[44] The statute authorizes the SVC to "*represent*[] the victim at *any proceeding* in connection with the *reporting* [and] *military investigation* . . . of the alleged sex-related offense."[45] It also authorizes "legal 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"[46] and "legal consultation

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[42] *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023).
[43] 10 U.S.C. § 1044e(c) (2024)
[44] 10 U.S.C. § 1044e(b) (2024) (emphasis added).
[45] 10 U.S.C. § 1044e(b)(6) (2024) (emphasis added).
[46] 10 U.S.C. § 1044e(b)(1) (2024) (emphasis added).

and assistance . . . in *any proceedings* of the military justice process in which a victim can participate as a witness *or other party*."[47]

In interpreting such statutory language, military courts "apply traditional canons of statutory construction."[48] "Statutory construction begins with a look at the plain language of a rule."[49] "[T]he plain language of a statute will control unless it leads to an absurd result."[50]

The plain language of 10 U.S.C. § 1044e(b)(6) supports that Appellant's second NCIS interview falls within the ambit of "*any proceeding* in connection with the *reporting* [and] *military investigation* . . . of the alleged sex-related offense," at which the statute further authorizes the SVC to "*represent*[] the victim."[51] The key statutory terms at issue here are "representing" and "any proceedings," the latter of which Congress chose to use three times in the same subsection.[52] These terms are defined, *inter alia*, as follows:

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[47] 10 U.S.C. § 1044e(b)(8)(B) (2024) (emphasis added).
[48] *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).
[49] *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989)).
[50] *King*, 71 M.J. at 52 (citing *Lewis*, 65 M.J. at 88).
[51] 10 U.S.C. § 1044e(b)(6) (2024) (emphasis added).
[52] 10 U.S.C. § 1044e(b)(5)(B), (6), (8)(B) (2024).

	Black's Law Dictionary[53]	American Heritage Dictionary[54]
"representation" or "represent"	"[t]he act or an instance of standing for or acting on behalf of another, esp. by a lawyer on behalf of a client"[55]	"[t]o serve as a delegate or agent for"[56]
"proceeding"	"[a]n act or step that is part of a larger action"[57]	"[a] course of action; a procedure" [58]

Appellant's second interview by NCIS falls within these definitions because it was a course of action—i.e., an act or step that is part of a larger action—that was "in connection with the *reporting* [and] *military investigation* . . . of the alleged sex-related offense."[59]

This interpretation also has contextual support. As this Court has stated, the meaning of a statute "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

[53] Black's Law Dictionary is the "preeminent source for definitions of legal terms and phrases." *United States v. Schmidt*, 82 M.J. 68, 75-76 (C.A.A.F. 2022).
[54] While not dispositive, "when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may also be consulted." *Id.*
[55] *Representation*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[56] *Represent*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2018).
[57] *Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[58] *Proceeding*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2018).
[59] 10 U.S.C. § 1044e(b)(6) (2024) (emphasis added).

whole."[60] Here, Congress chose to use the sole modifier "any" for "proceedings," whereas it chose additional modifiers for "any *criminal* proceedings" and "any *resulting military justice* proceedings" elsewhere within the same subsection.[61] The fact that Congress could have further modified the term "any proceeding" (as it did elsewhere), but elected not to in 10 U.S.C. §§ 1044e(b)(6) and 1044e(b)(8)(B), supports that the term should be interpreted in the most general way possible.

Such an interpretation is also consistent with the presumption of consistent usage, a canon of statutory construction whereby "a material variation in terms suggests a variation in meaning."[62] And it does not render the term ambiguous, since "a word or phrase is not ambiguous just because it has a broad general meaning under the *generalia verba sunt generaliter intelligenda* canon of statutory construction."[63] Instead, under that canon, "[g]eneral terms are to be given their general meaning."[64]

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[60] *Schmidt*, 82 M.J. at 75-76 (the meaning of a statute "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").
[61] 10 U.S.C. § 1044e(b)(10), (b)(10)(C) (2024) (respectively).
[62] SCALIA & GARNER, at 170; *see, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (internal quotations omitted)).
[63] *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 (9th Cir. 2016) (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)).
[64] SCALIA & GARNER, at 101.

Nor does this interpretation lead to an absurd result. An attorney cannot "stand[] for or act[] on behalf of"[65] their clients if they are kept in the dark by law enforcement, who know of their attorney-client relationship and yet consciously decide not to notify them about follow-up interviews "in connection with the *reporting* [and] *military investigation* . . . of the alleged sex-related offense."[66]

This interpretation is also consistent with the statute's legislative history.[67] A review of the congressional record and committee proceedings demonstrate bipartisan support for passage of 10 U.S.C. § 1044e to address underreporting of sexual assaults in the military and mitigate retaliation for coming forward.[68] As Senator Kelly Ayotte stated on the Senate floor, "victims of sexual assault will actually now have their own lawyer, someone to represent them and their interests, to know that if they come forward there is someone *looking out for them*. That is one of the provisions contained in this Defense authorization bill, to ensure that every victim will have someone who *stands for them*."[69]

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[65] *Representation*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[66] 10 U.S.C. § 1044e(b)(6) (2024) (emphasis added).
[67] This Court should not consider legislative history unless it considers the statute's plain language ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019) (explaining that consideration of the plain language alongside legislative history without first making a determination that the language is unclear is a "relic from a bygone era of statutory construction").
[68] Brief of Amicus Curiae in Support of Neither Party at 6-14 [hereinafter BU Amicus Curiae Br.].
[69] 159 CONG. REC. S8146 (daily ed. Nov. 19, 2013) (statement of Sen. Kelly Ayotte) (emphasis added).

Additionally, except in "exigent circumstances," 10 U.S.C. § 1044e(f)(2) mandates that "notice of the availability of a Special Victim's Counsel *shall* be provided to an individual described in subsection (a)(2) [i.e., an alleged victim] before any military criminal investigator . . . interviews, or requests *any* statement from, the individual regarding the alleged sex-related offense."[70] This provision is further indicia within the plain language of 10 U.S.C. § 1044e that Congress intended for alleged victims to have their SVC present at *any* NCIS interview regarding their allegations, regardless of NCIS's subjective belief as to their truth.

To interpret the statute otherwise would render the provision a nullity since there is no other logical purpose for Congress to require such notification other than to have SVC present while military criminal investigators interview alleged victims. The canon of *ut res magis valeat quam pereat* advises against such an interpretation, for the rule "does not require an interpretation which defeats the very object of the law."[71] Put another way, "an interpretation that validates outweighs one that invalidates."[72]

Likewise, under the harmonious-reading canon, 10 U.S.C. §§ 1044e(b)(6) and 1044e(b)(8)(B) should be read to confer a right to alleged victims to have SVC present when military criminal investigators question them. Otherwise, 10 U.S.C.

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[70] 10 U.S.C. § 1044e(f)(2) (2024) (emphasis added).
[71] *Clark v. Barnard*, 108 U.S. 436, 461 (1883).
[72] SCALIA & GARNER, at 66.

§§ 1044e(b)(6) and 1044e(b)(8)(B) would contradict 10 U.S.C. § 1044e(f)(2), which requires notice regarding the availability of SVC before a military criminal investigator requests "any statement" from an alleged victim "regarding the alleged sex-related offense." "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."[73]

Nor is this reading of the statute *overly* broad, as the Government asserts.[74] Rather, the scope and limitation within the plain meaning of the statute is clear: the right to representation by SVC and notice as to SVC's availability both apply when the proceeding/questioning concerns "the alleged sex-related offense."[75]

The Government is thus mistaken in asserting that NCIS was relieved from this statutorily mandated notification because "Appellant already had [SVC] and thus knew that the Counsel was available to her."[76] Aside from assuming facts not in the Record, this position ignores the fact that one of the last things the NCIS agent told Appellant at her first interview was, "I may reach out to you again, it's not likely. But what I'll do is I'll go through your VLC [SVC] . . . ."[77] At no point

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[73] *Id.* at 180; *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (statutes are "to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout").
[74] *See* Gov't Br. at 24.
[75] 10 U.S.C. §§ 1044e(b)(6), (f)(2) (2024).
[76] Gov't Br. at 25.
[77] J.A. 556. SVCs in the Naval Service are called "Victim's Legal Counsel (VLC)."

during Appellant's second interview did that same NCIS agent disabuse her of that notion. Rather, he left her free to assume that her SVC had been consulted and approved of the interview, undermining the entire intent behind the statute "to ensure that every victim will have someone who *stands for them*."[78]

i. Article 6b is inapplicable to the interpretation of 10 U.S.C. § 1044e.

The Government is misguided in suggesting that because Article 6b is what controls victims' rights in a court-martial, 10 U.S.C. § 1044e does not apply in this case because it is not part of the UCMJ.[79] This argument overlooks several aspects of both statutory schemes.

First, in terms of statutory placement, the statute adjacent to 10 U.S.C. § 1044e establishes the policies governing the new Office of Special Trial Counsel (OSTC).[80] The fact that these OSTC policies are not within the UCMJ does not make them any less applicable to courts-martial.

Second, Article 6b does not address when and how victims can obtain SVC for use in military justice proceedings, a right that comes solely from 10 U.S.C. §

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[78] 159 CONG. REC. S8146 (daily ed. Nov. 19, 2013) (statement of Sen. Kelly Ayotte) (emphasis added).
[79] *See* Gov't Br. at 25; *see also id.* at 22 ("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.").
[80] 10 U.S.C. § 1044f (2024).

1044e. Thus, the plain language of 10 U.S.C. § 1044e demonstrates Congress's intent that it apply in military justice proceedings.

Third, Article 6b only enumerates procedural rights and authorities *during* a court-martial, whereas 10 U.S.C. § 1044e's scope is more broadly drawn to encompass rights during both the investigatory stage *and* courts-martial. Indeed, 10 U.S.C. § 1044e creates rights that exist even when no investigation occurs, such as entitling an alleged victim to SVC when the report of the alleged sex-related offense is restricted.[81]

Thus, accepting the Government's invitation to hold Article 6b contains the *only* rights applicable to alleged victims would lead to an absurd result. Because the violation of Appellant's statutory rights occurred in connection with the military investigation of the alleged sex-related offense she reported, the rights 10 U.S.C. § 1044e confers plainly apply.

[81] 10 U.S.C. § 1044e(a)(1), (f)(3) (2024).

ii. The SVC was actively involved in representing Appellant in connection with the alleged sex-related offense at the time of her second interview.

Finally, it is undisputed that Appellant's SVC was actively involved in representing her both before, during, and after the second interview at issue, including being in regular contact with NCIS.[82] In fact, when the SVC discovered Appellant had been interviewed without his knowledge, he sent a pointed email to NCIS stating, "I would like to know why I was not informed that she was being interviewed and given the opportunity to be present."[83]

Contrary to the Government's assertions, these actions are consistent with the scope of representation contemplated by 10 U.S.C. § 1044e, which protects alleged victims by granting them representation by counsel throughout the military justice process. Because Appellant's SVC was intentionally excluded from her second NCIS interview—which addressed the very same "alleged sex-related offense" Appellant had reported during her first interview—and because NCIS did not notify her of the availability of an SVC at that interview, Appellant's statutory right to have her SVC represent her at that interview was violated.

[82] J.A. 4, 951-52; J.A. 591 (SVC submitting Appellant's preferences on her behalf to the Sexual Assault Initial Disposition Authority over three months after the interrogation).
[83] J.A. 958.

B. The Government's interpretation of 10 U.S.C. § 1044e disregards its plain language and would set a dangerous and untenable precedent.

Despite the statute's plain, mandatory language, the Government would have this Court find field-level law enforcement agents are the arbiters who decide when this statutory right to counsel applies: such that once the NCIS agent "no longer *considered* [Appellant] a victim for investigative purposes," then she "had no claim to victim status" because "her allegations . . . [were] determined by law enforcement to be unfounded."[84] This position mirrors the position NCIS took in this case when NCIS informed the SVC that "[Appellant] was interviewed as a subject under a CCN [case control number] different from the case wherein you were assigned as her [SVC]. As such, [Appellant] had no right to have a [SVC] present as a [SVC] is only offered to certain victims of crime."[85]

The Government cites no authority for the proposition that an NCIS agent can eliminate a statutory right to counsel by changing the number on a case file. Rather, this view undermines the statute's plain language and makes "the term 'alleged' used throughout the statute . . . superfluous."[86] It also undermines the very protection that Congress afforded to alleged victims in the first place.

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[84] *See* Govt's Br. at 32 (emphasis added).
[85] J.A. 958.
[86] BU Amicus Curiae Br. at 17.

The Government's position not only presents a dangerous governmental overreach contrary to the statute's explicit mandates, but also ignores that judicial deference "is at its apogee when reviewing congressional decision-making" in this area of the "rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."[87] The statutory right to SVC representation exists for a reason, and nowhere does the statute suggest that the investigating NCIS agent gets to determine which "victims" it applies to and which it does not.

Nor is the Government correct that this question should solely be viewed through the Fifth Amendment right to counsel, when the statute's mandated designation of an SVC for a victim is more analogous to the attachment of the Sixth Amendment right to counsel. Under the Sixth Amendment, "once the right [to counsel] has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium between [the suspect] and the State' during the interrogation."[88] "[T]his guarantee includes the State's affirmative obligation *not to act in a manner that circumvents the protections accorded the accused* by invoking this right."[89] Indeed, "knowing exploitation by the State of an

[87] *Weiss v. United States*, 510 U.S. 163, 177 (1994).
[88] *Moran v. Burbine*, 474 U.S. 159, 428 (1986) (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985)).
[89] *Moulton*, 474 U.S. at 176 (emphasis added).

opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."[90]

Whereas an accused's constitutional right to counsel under the Sixth Amendment attaches upon preferral of charges,[91] an alleged victim's statutory right to counsel under 10 U.S.C. § 1044e attaches upon the "report" of the "alleged sex-related offense."[92] Since 10 U.S.C. § 1044e is designed to offer victims a similar right to rely on the representation of counsel during interactions between her and the Government, an NCIS agent's unilateral decision to circumvent an SVC violates the statute's right to the assistance of that counsel.

Nor does 10 U.S.C. § 1044e condition its applicability on the outcome of an investigation or other military justice proceeding, as the Government suggests. It applies to an individual "who is the victim of an *alleged* sex-related offense, regardless of whether the report of that offense is restricted or unrestricted."[93] This makes the Government's assertion that "law enforcement told Appellant's command, the sexual response coordinator, and her victim advocate that the investigation into her allegation was closed," at best, irrelevant.[94]

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[90] *Id.*
[91] *United States v. Flanner*, 85 M.J. 163, 176 (C.A.A.F. 2024)).
[92] 10 U.S.C. § 1044e(a)(1).
[93] 10 U.S.C. § 1044e(a)(1) (emphasis added).
[94] Govt's Br. at 32.

Rather, the Government's actions in the week leading up to the second interview reflect a deceptive purpose: to subvert Appellant's relationship with her SVC and ensure he remained ignorant of their plan to re-interview her. As the lower court noted, *both parties agree* that Appellant's attorney-client relationship with her SVC was *still ongoing* at the time of the second interview.[95] However, the responses from both NCIS and the Trial Counsel to the SVC's emails the week before that second interview were conspicuously innocent-sounding as to the status of the case and when and whether a disposition report would be issued.[96] Indeed, the substance and tone of those emails, sent a week prior to the second interview, conveyed to the SVC that there was no reason to speak with his client. And that tone notably shifted when, after the second interview, the NCIS agent sternly insisted to the SVC that he did not represent her.[97]

The fact that NCIS had internally decided to close one investigative file and open another one does not change the fact that Appellant was still entitled to notice of the availability of, and representation by, her SVC at an interview where a

[95] J.A. 4.
[96] J.A. 954 ("The SJA is drafting a SADR [Sexual Assault Disposition Report] . . . . We closed on our end prior to receipt. Will that help you once signed?").
[97] J.A. 958 ("Rct DEREMER had no right to have a [SVC] present as a [SVC] is only offered to certain victims of crime.").

military criminal investigator was requesting a statement "regarding the alleged sex-related offense" she had reported.[98]

The Government's position—that "this Court should not extend [the statute's] coverage in this case, in which Appellant was ultimately convicted for falsely claiming to be a victim"[99]—seeks to retroactively turn the statute on its head. By the Government's logic, a subsequent court action can determine whether a victim had a statutory right to counsel months earlier. But legal rights don't work that way; they work forward from the present, not backward from the future.

If this Court accepts Appellant's premise that 10 U.S.C. § 1044e confers a right for alleged victims to have their SVC present when being interviewed about the alleged sex-related offenses they have reported, then it must apply that law equally and indiscriminately *as of the time of the interview*. This means that Appellant had a right to representation by her SVC during the second NCIS interview about the allegations she had reported, irrespective of the outcome of her subsequent court-martial.

Conclusion

This Court should affirm the lower court's ruling on this issue.

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[98] 10 U.S.C. § 1044e(f)(2).
[99] Govt's Br. at 33.

II.

The lower court did not err in finding the second interview by NCIS violated Appellant's due process rights and resulted in an involuntary statement.

Standard of Review

The denial of a suppression motion is reviewed for an abuse of discretion.[100] A military judge abuses his discretion when he: "(1) predicates a ruling on findings of fact that are not supported by the evidence of record[;]" (2) "uses incorrect legal principles[;]" (3) "applies correct legal principles to the facts in a way that is clearly unreasonable[;]" or (4) "fails to consider important facts."[101] Moreover, when a military judge "fails to place his findings and analysis on the record, less deference will be accorded" because the Court does not "have the benefit of the military judge's legal reasoning in determining whether he abused his discretion."[102]

Analysis

Upon an accused's timely motion, "an involuntary statement from the accused . . . is inadmissible at trial . . . ."[103] "[A] statement obtained in violation of

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[100] *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (citing *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008)).
[101] *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).
[102] *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020) (citations omitted).
[103] MCM, MIL. R. EVID. 304(a).

the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement" is an "involuntary statement" *per se*.[104]

A. A statement obtained in violation of the Due Process Clause is an "involuntary statement" under MRE 304(a)(1)(A).

When the lower court held the Government's violation of 10 U.S.C. § 1044e was a "due process violation, and [that it] render[ed] any statement obtained involuntary under Mil. R. Evid. 304," the court applied the strict definition of an "involuntary statement" under MRE 304(a)(1)(A).[105] That Rule defines an involuntary statement in a number of ways, to include a statement obtained through a violation of the self-incrimination privilege; a violation of Article 31, UCMJ; the use of coercion, unlawful influence, or unlawful inducement; or a due process violation.[106] Here, the lower court correctly found Appellant's statements during her second NCIS interview were involuntary because they were obtained in violation of due process.

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[104] *Id.*, MIL. R. EVID. 304(a)(1)(A).
[105] J.A. 5, 5 n.21, 11.
[106] MCM, MIL. R. EVID. 304(a)(1)(A).

B. The lower court's finding that the violation of Appellant's statutory rights amounted to a Due Process violation is consistent with well-established legal principles.

In *United States v. Caceres*, when deciding whether to apply the exclusionary rule to statements obtained in violation of federal agency regulations, the Supreme Court stated, "the Due Process Clause is implicated [when] an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency."[107] As more fully explained in Section III.A., *infra*, this case presents precisely such a situation: where Appellant relied on statutory rights given to her by Congress for her benefit (not solely to regulate internal governmental conduct) and she suffered substantially when the agency violated those rights by using the unlawfully obtained evidence to secure a criminal conviction against her.[108]

The Supreme Court's holding in *Caceres* is consistent with subsequent Supreme Court case law reaffirming the principle that a legislature can create a constitutionally protected liberty interest through enactment of a statute, as discussed by *amicus curiae*.[109] Notably, the Government declined to mention or

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[107] *United States v. Caceres*, 440 U.S. 741, 752-53 (1979).
[108] *See* Section III.A., *infra*.
[109] BU Amicus Curiae Br. at 26-27 (citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies[.]"); *Kerry v. Din*, 576 U.S. 86, 98 (2015) (plurality opinion) (the "'expectation or interest' must be 'a present and legally

address this pivotal Supreme Court case or its subsequent development in the case law, which is both applicable and decisive on this issue.[110]

Instead, the Government invites this Court to apply *United States v. Vazquez* and *United States v. Finch* to find that the rights to which Appellant was entitled at her second NCIS interview are limited to those contained in the Constitution, the UCMJ, and the Manual for Courts-Martial.[111] This argument is misguided for three reasons. First, it overlooks the Supreme Court precedent discussed above, holding that in some circumstances statutes can create constitutionally protected liberty interests. Second, it assumes this Court could have contemplated the legal issue Appellant's case presents when it decided *Vazquez* or *Finch*, both of which predated the enactment of 10 U.S.C. § 1044e on December 26, 2013.[112] Moreover, *Vazquez* and *Finch* are distinguishable for the same reason. In those cases, the

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recognized substantive entitlement[,]' rather than a 'judicially unenforceable substantial hope[.]'"); *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) ("[W]e are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest."), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)).

[110] *See* Govt's Br. at 42-49.

[111] *See id.* at 34, 47 (citing *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013)); 44-45 (citing *United States v. Finch*, 64 M.J. 118, 124 (C.A.A.F. 2006)).

[112] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, Div. A, Title XVII, Subtitle B, § 1716(a)(1), 127 Stat. 672, 966-69 (Dec. 26, 2013).

appellant asked this Court to find that an *unwritten* constitutional right exists.[113] Here, Appellant is asking this Court to acknowledge and enforce a *written* right explicitly conveyed in a statute. And third, as the lower court itself reasoned, "[i]t is axiomatic that as much as 'a change in a rule cannot supplant a statute,' the absence of a change cannot supplant a *new* statute."[114]

C. The Government's Answer discusses other Fifth Amendment legal theories that the lower court did not reach and thus are beyond the scope of the certified questions.

This Court "may act only with respect to . . . a decision, judgment, or order by a military judge *as affirmed or set aside* as incorrect in law by the Court of Criminal Appeals," and in a JAG-certified case, "only with respect to the *issues raised by* [the JAG]."[115] The certified question at issue here asks whether the lower court erred in finding that Appellant's Due Process rights were violated, rendering any resulting admissions involuntary under MRE 304(a)(1)(A).[116] The lower court confined its ruling to the violation of 10 U.S.C. § 1044e.[117] The scope of the certified question is thus confined to the lower court's rationale—i.e., the JAG did

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[113] *Vazquez*, 72 M.J. at 19 (holding no "military due process" right existed "to have a panel of members who have all heard and seen the same material evidence"); *Finch*, 64 M.J. at 123-25 (holding no constitutional requirement to notify an accused's counsel prior to questioning because M.R.E. 305(e) changed and no longer required such notification).
[114] J.A. 10 (quoting *Finch*, 64 M.J. at 124) (emphasis added).
[115] 10 U.S.C. § 867(c)(1)(B), (2) (2024) (emphasis added).
[116] MCM, MIL. R. EVID. 304(a)(1)(A).
[117] J.A. 5-6, 10-11.

not certify, and this Court cannot rule on, other Due Process arguments that the lower court declined to reach.

For clarity, Appellant briefed various other issues in detail to the lower court, arguing: (1) the Military Judge abused his discretion by analyzing only whether Appellant voluntarily waived her rights and not whether she also *knowingly and intelligently* did so, as required by *United States v. Mott* and *Edwards v. Arizona*; (2) Appellant did not knowingly and intelligently waive her rights due to government-created "confusion;" (3) Appellant's rights waiver was not voluntary because unconstitutional trickery was used to obtain the rights waiver; (4) Appellant's "confession" itself was involuntary because her will was overborne by the NCIS agent's threat to prosecute her if she did not convince him she was being truthful; (5) Contrary to the Government's claim, Appellant's colorable assertion of custody in her trial motion preserved that issue; and (6) Even if a custodial interrogation claim is waived, that does not vitiate any of Appellant's theories of suppression.[118]

Accordingly, while Appellant squarely raised the other issues briefed by the Government—whether Appellant's waiver of rights in and of itself was knowing, intelligent, and voluntary and whether her admissions themselves were voluntary—the lower court declined to reach them because it ruled that the

[118] J.A. 760-98, 1048-64.

statutory violation was a Due Process violation.[119] This Court's review of the case should be confined to that issue, it should disregard the Government's irrelevant briefing of these issues, and confine its ruling to matters of law contained in the lower court's ruling.

In other words, if this Court reverses the lower court's ruling on the suppression issue for any reason, it should not decide the six above-listed issues in the first instance in this appeal. Rather, it should remand the case and direct the lower court to rule in the first instance on these other Fifth Amendment issues, which Appellant squarely raised and addressed to that court.

Conclusion

This Court should affirm the lower court's ruling on this issue.

[119] J.A. 5-6, 10-11.

III.

The lower court did not err in holding that suppression is an appropriate remedy for a violation of 10 U.S.C. § 1044e.

Standard of Review

Appellant concurs with the Government that the standard of review for this certified issue is *de novo*.[120]

Analysis

The lower court correctly concluded that the exclusionary rule is the appropriate remedy here because: (1) the statute confers a right and benefit to the accused and is not solely for the internal regulation of government conduct; (2) the Due Process Clause is implicated because of reasonable reliance on the statutory right; and (3) Appellant suffered substantially because of the statutory violation.

While the Fifth Amendment does not automatically guarantee the presence of a known counsel at law enforcement interviews,[121] here NCIS violated Appellant's statutory right under 10 U.S.C. § 1044e by excluding her known SVC from the second interview and not informing her about the availability of her SVC

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[120] Govt's Br. at 49 (citing *United States v. Willman*, 81 M.J. 355, 357 (C.A.A.F. 2021)).

[121] *See, e.g.*, *Moran*, 475 U.S. at 426-27 (holding that police failure to inform suspect of his counsel's efforts to reach him, and misinforming counsel that suspect would not be questioned did not invalidate rights waiver or due process).

prior to questioning that day. Appellant's statutory right to that attorney is what controls because "[n]ormal rules of statutory construction provide that the highest source authority will be paramount, *unless* a lower source creates rules that are constitutional and provide greater rights for the individual . . . ."[122] As the Supreme Court has consistently held, judicial deference "is at its apogee when reviewing congressional decision making" in the area of "rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."[123]

The Common Law has also long recognized that "it is a general and *indisputable* rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[124] In other words, "every right, when withheld, must have a remedy, and every injury its proper redress."[125] A court-martial is "'in the strictest sense" a 'court of law and justice'—'bound, like any court, by the fundamental principles of law' . . . ."[126]

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[122] *United States v. Lopez*, 35 M.J. 35, 39 (C.A.A.F. 1992) (emphasis added).
[123] *Weiss v. United States*, 510 U.S. 163, 177 (1994) (citations omitted).
[124] *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23) (emphasis added).
[125] *Id*. (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *109) (emphasis added).
[126] *Ortiz v. United States*, 585 U.S. 427, 440 (2018) (quoting W. WINTHROP, MILITARY LAW AND PRECEDENTS 48 at 54 (2d ed. 1920)).

A. The lower court's application of the exclusionary rule to remedy a statutory rights violation is consistent with the precedents of both the Supreme Court and this Court.

The lower court held the NCIS agent's "questioning of [the] alleged victim, about related matters [to her alleged sex-related offense], without affording the counsel reasonable opportunity to be present is a due process violation, and renders any statement obtained involuntary under Mil. R. Evid. 304."[127] That Rule defines an "involuntary statement" as one "obtained in violation of . . . the Due Process Clause of the Fifth Amendment."[128]

The lower court's connection of a statutory violation to a due process violation and to the exclusionary rule is supported by key Supreme Court precedents that inform the exclusionary rule's application to violations of statutes and regulations: *United States v. Caceres*[129] and *Yellin v. United States*.[130]

In *Caceres*, the Supreme Court addressed whether the exclusionary rule should be applied to suppress surreptitiously-recorded statements of a defendant made to Internal Revenue Service (IRS) agents in violation of internal IRS regulations that required the Department of Justice's prior approval for such recording.[131] While the Court ultimately denied relief in *Caceres*, this case is

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[127] J.A. 11.
[128] MCM, MIL. R. EVID. 304(a)(1)(A).
[129] *United States v. Caceres*, 440 U.S. 741 (1979).
[130] *Yellin v. United States*, 374 U.S. 109 (1963).
[131] *Caceres*, 440 U.S. at 754-55.

readily distinguishable. First, NCIS's compliance with the rule here is mandated by a federal statute, 10 U.S.C. § 1044e, not just an internal agency regulation.[132] Second, unlike in *Caceres*, compliance with 10 U.S.C. § 1044e would have led to different treatment of Appellant because her SVC would have been notified of the re-interview and would have been present to counsel and assist Appellant in invoking her rights, just as Congress envisioned in passing the law.[133] Third, unlike in *Caceres*, nothing in the Record supports that NCIS believed this was an emergency situation justifying a departure from the requirements at issue.[134]

Moreover, and contrary to the Government's characterization of *Caceres* in response to the Defense's pretrial motion, nowhere in *Caceres* does the Supreme Court create a *per se* bar to applying the exclusionary rule to governmental violations of rules or regulations in the investigation of criminal cases.[135] In fact, the Court specifically left the door open to this in certain situations, stating, "Nor is this a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit

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[132] *See id*. at 749-751.
[133] *See id*. at 752; J.A. 844 (wherein Appellant's SVC includes an unequivocal invocation of her rights pursuant to both the Fifth Amendment and Article 31(b), UCMJ); 159 CONG. REC. S8146 (daily ed. Nov. 19, 2013) (statement of Sen. Kelly Ayotte).
[134] *See Caceres*, 440 U.S. at 752.
[135] *See* J.A. 640.

and has suffered substantially because of their violation by the agency."[136] Indeed, citing *Caceres*, this Court has squarely held that "excluding evidence from a court-martial to remedy a regulatory violation may be appropriate if the alleged violation implicated constitutional or *statutory rights*."[137]

This rationale is also consistent with *Yellin v. United States*, where the Supreme Court reversed a criminal conviction for contempt of Congress because a congressional committee violated its own procedural rule.[138] In *Yellin*, the Court first analyzed whether the rule "was written to provide guidance for the Committee alone . . . [or] designed to confer upon witnesses the right to request an executive session and the right to have the Committee act, either upon that request or on its own, according to the standards set forth in the rule."[139] In deciding that the rule did confer such a procedural right, the Court reversed the conviction because the Committee's practice led the defendant to a "misplaced reliance upon its rules."[140] The Court found it was a "reasonable expectation" "that the Committee actually does what it purports to do" and reasoned that "[t]o foreclose a defense based upon

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[136] *Caceres*, 440 U.S. at 752-53.
[137] *United States v. Guzman*, 52 M.J. 318, 320-21 (C.A.A.F. 2000) (citing *Caceres*, 440 U.S. at 749; *United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992); *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982)) (emphasis added).
[138] *Yellin*, 374 U.S. at 123-24.
[139] *Id.* at 115.
[140] *Id.* at 123.

those rules, simply because the [defendant] was deceived by the Committee's appearance of regularity, is not fair."[141]

Application of the exclusionary rule in this case is consistent with *Yellin*, *Caceres*, and this Court's cases cited above because: (1) the statute at issue confers a right and benefit to Appellant and is not solely for the internal regulation of governmental conduct; (2) the Due Process Clause is implicated because Appellant reasonably relied on the statutory right; and (3) Appellant suffered substantially because of the statutory violation.

First, as discussed above, while 10 U.S.C. § 1044e includes procedures for governmental actors to follow, the statute also confers a right and benefit to alleged victims like Appellant to not only have SVC detailed as their counsel, but to have that counsel represent them "at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense."[142] Thus, the statute does not exist solely to regulate internal government conduct. Rather, as this Court itself has noted, "Special victims counsel represent the victim's interests instead of the government's."[143]

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[141] *Id*.
[142] *See* Section I.A., *supra*.
[143] *United States v. Harrington*, 83 M.J. 408 (C.A.A.F. 2023) (citing 10 U.S.C. § 1044e(c)).

Second, Appellant reasonably relied on this statutory right because she had her SVC present at her first NCIS interview, after which the NCIS agent assured her that he would go through her SVC if he needed to speak to her again.[144] This reasonable reliance on a procedural statutory right implicates the Due Process Clause, as noted in *Caceres*.[145] Additionally, just as in *Yellin*, Appellant had a "reasonable expectation" that NCIS "actually does what it purports to do" and was deceived by NCIS's "appearance of regularity," as was her SVC.[146]

Further, the absurdity of the unwritten NCIS policy that 10 U.S.C. § 1044e ceases to apply whenever an NCIS agent decides it does not apply reinforces the detrimental reliance in this case. When the NCIS agent told Appellant he would contact her through her SVC, he obviously did not tell her: "unless we decide you are lying and then consider you a suspect, in which case we will contact you without informing your SVC because we do not believe your attorney represents you for that." Such a statement seems absurd, irregular, and highly unlikely. But this is precisely what NCIS put in writing in its email to the SVC *after* the second interview—after the damage was done. Thus, the agents misled Appellant about what they would do. This context reflects how Appellant detrimentally relied on the more obvious, common sense interpretation of 10 U.S.C. § 1044e: that her

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[144] J.A. 556.
[145] *Caceres*, 440 U.S. at 752-53.
[146] *See Yellin*, 374 U.S. at 123.

SVC represented her and would be contacted before NCIS asked to speak with her again about the alleged sex-related offense she had reported.

Third, the statutory violation in this case proximately led to Appellant making incriminating statements that were the most important piece of evidence leading to her criminal convictions—thereby causing substantial suffering.[147]

For these reasons and those discussed in Sections II.A. and II.B., *supra*,[148] this Court's analysis need not go further to determine that suppression is required because "a statement obtained in violation of the . . . Due Process Clause of the Fifth Amendment to the United States Constitution . . ." is an "involuntary statement" *per se*, and thus, inadmissible under MRE 304(a)(1)(A).[149] The below subsections, however, provide additional justification for why the exclusionary rule is the appropriate remedy.

B. Military justice precedent supports application of the exclusionary rule where criminal investigators violate military regulations.

As this Court and its predecessors have repeatedly held, "[i]t is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or

[147] *See* J.A. 12 (first paragraph under "Analysis of Prejudice"); Section IV, *infra*.
[148] *See* Sections II.A., II.B., *supra*.
[149] MCM, MIL. R. EVID. 304(a)(1)(A).

interests."[150] In *United States v. Dillard*, the Court of Military Appeals, citing *Caceres*, applied the exclusionary rule to evidence seized in violation of a regional Army regulation.[151] It did the same in *United States v. Hood* when it held a search was illegal because the supporting affidavit from law enforcement violated an Army Regulation.[152]

Military service courts of criminal appeals have reached the same conclusion. In *United States v. Thompson*, for example, the Air Force Court of Military Review applied the exclusionary rule to evidence seized from the appellant's barracks room in violation of an Air Force regulation that "confer[red] upon the individual a new right – the right to counsel in deciding whether or not to consent to the search . . . ."[153] The *Thompson* court held that "a right created by government regulation may be invoked by a party in the protected class" where the regulation at issue "was intended to protect his personal interests."[154]

Similarly, here, 10 U.S.C. § 1044e confers rights upon a protected class: individuals who are "the victim of an *alleged* sex-related offense, regardless of

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[150] *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010) (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980); *United States v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975) (superseded by statute on other grounds)).
[151] *Dillard*, 8 M.J. at 213.
[152] *United States v. Hood*, 7 M.J. 128, 129-30 (C.M.A. 1979).
[153] *United States v. Thompson*, 12 M.J. 993, 997 (A.F.C.M.R. 1982).
[154] *Id.*

whether the report of that offense is restricted or unrestricted."[155] This is why Judge Harrell's dissent from the lower court decision in this case is incorrect in opining that the lower court "legislates a bright-line rule of suppression" for a particular class of people—victims who are appointed military SVCs under 10 U.S.C. § 1044e.[156] It was Congress, not the lower court, that clearly and intentionally conferred the specific statutory rights at issue to a particular class of individuals, to address a specific problem, in response to decades of issues in the military justice system.

While the Government argues that suppression is not an appropriate remedy because "neither the statute nor regulations provide for suppression,"[157] none of the above-discussed cases indicate that the regulations violated contained a remedy. This Court is, just as the lower court was, wholly within its authority to affirm this judicially-created remedy to meaningfully deter law enforcement violation of a servicemember's rights.

[155] 10 U.S.C. § 1044e(a)(1) (emphasis added).
[156] J.A. 29.
[157] Govt's Br. at 50.

C. Exclusion of Appellant's statements is the appropriate remedy for the violation of Appellant's statutory rights in this case.

Regardless of the Due Process implications, application of the exclusionary rule is the appropriate legal remedy for NCIS's violation of Appellant's right to her SVC's presence. As the Supreme Court has explained,

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[158]

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct *which has deprived the defendant of some right*."[159] That is exactly what occurred here.

Indeed, as this Court has emphasized, if the exclusionary rule is not applied after a rights violation in conjunction with a "somewhat sloppy and apathetic investigation," then the court "might well be encouraging unlawful conduct rather than deterring it."[160] Here, the NCIS agent intimidated Appellant's only corroborating witness into changing her account, intentionally isolated Appellant from her counsel, and then threatened her with prosecution to pressure her into

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[158] *Herring v. United States*, 555 U.S. 135, 144 (2009).
[159] *United States v. Leon*, 468 U.S. 897, 919 (1984) (emphasis added).
[160] *United States v. Darnall*, 76 M.J. 326, 332 (C.A.A.F. 2017) (quoting *United States v. Conklin*, 63 M.J. 333, 340 (C.A.A.F. 2006)).

telling him what he wanted to hear. Application of the exclusionary rule would deter the kind of manipulative investigation that led to this rights violation, while instilling a greater degree of care toward the rights of an accused.

The Record also reveals that this NCIS violation of Appellant's statutory counsel rights was not an isolated incident; rather, the SVC chain of command had seen "*a pattern of NCIS deciding clients are lying about their sexual assault and trying to interview them without telling the [SVC]*."[161] This deplorable practice by military law enforcement is exactly the sort of deliberate, culpable, and systemic conduct that the exclusionary rule is designed to deter.

Finally, suppression would deter the deceptive manner in which NCIS responded to Appellant's detailed SVC—knowing full well that they intended to re-interview Appellant. As discussed above, the week prior to the second interview, after NCIS had already decided to consider Appellant a "suspect" as opposed to a "victim," both NCIS and Trial Counsel innocuously responded to the SVC's requests for a status update with benign responses inferring business as usual.[162] NCIS projected a scenario where Appellant's case was closed, that a disposition report would be issued soon, and that there was nothing for the SVC to do in furtherance of his representation of his client. In other words, the emails

[161] J.A. 959 (emphasis added).
[162] J.A. 954-56.

intentionally lulled the SVC into thinking there was no reason to speak with his client—when in fact there was. It is highly unlikely those agents were, as they said, actually working with the staff judge advocate (SJA) on "drafting" a four-page, fillable form disposition report that would not be issued for months.[163] This is because, in reality, they were preparing to re-interview his client to see if she was lying about the alleged sex-related offense she reported, which is precisely what entitled her to SVC representation.

Indeed, among the drop-down options in effect at the time for disposing of an alleged sex-related offense in Block 24 of the fillable Department of Defense Uniform Command Disposition Report (DD Form 3114) is: "False – evidence led to victim being titled for making a false report."[164] NCIS could not have been substantively drafting that form with the SJA yet because they were endeavoring to confirm that disposition rationale through their re-interview of Appellant. In other words, a confession to NCIS for lying about the alleged sex-related offense—which had not yet occurred—would undoubtedly be included in the disposition report and affect the initial disposition authority commander's disposition decision

[163] *See* J.A. 591 (SVC submitting Appellant's disposition preferences in her capacity as a victim to the initial disposition authority in May 2022).
[164] U.S. Dep't of Def., DD Form 3114, Department of Defense Uniform Command Disposition Report (Jan. 2022), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd3114.pdf (last visited Aug. 6, 2025).

of Appellant's alleged sex-related offense (the very legal matter for which the SVC represented Appellant). As it is hard to imagine anything more contrary to the plain text and purpose of 10 U.S.C. § 1044e, the lower court appropriately invoked the exclusionary rule to both deter such conduct and remedy the harm to the right it had violated.

Conclusion

This Court should affirm the lower court's ruling on this issue.

IV.

The lower court erred by affirming Appellant's conviction for malingering despite holding her confession to NCIS should have been suppressed.

Standard of Review

Under both constitutional and nonconstitutional evidentiary errors, this Court reviews prejudice determinations *de novo*.[165]

Analysis

A. The lower court applied the wrong legal standard in its prejudice analysis.

As discussed above, because the lower court correctly held NCIS's actions violated constitutional Due Process,[166] the applicable prejudice standard is harmlessness beyond a reasonable doubt.[167] "[H]armless beyond a reasonable doubt" means there is no "reasonable *possibility* that the evidence complained of *might* have contributed to the conviction."[168] The Supreme Court framed the standard similarly: "it must be determined whether the [Government] has met its

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[165] *United States v. Roberson*, 65 M.J. 43, 47-48 (C.A.A.F. 2007) (reviewing for nonconstitutional harmless error); *United States v. Cano*, 61 M.J. 74, 76 (C.A.A.F. 2005) (reviewing for harmlessness beyond a reasonable doubt).
[166] J.A. 11.
[167] *Mott*, 72 M.J. at 332; (citing *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009))
[168] *Id.* (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007); *see also Chapman v. California*, 386 U.S. 18, 24 (1967)) (emphasis added).

burden of demonstrating that the admission of the confession . . . did not *contribute* to [the] conviction."[169]

Here, the lower court erred by not assessing whether there is "a reasonable *possibility* that the evidence complained of [Appellant's admissions to NCIS] *might* have contributed to the conviction" for malingering.[170] Instead, the standard the court used was that it was "convinced, beyond a reasonable doubt," that even without her admissions to NCIS "Appellant would have been convicted of" the malingering charge.[171] It further stated that "[i]n the absence of the evidence that should have been suppressed, the testimony of medical personnel and independent lay witnesses *was sufficient to obtain and sustain a conviction* on the malingering charge."[172]

These standards for prejudice employed by the lower court are different than the one required by this Court and the Supreme Court, which assesses whether the erroneously admitted evidence *might* have contributed to the conviction—not whether there is other evidence to support it. And because the standard the lower court used is erroneous, so is the conclusion based on it.

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[169] *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (emphasis added).
[170] *Mott*, 72 M.J. at 332.
[171] J.A. 13.
[172] *Id.* (emphasis added).

Indeed, the error is particularly egregious in this case, where the erroneously admitted evidence is Appellant's own (albeit false) *confession*. Even when they apply the correct test for prejudice, appellate courts are "require[d] . . . to exercise *extreme caution* before determining that the admission of the confession at trial was harmless."[173] After all, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[174] This case is no exception. After getting pressured by NCIS into recanting her sexual assault allegation (for which she was charged with making a false official statement), Appellant was then pressured into recanting her allegation of needing a wheelchair (for which she was charged with malingering).

Among the elements of malingering, the Government must prove beyond a reasonable doubt that "the accused *feigned* . . . physical disablement . . . ."[175] It is difficult to conceive of better evidence that *might* have contributed to a conviction for malingering than the suspect admitting to NCIS that she does not really need the wheelchair she is in.[176]

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[173] *Mott*, 72 M.J. at 332 (quoting *Fulminante*, 499 U.S. at 296) (emphasis added).
[174] *United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002).
[175] MCM, pt. IV, ¶7.b.(2).
[176] J.A. 626, 631, 633.

B. The NMCCA failed to consider important facts in its prejudice analysis.

In holding the admission of Appellant's confession caused no prejudice, the lower court stated, "the Government presented compelling and overwhelming medical documentation and testimony . . . that proved beyond a reasonable doubt each and every element of the Article 83 violation [malingering]."[177] But in reaching its conclusion to affirm Appellant's conviction, the court overlooked crucial facts in its prejudice analysis that rebut the element that she feigned physical disablement.

At trial, three government medical experts testified that they could not prove someone was not in pain or rule out psychological factors.[178] One of those experts, Dr. Bravo, who examined and treated Appellant during the period in question, testified that her symptoms and circumstances were consistent with Conversion Disorder, a legitimate and common medical condition in which people truly believe they are experiencing the symptoms even when they actually are not.[179] The facts established in the Record align with Dr. Bravo's testimony about Conversion Disorder. The following chart illustrates this:

[177] J.A. 12.
[178] J.A. 112, 133, 136-37, 151, 157, 229, 239-40.
[179] J.A. 215-18, 229-34. Note: "Dr. Bravo" is a pseudonym for the witness's name.

Dr. Bravo's Testimony	Facts from the Record
A common contributing factor to Conversion Disorder is depression anxiety.[180]	Appellant had deteriorating mental health ultimately resulting in an intent to commit suicide.[181]
A contributing factor to Conversion Disorder can be a history of sexual or non-sexual abuse in childhood.[182]	Appellant was raped when she was five years old, never told anyone, and also had abusive parents.[183]
Weakness in one or more extremities can be a symptom of Conversion Disorder.[184]	Appellant presented with lower extremity numbness and weakness.[185]
People with Conversion Disorder can have a fluctuating cause of symptomatology.[186]	Appellant demonstrated fluctuating symptoms.[187]
Recovery times for Conversion Disorder can take days, weeks, months, and even some patients never recover.[188]	Appellant showed improvement within a matter of weeks.[189]

[180] J.A. 230.
[181] J.A. 731, 741. While this particular evidence was not before the trier of fact, the Defense could have elicited this information at trial as part of a defense strategy related to Conversion Disorder, if not for the highly incriminating admissions Appellant made in the interrogation at issue that undercut that strategy.
[182] J.A. 230.
[183] J.A. 308, 393.
[184] J.A. 232.
[185] J.A. 215.
[186] J.A. 233.
[187] J.A. 174-77, 180, 184, 191-92, 203, 250-52, 256-57, 261, 264-65, 282-83.
[188] J.A. 234.
[189] J.A. 169-70.

Simply put, the medical testimony that was elicited, coupled with other facts about Appellant in the Record, does not prove Appellant feigned her physical disablement, as opposed to suffered from Conversion Disorder. Without Appellant's admissions during her second interview suggesting that she was exaggerating her physical disablement, the trier of fact could reasonably believe Appellant suffered from Conversion Disorder. Thus, there is more than "a reasonable *possibility* that the evidence complained of *might* have contributed to the conviction."[190]

The lower court also stated that its prejudice analysis relied in part on the "compelling and overwhelming medical documentation and testimony" from "staff and lay observers."[191] But *quantity* of lay observers does not equal *quality*. And the fluctuating symptomatology and unpredictable recovery times associated with Conversion Disorder undermine the probative value of the witness testimony describing Appellant getting out of the shower or on and off the bus.[192] Not to mention that many of the Government's lay witnesses for this charge did not like, and were shown to have bias against, Appellant.[193]

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[190] *Mott*, 72 M.J. at 332 (emphasis added).
[191] J.A. 12.
[192] J.A. 301-02.
[193] J.A. 253, 276-77, 284, 293, 306-07, 311, 345.

From start to finish, the one piece of evidence that could make the possibility of Conversion Disorder unreasonable was Appellant's admission to NCIS that suggested she exaggerated her physical disablement. And those statements to NCIS are precisely what the lower court held should have been excluded from evidence.[194] That is why the admission of these statements was prejudicial even under the nonconstitutional harmlessness test.[195] Without Appellant's statements in evidence, the Government's case was weaker, the Defense's stronger, and the materiality and quality of the evidence were extremely high. Accordingly, it is telling that the Government's Brief fails to mention those last two prongs.[196]

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[194] J.A. 11-12.
[195] *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (prejudice test for nonconstitutional evidentiary error is the strength of the Government's case, the strength of the Defense case, the materiality of the evidence, and the quality of the evidence).
[196] *See* Govt's Br. at 53-54.

Conclusion

Appellant respectfully requests that this Court find the Military Judge's denial of the suppression motion was prejudicial error and set aside both findings and the sentence.

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