

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellant

v.

Levani J. ENELIKO
Master-at-Arms
Petty Officer Third Class (E-4)
U.S. Navy,

Appellee

BRIEF ON BEHALF OF APPELLEE

Crim. App. Dkt. No. 202400058

USCA Dkt. No. 26-0138/NA

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

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Issue Presented

Did the lower court err in reversing the Military Judge on the basis of *United States v. Mott*?

Statement of Statutory Jurisdiction

Appellee timely filed a Notice of Appeal of his special court-martial conviction.¹ The lower court had jurisdiction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).² The Navy Judge Advocate General (JAG) filed a Certificate for Review of the above issue with this Court, giving this Court jurisdiction under Article 67(a)(2), UCMJ.³

Relevant Authorities

The Fifth Amendment to the United States Constitution states in relevant part: “No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty . . . without due process of law . . .”⁴

Statement of the Case

A special court-martial consisting of a military judge alone convicted Appellee, contrary to his plea, of one specification of wrongful use of a controlled

¹ Notice of Appeal, *United States v. Eneliko*, No. 202400058 (N-M. Ct. Crim. App. May 29, 2024).

² 10 U.S.C. § 866(b)(1)(A) (2024).

³ Certificate for Review, Feb. 26, 2026; 10 U.S.C. § 867(a)(2) (2024).

⁴ U.S. Const. amend. V.

substance in violation of Article 112a, UCMJ.⁵ The Military Judge sentenced him to reduction by one pay grade to E-3.⁶ The Convening Authority approved the finding and sentence, and the Military Judge entered it into judgment.⁷

The lower court set aside the finding and sentence and authorized a rehearing on August 28, 2025, due to the Military Judge's insufficient ruling on Appellee's pre-trial suppression motion.⁸ The Government moved for panel and en banc reconsideration on September 29, 2025, which the lower court denied on December 30, 2025.⁹ The JAG certified the above issue to this Court on February 26, 2026.¹⁰

Statement of Facts

A. Appellee was escorted from a mental health appointment to an interrogation room, where law enforcement made statements about the purpose of the interrogation prior to any rights advisement.

A Master-at-Arms (MA) escorted Appellee to a mandatory mental health appointment at Naval Hospital Bremerton.¹¹ A Chief (E-7) MA instructed the MA that after the mental health appointment, he was to escort Appellee to an

⁵ J.A. 232.

⁶ J.A. 460.

⁷ J.A. 232-35.

⁸ J.A. 9.

⁹ Order Den. the Government's Mot. for Recons., *United States v. Eneliko*, No. 202400058 (N-M. Ct. Crim. App. Dec. 30, 2025) (en banc).

¹⁰ Certificate for Review, Feb. 26, 2026.

¹¹ J.A. 213.

interrogation room so the Criminal Investigation Division (CID) and the Naval Criminal Investigative Service (NCIS) could interrogate Appellee.¹² A CID Detective and an NCIS Agent then interrogated Appellee regarding an allegation that Appellee wrongfully used cocaine.¹³ The interrogation lasted approximately twenty-eight minutes.¹⁴

At the beginning of the interrogation the Detective asked, “you understand what you’re here for?”¹⁵ Appellee responded, “not exactly,” to which the Detective replied, “Urinalysis.”¹⁶ Then, prior to informing Appellee of his Article 31(b) rights, or that he was suspected of a crime, the Detective said “[a]nd just to let you know we’re here to try to help you through this whole thing. . . . [B]ut we can’t help you if you can’t . . . tell us what happened and . . . help us out.”¹⁷ The Detective then provided Appellee his Article 31(b) rights advisement verbally and in writing.¹⁸ Appellee initialed and signed the rights waiver portion of the document and indicated that he waived his rights and would speak with the

¹² J.A. 213, 219.

¹³ J.A. 213-14, 238.

¹⁴ J.A. 238.

¹⁵ J.A. 214.

¹⁶ *Id.*

¹⁷ J.A. 153, 214.

¹⁸ J.A. 214.

Detective and NCIS Agent.¹⁹ The Detective showed Appellee the urinalysis paperwork, which positively identified cocaine metabolite in Appellee's urine.²⁰

The Detective then reiterated his earlier statements by saying, "like I said before, we're here to try to help you through this. Okay? It's pretty evident. Right?" and "So, right now, it's about navigating through this whole thing, and hopefully you can help us, and we will try to help you. Okay? No guarantees. All right?"²¹ After reviewing the date and results of the urinalysis, Appellee stated for the previous six to seven months he was "spiraling down into . . . a depression state. That's why [he was] seeing a psychiatrist and a therapist"²² The Detective then asked Appellee questions about the type of drugs he had been offered, the drug's form, appearance, how it was ingested, who provided it, and the location where the accused allegedly used it.²³ Appellee confessed to the wrongful use of cocaine by answering these questions.²⁴

¹⁹ *Id.*

²⁰ *Id.*

²¹ J.A. 157.

²² J.A. 215.

²³ *Id.*

²⁴ *Id.*

B. The Military Judge denied Appellee’s suppression motion, and the Government used those statements against Appellee at trial to prove the requisite *mens rea*.

At trial, Appellee filed a timely pre-trial motion to suppress all statements he made to law enforcement investigators.²⁵ The written motion stated it was raised pursuant to *inter alia* “the Fifth Amendment to the U.S. Constitution,” and stated, “These statements were involuntary and MA3 Eneliko did not waive his rights”²⁶ At the motion hearing, when the Military Judge inquired about the scope of the motion, the Trial Defense Counsel responded, “the defense would say that the way you characterized it in a way, as confusion [by Appellee], we believe that extends to the portion where he’s being read his Article 31(b) rights.”²⁷

The Military Judge subsequently denied Appellee’s motion to suppress.²⁸ In his ruling’s “Statement of the Law” section, he recited a paragraph of law from the Military Rules of Evidence (MRE) and case law from the lower court, this Court, and the Supreme Court about the legal standards for a valid rights waiver.²⁹ This included, “The Government must therefore ‘demonstrate that the accused

²⁵ J.A. 176.

²⁶ *Id.*

²⁷ J.A. 272.

²⁸ J.A. 212.

²⁹ J.A. 218.

‘understood his right to counsel and intelligently and knowingly relinquished it.’”³⁰

Yet in his “Discussion” section, the Military Judge made the following conclusions about Appellee’s rights waiver:

- “[T]he statements made by the accused . . . were voluntary, and the result of a voluntary waiver of rights.”³¹
- “The investigators did not . . . make promises to the accused”³² (the military judge did not recognize the investigators told the accused, “we’re here to try to help you through this whole thing”³³ and “we will try to help you”³⁴).
- “They presented the accused with a written rights waiver and had him read along and asked him if he wanted to waive his rights, which he indicated that he did.”³⁵
- “[T]he detective . . . obtain[ed] a valid waiver[.]”³⁶

³⁰ *Id.* (quoting and citing *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013); *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)).

³¹ *Id.*

³² J.A. 219.

³³ J.A. 153, 214.

³⁴ J.A. 157.

³⁵ J.A. 219.

³⁶ J.A. 220.

- “[U]se of the specific word ‘help’ and the general notion of ‘helping’ the accused, when viewed in context in this case, is a legitimate law enforcement tactic to be used, potentially to convey sympathy or playing on the accused’s emotions, which have been found to be legally permissible.”³⁷
- “There is *no* evidence to suggest that the accused was ‘threatened, tricked, or cajoled’ into waiving his rights or making admissions; rather, the evidence reveals that his rights were appropriately explained to him both orally and in writing and the accused made a knowing, intelligent, and voluntary choice to waive them – the detective specifically stated ‘no guarantees.’”³⁸

The Military Judge did not recognize that the “no guarantees” comment happened *after* Appellee waived his rights.³⁹ That sentence was the only time the Military Judge’s ruling stated the words “knowing” and “intelligent” in his Discussion section.⁴⁰

³⁷ J.A. 221 (citing *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002)).

³⁸ J.A. 221-22 (quoting *Miranda v. Arizona*, 384 U.S. 436, 476 (1966)) (emphasis added).

³⁹ J.A. 157.

⁴⁰ J.A. 221.

The Government then used Appellee’s statements against him to prove he intentionally and knowingly ingested cocaine.⁴¹ Appellee’s statements and a single urinalysis lab test result were the only evidence the Government presented to prove his guilt.⁴²

C. At trial, the Defense repeatedly attacked the credibility of the urinalysis lab tests.

The Defense repeatedly called into question the reliability of the urinalysis results.⁴³ In its cross-examination of the Government’s lone, surrogate lab expert, the Defense established mistakes were made in the urinalysis sample’s chain of custody.⁴⁴ The surrogate expert *agreed* with the following during cross-examination:

- “And nowhere in this chain of custody document does it ever say that those processes were followed in this case, does it?”;
- “So for those vital steps, *you have to assume* that whoever handled—whoever is listed as testing at that stage, correctly followed the SOP?”;
- “*You are assuming* that they acted in accordance with procedure for every step that is not certified to on the chain of custody, correct?”; and

⁴¹ J.A. 445-52.

⁴² J.A. 451-52.

⁴³ J.A. 452-57.

⁴⁴ J.A. 432-33.

- “And you don’t know based on the documents if they did anything wrong that day either, do you?”⁴⁵

When discussing the people involved in testing Appellee’s urine sample, the expert also confirmed that “virtually every single person on this chain of custody was decertified one or more times within the last few years for not following . . . portions of the [standard operating procedures].”⁴⁶ The Defense also crossed the Government’s expert on the foundation of his opinion testimony because his opinion was based on his review of testing data conducted by other people—not him.⁴⁷

D. The lower court set aside the finding and sentence because the Military Judge’s suppression motion ruling was legally insufficient.

The lower court found several reasons the Military Judge’s suppression motion ruling was legally insufficient under *United States v. Mott*.⁴⁸

Specifically, the military judge did not address the propriety or any impact of Detective [Watson]’s questions *preceding* [Appellee]’s waiver of his Article 31(b) rights. The military judge also did not analyze the impact of Detective [Watson]’s statement as to the help he could provide [Appellee] if he spoke to them and helped them out on whether [Appellee] was able or did then make a knowing and intelligent waiver of his rights.⁴⁹

⁴⁵ J.A. 431-32, 436.

⁴⁶ J.A. 435.

⁴⁷ J.A. 418-36.

⁴⁸ *Mott*, 72 M.J. 319; J.A. 8-9.

⁴⁹ J.A. 8 (emphasis added).

The lower court held “the military judge’s failure to address or analyze specific relevant facts of this case in determining if there was a *voluntary, knowing and intelligent waiver* requirement under *Mott* constitutes an abuse of discretion.”⁵⁰

Summary of Argument

The lower court did not err in reversing the Military Judge based on *Mott* because it correctly held: (1) the Military Judge failed to consider the requisite totality of the circumstances; and (2) did not distinctly analyze the “knowing and intelligent” prong of the *Edwards* test, as *Mott* required. Admitting Appellee’s statements to law enforcement was not harmless beyond a reasonable doubt because they were vital to the Government’s burden of proof on essential elements of the sole charged offense.

The Government’s arguments that Appellee waived this issue, that Appellee’s rights waiver was valid, and other non-*Mott* reasons it argues the Military Judge’s ruling is correct are outside the scope of the question certified to this Court. Regardless, the *Mott* issue was neither waived at trial nor on appeal because it was inherent to the legal theories the Defense raised in its suppression motion and the Military Judge’s ruling. Further, the Military Judge abused his discretion by not suppressing Appellee’s statements to law enforcement. Appellee did not knowingly and intelligently waive his rights because the Detective’s pre-

⁵⁰ *Id.* (emphasis added).

advisement statements fundamentally altered Appellee’s understanding of how his rights would generally apply. Those same pre-advisement statements made Appellee’s rights waiver involuntary because they amounted to unlawful trickery, cajoling, and inducement into waiving his rights.

Argument

The lower court did not err in reversing the Military Judge on the basis of *United States v. Mott*.

Standard of Review

The denial of a suppression motion is reviewed for an abuse of discretion.⁵¹ “An abuse of discretion occurs when the trial court’s findings of fact are clearly erroneous or if the court’s decision is influenced by an erroneous view of the law.”⁵² “[T]he military judge may nonetheless have abused his discretion where . . . the military judge’s findings failed to address the relevant considerations.”⁵³ A military judge also abuses his discretion when he “applies correct legal principles to the facts in a way that is clearly unreasonable.”⁵⁴ “When reviewing a military

⁵¹ *Mott*, 72 M.J. at 329 (citing *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

⁵² *Id.* (quoting *Freeman*, 65 M.J. at 453).

⁵³ *Id.*

⁵⁴ *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022); *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

judge’s ruling for an abuse of discretion, this Court pierces the CCA’s opinion and examines the military judge’s ruling directly.”⁵⁵

Whether an accused knowingly and intelligently waived his *Miranda* rights is a conclusion of law.⁵⁶ This Court reviews conclusions of law *de novo*.⁵⁷ This Court independently reviews the issue of voluntariness *de novo*, as it is also a question of law.⁵⁸ “This Court reviews *de novo* whether an accused has waived an issue.”⁵⁹ Finally, this Court reviews questions of statutory interpretation *de novo*.⁶⁰

⁵⁵ *United States v. Ruiz*, 86 M.J. 75, 80 (C.A.A.F. 2025) (quoting *United States v. Carpenter*, 77 M.J. 285, 287 n.5 (C.A.A.F. 2018)) (alterations omitted).

⁵⁶ *Mott*, 72 M.J. at 332 (“The military judge also erred when he addressed whether Appellant’s waiver was knowing and intelligent solely as a conclusory finding of fact, rather than as a conclusion of law.”).

⁵⁷ *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (citing *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015)).

⁵⁸ *Freeman*, 65 M.J. at 453; *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993)).

⁵⁹ *United States v. Harborth*, 85 M.J. 469, 475 (C.A.A.F. 2025) (quoting *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020)).

⁶⁰ *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023).

Analysis

A. The lower court did not err by reversing the Military Judge on the basis of *Mott*.

1. As the lower court correctly held, the Military Judge failed to consider the totality of the circumstances, which he was required to do.

“[A]n inquiry into the totality of the circumstances surrounding the interrogation [is to be made] to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.”⁶¹ The lower court logically reasoned, “This obligation encompasses any circumstance that could reasonably affect an appellant’s ability to make a knowing, intelligent, and voluntary waiver of Article 31(b) rights.”⁶² In his ruling, the Military Judge failed to consider the propriety or impact of the Detective’s pre-rights advisement statements in two significant ways.

First, as the lower court highlighted, the Military Judge did not consider whether an Article 31(b) violation occurred when the Detective asked Appellee if Appellee knew why he was there and that Appellee nodded his head and said “okay” when the Detective informed him it was because of a urinalysis.⁶³ The Defense’s suppression motion drew the Military Judge’s attention to the pre-

⁶¹ *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979).

⁶² J.A. 6.

⁶³ J.A. 7, 152-53.

advisement conversation. This is apparent from the Military Judge’s discussion of the Detective’s references to an “appointment” and “help[ing] [Appellee] through this whole thing,” in his ruling.⁶⁴ And despite the suppression motion asserting upfront that “MA3 Eneliko did not waive his rights,”⁶⁵ the Military Judge did not discuss that very conversation in the context of whether an Article 31 violation had occurred pre-advisement. Certainly, when an accused challenges the validity of a rights waiver, the pre-advisement conversations with the accused in the interrogation room are part of the totality of the circumstances that must be considered.

Second, the lower court correctly identified that the Military Judge “did not analyze the impact of Detective Watson’s statement as to the help he could provide [Appellee] if [Appellee] spoke to them and helped them out on whether [Appellee] was able or did then make a knowing and intelligent waiver of his rights.”⁶⁶ The Military Judge’s ruling discussed whether use of the word “help” “somehow suggested that they were providing mental health ‘help’ or treatment to the accused, or under the guide [sic] of providing medical care.”⁶⁷ Yet he did not address how the Detective’s statements—“And just to let you know, we’re here to

⁶⁴ J.A. 220-21.

⁶⁵ J.A. 176.

⁶⁶ J.A. 8.

⁶⁷ J.A. 220.

try to help you through this whole thing” and “but we can’t help you if you can’t, you know, tell us what happened and you can’t, you know, help us out,”—seconds before the rights advisement could alter Appellee’s perspective of that rights advisement in a more general, non-medical sense.⁶⁸ The Defense suppression motion repeated and highlighted these quotes *twice* in a seven-page motion about whether Appellee validly waived his rights.⁶⁹

The pre-advisement statements were relevant and necessary for the Military Judge’s consideration in light of the Supreme Court’s rationale in *Miranda v. Arizona* that one of the purposes of the rights advisement is to “make the individual more acutely aware that he is faced with a phase of the adversary system -- that he is *not* in the presence of persons acting *solely* in his interest.”⁷⁰ But the Military Judge did not discuss these pre-advisement statements within the *totality* of the circumstances.⁷¹ It is unsurprising, accordingly, that the Military Judge’s ruling led to the clearly erroneous conclusion that “[t]here is *no* evidence to suggest that the accused was . . . tricked[] or cajoled into waiving his rights.”⁷²

⁶⁸ J.A. 153.

⁶⁹ J.A. 178, 181.

⁷⁰ *Miranda*, 384 U.S. at 469 (emphasis added).

⁷¹ J.A. 218-22.

⁷² J.A. 221 (emphasis added) (quotations omitted); *see* Argument Section C.3.b), *infra*.

Regardless, this demonstrates that the Military Judge abused his discretion because his “findings failed to address the relevant considerations.”⁷³

2. The Military Judge did not distinctly analyze the knowing and intelligent prong of the *Edwards* test, as *Mott* requires.

In *Mott*, this Court held, “Voluntariness of consent and knowing waiver are two distinct and ‘discrete inquiries.’”⁷⁴ These “two distinct dimensions” also apply to a valid waiver of the right to remain silent.⁷⁵ A voluntary waiver is one that “was the product of a free and deliberate choice rather than intimidation, coercion, or deception.”⁷⁶ A knowing and intelligent waiver is one where the accused has “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”⁷⁷ “*Edwards* clearly requires that the judge analyze whether the waiver was knowing and intelligent.”⁷⁸ Accordingly, when the military judge did “not apply the *Edwards* framework, which requires a separate analysis of voluntary waiver and knowing and intelligent waiver,” “the military judge abused his discretion.”⁷⁹ Like *Mott*, this happened here.⁸⁰

⁷³ See *Mott*, 72 M.J. at 329.

⁷⁴ *Id.* at 330 (quoting *Edwards*, 451 U.S. at 484).

⁷⁵ *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010).

⁷⁶ *Mott*, 72 M.J. at 330 (quoting *Berghuis*, 560 U.S. at 382).

⁷⁷ *Id.* at 330 (quoting *Berghuis*, 560 U.S. at 382-83).

⁷⁸ *Id.* at 331.

⁷⁹ *Id.*

⁸⁰ See *id.*

The Military Judge’s ruling analyzes the voluntariness of the rights waiver and the voluntariness of the confession itself.⁸¹ The Military Judge also concluded in passing that the Detective “obtain[ed] a valid waiver.”⁸² But the only time he used the words “knowing” and “intelligent” in his Discussion section is in a single, conclusory sentence in the final paragraph: “. . . the evidence reveals that his rights were appropriately explained to him both orally and in writing and the accused made a knowing, intelligent, and voluntary choice to waive them”⁸³ There is no separate analysis of why the rights waiver was specifically knowing and intelligent. Like *Mott*, “The military judge also erred when he addressed whether [Appellee’s] waiver was knowing and intelligent solely as a conclusory finding of fact, rather than as a conclusion of law.”⁸⁴ Hence, the Government’s argument that this specific line from the Military Judge made his ruling sufficient is unpersuasive.⁸⁵ Therefore, the Military Judge’s conclusory assertion is akin to what occurred in *Mott* because it was not supported by any analysis on that distinct point of law.⁸⁶

⁸¹ J.A. 218-21.

⁸² J.A. 220.

⁸³ J.A. 221-22.

⁸⁴ *See Mott*, 72 M.J. at 332.

⁸⁵ *See Appellant’s Br.* at 28.

⁸⁶ *See Mott*, 72 M.J. at 332.

3. The Government’s argument about the pre-waiver conversation is premised on a mistaken view of the lower court’s opinion. The lower court ruled the Military Judge did not consider facts he was required to consider—not that the rights waiver was invalid.

The Government argues “Appellee waived appellate review of Detective Watson’s pre-waiver questions” and “Appellee’s pre-waiver statements . . . could not have tainted the post-waiver confession.”⁸⁷ It further argues “[t]he lower court’s Opinion is internally inconsistent” because the lower court found “Appellee forfeited his objection but grant[ed] relief as if the issue was properly preserved at trial.”⁸⁸ This is an incorrect characterization of the lower court’s opinion and the rationale on which that opinion is based for four reasons.

First, the lower court’s decision was not solely based on the pre-waiver questions and responses that were (assuming *arguendo*) “forfeited.” The lower court explicitly stated, “we would review the military’s judge’s admission of these statements for plain error . . . if it was *only* [Appellee]’s responses to these questions at issue.”⁸⁹

Second, the Government argues these pre-waiver statements do not matter for admissibility.⁹⁰ But this was not the point of the lower court’s opinion. The key takeaway, like *Mott*, is that the Military Judge was required to consider these

⁸⁷ Appellant’s Br. at 17-19.

⁸⁸ Appellant’s Br. at 20-21.

⁸⁹ J.A. 7 n.32 (emphasis added).

⁹⁰ See Appellant’s Br. at 17-19.

relevant facts as part of the totality of the circumstances and he did not do so—not whether those facts would have ultimately rendered the subsequent rights waiver invalid.⁹¹ The lower court repeatedly asserted the error it identified was “the military judge’s failure to address or analyze specific relevant facts of this case,” “the military judge erred in failing to consider the totality of the circumstances,” and “failing to analyze the totality of the circumstances in this case.”⁹² It also made clear it granted relief for this improperly admitted evidence “[w]ithout deciding whether [Appellee] made a voluntary, knowing, and intelligent waiver”⁹³ In short, it found the Military Judge did not properly determine whether the Government met its burden for admissibility. The lower court’s opinion looked at the sufficiency of the Military Judge’s ruling itself—not at some facts through plain error and others through an abuse of discretion standard. Therefore, the lower court’s opinion is not “internally inconsistent,” as the Government argues.⁹⁴

Third, regarding standards of review, the Government faults the lower court for “fail[ing] both to give deference to the Judge’s findings, and also fail[ing] to

⁹¹ See *Mott*, 72 M.J. at 332 (“[W]hile there were facts that supported a finding of knowing and intelligent waiver, the military judge did not address how the accused’s waiver was knowing and intelligent in [] context;” “we do not reach a conclusion as to whether the confession in this case could be admissible -- only that it was not properly admitted in this case.” (emphasis in original)).

⁹² J.A. 8-9.

⁹³ J.A. 8 (emphasis added).

⁹⁴ See Appellant’s Br. at 20.

view those facts in the light most favorable to the United States.”⁹⁵ But the lower court demonstrated that it understood how to apply the standard of review properly and applied the required deference. It correctly identified that the standard of review for a suppression motion is abuse of discretion and “recogniz[ed] that a judge has a wide range of choices and will not be reversed . . . unless that decision was ‘arbitrary, fanciful, clearly unreasonable,’ or ‘clearly erroneous.’”⁹⁶ Under that abuse of discretion standard, as this Court held, even when a military judge’s findings of fact are not clearly erroneous and he applies the correct law, “the military judge may nonetheless have abused his discretion where . . . the military judge’s findings failed to address the relevant considerations.”⁹⁷

This is the type of abuse of discretion that the lower court held warranted relief. Here, it is not what the Military Judge *did* in his ruling, it is what he *did not do*. No amount of deference can add factual considerations and corresponding conclusions that simply are not there. Thus, the Government’s argument about the lower court’s lack of deference to the Military Judge is inapplicable to the specific type of abuse of discretion that occurred in this case.⁹⁸

⁹⁵ Appellant’s Br. at 26.

⁹⁶ J.A. 5 (citing *Freeman*, 65 M.J. at 453; *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)).

⁹⁷ *Mott*, 72 M.J. at 329.

⁹⁸ See Appellant’s Br. at 25-27.

Fourth, the Government appears to imply throughout its brief that the lower court faulted the Military Judge only for insufficiently considering whether Appellee’s rights waiver was knowing and intelligent.⁹⁹ To the extent that is part of the Government’s argument, that is also a mischaracterization of the lower court’s opinion. The lower court repeated that it found the Military Judge’s ruling insufficient on *both* prongs of the *Edwards* test: “the military judge’s failure to address or analyze specific relevant facts of this case in determining if there was a *voluntary, knowing and intelligent waiver* requirement under *Mott* constitutes an abuse of discretion” and “the military judge erred in failing to consider the totality of the circumstances to determine *not only* whether [Appellee’s] rights waiver was *voluntary*”¹⁰⁰

The Government’s argument that “[u]nlike the military judge in *Mott*, this Military Judge directly addressed the specific prong of the *Edwards* test that Appellee challenged,” fails even if this Court adopts its proposed standard.¹⁰¹ Assuming the Military Judge only needed to address the voluntariness prong, the ruling remains insufficient because he failed to adequately analyze the totality of the circumstances as that prong requires. This is further elaborated on below.¹⁰²

⁹⁹ See Appellant’s Br. at 6-8, 20, 22, 26, 28.

¹⁰⁰ J.A. 8 (emphasis added).

¹⁰¹ See Appellant’s Br. at 13-14, 22.

¹⁰² See Argument Section C.3.b), *infra*.

Thus, the lower court did not err in reversing the Military Judge based on *Mott* because his ruling failed to consider the totality of the circumstances presented to him that were relevant to points raised in the Defense’s motion and because he did not analyze why Appellee’s rights waiver was knowing and intelligent separately from voluntariness.

B. The lower court did not err in setting aside the finding because the admission of the confession was not harmless beyond a reasonable doubt.

Constitutional errors are reviewed for harmlessness beyond a reasonable doubt.¹⁰³ “The admission of the statement and interrogation video are not harmless beyond a reasonable doubt if ‘there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction.’”¹⁰⁴ Appellate courts are “require[d] . . . to exercise extreme caution before determining that the admission of the confession at trial was harmless.”¹⁰⁵ As this Court has opined, “the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.”¹⁰⁶ That is precisely the case here.

¹⁰³ *Mott*, 72 M.J. at 332 (citing *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009)); *Freeman*, 65 M.J. at 453 (citing *Fulminante*, 499 U.S. at 285).

¹⁰⁴ *Mott*, 72 M.J. at 332 (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007); *Chapman v. California*, 386 U.S. 18, 24 (1967)) (emphasis added); see also *Fulminante*, 499 U.S. at 296 (“[I]t must be determined whether the [Government] has met its burden of demonstrating that the admission of the confession . . . did not contribute to [the] conviction.”).

¹⁰⁵ *Mott*, 72 M.J. at 332 (quoting *Fulminante*, 499 U.S. at 296).

¹⁰⁶ *Ellis*, 57 M.J. at 381.

To prove wrongful use of a controlled substance, the Government must show “(a) that the accused used a controlled substance; and (b) that the use by the accused was wrongful.”¹⁰⁷ Knowledge of the nature of the substance is required to find that use was wrongful¹⁰⁸ and can be “inferred from the presence of the controlled substance in the accused’s body.”¹⁰⁹

Appellee’s confession was the key evidence to prove beyond a reasonable doubt that he wrongfully used cocaine, which is why the Government consistently referenced Appellee’s statements throughout its closing argument.¹¹⁰ The Trial Counsel referenced the unlawfully obtained statements from Appellee’s interrogation with law enforcement at least six times in a two-page closing argument, including statements such as “[n]o exceptions and no excuses. That’s how [Appellee] described, in his own words, the Navy’s zero tolerance policy towards drug use, a policy he admitted he broke.”¹¹¹ “But [Appellee] knew, and he admitted that he knew that he had used cocaine, and that it had been wrong.”¹¹²

¹⁰⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 50.b.(2) (2019) [hereinafter MCM].

¹⁰⁸ *Id.*, pt. IV, ¶ 50.c.(5).

¹⁰⁹ *Id.*, pt. IV, ¶ 50.c.(10).

¹¹⁰ J.A. 451-52.

¹¹¹ J.A. 451.

¹¹² J.A. 452.

The Government also referenced Appellee’s admissions on every page of its rebuttal argument.¹¹³

In comparison, the urinalysis results, whose reliability the Defense repeatedly called into question, was far less compelling.¹¹⁴ In its cross-examination of the Government’s surrogate lab expert, the Defense established there were mistakes made in the chain of custody of Appellee’s urinalysis sample.¹¹⁵ The expert also confirmed “virtually every single person on this chain of custody was decertified one or more times within the last few years for not following . . . portions of the [standard operating procedures]” that were involved in the testing of Appellee’s urine sample.¹¹⁶ Thus, without the corroboration of Appellee’s inadmissible statements, the reliability of the positive urinalysis is, at a minimum, questionable in proving either use *or* wrongfulness.

Further, the so-called “permissive inference” is just that—*permissive*—and has minimal value in proving use. This Court should find that the permissive inference cannot be drawn in this case due to the questionable handling of Appellee’s urine sample at the lab, the history of mistakes by the lab personnel who handled the sample, and the fact that the Government did not call *any* of those

¹¹³ J.A. 457-59.

¹¹⁴ J.A. 452-57.

¹¹⁵ J.A. 432-33.

¹¹⁶ J.A. 435.

lab personnel (but instead relied solely on a surrogate lab expert who performed none of the lab tests).¹¹⁷

Notably, here, there was neither testimony about whether Appellee would have felt the effects of cocaine based on the concentration level at which the urine tested, nor was this answered in Appellee’s interrogation with law enforcement.¹¹⁸

This Court recently opined about this very subject:

If the Government seeks to obtain an inference of wrongfulness through the process set forth in *Campbell*, the expert testimony proffered by the government must establish multiple facts about the testing, including . . . the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion.¹¹⁹

The Government’s expert here agreed that he could not “tell you if that individual understood the wrongfulness of the use of cocaine at its ingestion.”¹²⁰

¹¹⁷ See *United States v. Hirst*, No. 202300208, 2024 CCA LEXIS 372, at *5 n.18, *14 (N-M. Ct. Crim. App. Sep. 4, 2024); *United States v. Arnoldt*, No. 201800372, 2019 CCA LEXIS 500, at *1-2 (N-M. Ct. Crim. App. Dec. 12, 2019) (declining to draw the permissive inference when the person who supervised the collection and labeling of specimen bottle did not testify); *United States v. Potter*, No. 20110332, 2012 CCA LEXIS 432, *14-15 (A. Ct. Crim. App. Nov. 8, 2012) (declining to draw the permissive inference when Government expert failed to testify about whether appellant would have actually felt the effects of the drug).

¹¹⁸ J.A. 144-74, 322-444; see J.A. 439; J.A. 455 (Defense argued in closing “There are no answers or questions about what effects he felt after ingesting the substance. Nothing.”).

¹¹⁹ *United States v. Downum*, 86 M.J. 200, 204 (C.A.A.F. 2025) (citing *United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000)).

¹²⁰ J.A. 439.

Because Appellee’s inadmissible statements were the Government’s best evidence against him for the sole charge and were essential to the Government’s ability to meet its burden of proof, their admission was not harmless beyond a reasonable doubt.

C. The Government argues issues not before this Court. Regardless, Appellee prevails on the merits of those issues.

1. About three-quarters of the substantive pages of the Government’s Brief exceed the scope of the legal issue the JAG put before this Court.

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].”¹²¹ The JAG certified one, narrow issue to this Court: whether the lower court erred in reversing the Military Judge on the basis of *United States v. Mott*. This issue neither encompasses whether the *Mott* issue was waived—either at trial or on appeal—nor whether the Military Judge’s suppression ruling was substantively correct in denying the Defense’s motion. Consistent with *Mott*, the lower court *only* decided there was an abuse of discretion due to “the military judge’s failure to address or analyze specific relevant facts of this case in determining if there was a voluntary, knowing and intelligent waiver requirement

¹²¹ 10 U.S.C. § 867(c)(1)(B), (2) (2024) (emphasis added).

[sic] under *Mott*”¹²² That is the issue and ruling below that is before this Court. The lower court made clear it reached this decision “[w]ithout deciding whether [Appellee] made a voluntary, knowing and intelligent waiver of his Article 31(b) rights.”¹²³

Yet the Government spent most of its brief addressing issues of waiver, whether Appellee’s rights waiver was valid, the trickery doctrine, and other non-*Mott* reasons the Military Judge’s suppression ruling was substantively correct.¹²⁴ This Court’s review of the case should be confined to the narrow issue certified. In other words, if this Court reverses the lower court’s ruling, it should not be the first appellate court to decide any issue related to whether Appellee validly waived his rights or other non-*Mott* issues. Rather, it should remand the case and direct the lower court to rule in the first instance on these other issues, which Appellee squarely raised and addressed to that court.¹²⁵ If this Court disagrees, Appellee responds to the issues the Government raised below.

¹²² J.A. 8; *see Mott*, 72 M.J. at 332 (“[W]e do not reach a conclusion as to whether the confession in this case could be admissible -- only that it was not properly admitted in this case.”) (emphasis in original).

¹²³ J.A. 8.

¹²⁴ Appellant’s Br. at 11-21, 23-37.

¹²⁵ J.A. 10-58, 99-117.

2. Appellee did not waive the *United States v. Mott* issue for which the lower court granted relief.

Under MRE 304(f)(1), failure to move to suppress, or object to, an accused's confessions or admissions constitute waiver.¹²⁶ "When an issue is waived, 'it is extinguished and may not be raised on appeal.'"¹²⁷ This Court has repeatedly held that motions to suppress *physical* evidence under MRE 311(d)(2)(A) must make a "particularized objection" to preserve an argument.¹²⁸ Contrary to the Government's assertions, and based on undersigned counsel's research, this Court has never imported that legal standard for motions to suppress confessions or admissions under MRE 304(f)(1).¹²⁹ Further, the law does not require the defense to specifically invoke "talismanic words" at the trial level.¹³⁰

Additionally, this Court has repeatedly reaffirmed a presumption against waiver where, as here, constitutional rights are at issue.¹³¹ In applying this

¹²⁶ MCM, MIL. R. EVID. 304(f)(1); *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

¹²⁷ *Harborth*, 85 M.J. at 475 (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)).

¹²⁸ *Id.* (quoting *United States v. Perkins*, 78 M.J. 381, 390 (C.A.A.F. 2019)).

¹²⁹ Appellant's Br. at 11 (asserting the "particularized objection" requirement applies to this case); see, e.g., *Ahren*, 76 M.J. at 197-98 (applying and analyzing the contours of MIL. R. EVID. 304(f)(1) but not mentioning a "particularized objection" requirement).

¹³⁰ *Blackburn*, 80 M.J. at 209-10.

¹³¹ *Harborth*, 85 M.J. at 475; *Blackburn*, 80 M.J. at 209; *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011); *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008).

presumption, this Court has held even a “subtle . . . theory [that] was inherent to the defense argument” raised on appeal is not waived where “the defense’s arguments as a whole demonstrate” the preservation of that theory.¹³² The D.C. Circuit has likewise held that an accused preserves a theory of suppression on appeal if it is “a species of the same legal theory” raised before the trial court.¹³³

a) *Mott* is at issue on appeal because Appellee asserted his rights waiver was invalid in his pre-trial suppression motion and the Military Judge’s ruling acknowledged and incorporated *Mott*.

Military Rule of Evidence 304(f)(6) extends the prosecution’s admissibility burden “only to the grounds upon which the defense moved to suppress” “when the military judge has required a specific motion or objection.”¹³⁴ Here, the Defense made a specific motion and articulated specific grounds for suppression. Trial Defense Counsel filed the pre-trial suppression motion pursuant to “the Fifth Amendment to the U.S. Constitution,” and stated, “These statements were involuntary and MA3 Eneliko did not waive his rights under Article 31(b), UCMJ.”¹³⁵ When the Military Judge inquired about the scope of the motion at the court hearing, Trial Defense Counsel responded, “the defense would say that the way you characterized it in a way, as confusion [by Appellee], we believe that

¹³² *Blackburn*, 80 M.J. at 210.

¹³³ *United States v. Griffith*, 867 F.3d 1265, 1277-78 (D.C. Cir. 2017).

¹³⁴ MCM, MIL. R. EVID. 304(f)(6).

¹³⁵ J.A. 176 (emphasis added).

extends to the portion where he’s being read his Article 31(b) rights.”¹³⁶ These assertions, both orally and in writing, show Appellee challenged the validity of his rights waiver as a whole. Further, by asserting to the Military Judge that there was “confusion . . . where he’s being read his Article 31(b) rights,” Trial Defense Counsel argued that Appellee did not knowingly and intelligently waive his rights.¹³⁷ One cannot knowingly and intelligently waive something when one is confused about the very thing they are being asked to waive.

The Government argues “Appellee’s waiver was express” because Trial Defense Counsel agreed with several points the Military Judge asked him.¹³⁸ But that occurred just *before* the Trial Defense Counsel clarified that Appellee experienced “confusion . . . where he’s being read his Article 31(b) rights.”¹³⁹ Accordingly, the lower court correctly found Appellee “challenged the knowing, intelligent, *and* voluntary nature of his rights waiver and statement.”¹⁴⁰ Because of the presumption against waiver of constitutional issues and no requirement of “talismanic words,” these assertions are a “subtle . . . theory [that] was inherent to the defense argument” and “the defense’s arguments as a whole demonstrate” the

¹³⁶ J.A. 272.

¹³⁷ *Id.*

¹³⁸ Appellant’s Br. at 16 (citing J.A. 271).

¹³⁹ J.A. 272 (“[T]he defense would say that the way you characterized it in a way, as confusion, we believe that extends to the portion where he’s being read his Article 31(b) rights.”).

¹⁴⁰ J.A. 4 (citing the same page from the Record—J.A. 272) (emphasis added).

preservation of that theory.¹⁴¹ Thus, the Government’s argument that the Trial Defense Counsel made “no reference to whether Appellee’s Statement was knowing and intelligent” is misplaced.¹⁴²

For example, these facts contrast starkly with this Court’s recent waiver decision in *United States v. Harborth*. In *Harborth*, this Court found trial defense counsel affirmatively told the military judge during the suppression motion hearing that “Appellant sought to suppress the ‘unlawful *search* of the iPhone X[S]’ and offered ‘a separate argument’ concerning ‘the *seizure* of the *other* three Apple devices.’”¹⁴³ This Court held the appellant waived the constitutional challenge to the iPhone XS’s seizure.¹⁴⁴ In other words, in *Harborth*, trial defense counsel affirmatively asserted the appellant only challenged the search of the device at issue and not the seizure of that device—waiving a seizure challenge of that same device.¹⁴⁵

Here, no such colloquy or assertions occurred at trial.¹⁴⁶ Unlike the assertions made to the military judge in *Harborth*, neither in Appellee’s pre-trial motion nor during the motion hearing did the Trial Defense Counsel say Appellee

¹⁴¹ See *Blackburn*, 80 M.J. at 209-10.

¹⁴² Appellant’s Br. at 16.

¹⁴³ *Harborth*, 85 M.J. at 474.

¹⁴⁴ *Id.* at 475.

¹⁴⁵ *Id.* at 474-75.

¹⁴⁶ See J.A. 263-84.

did not challenge whether he knowingly and intelligently waived his rights.¹⁴⁷

These facts demonstrate the opposite of “a voluntary relinquishment of the right to object,” as the Government argues.¹⁴⁸

Even the Military Judge did not seem to think Appellee waived this issue.¹⁴⁹ In his ruling, the Military Judge recited a whole paragraph on the legal standard for a proper rights waiver.¹⁵⁰ He correctly quoted and cited MRE 305(e)(1) that requires a waiver of the self-incrimination privilege “be made freely, knowingly, and intelligently.”¹⁵¹ Notably, this is a codification of “traditional constitutional criminal procedure rules.”¹⁵² He then correctly quoted and cited both *Mott* and *Edwards v. Arizona*: “The Government must therefore ‘demonstrate that the accused ‘understood his right to counsel *and* intelligently and knowingly relinquished it.’”¹⁵³ He then mentioned Appellee’s rights waiver six times in the

¹⁴⁷ J.A. 176-82, 263-84; *see Harborth*, 85 M.J. at 474.

¹⁴⁸ Appellant’s Br. at 17.

¹⁴⁹ *See* J.A. 218-22.

¹⁵⁰ J.A. 218.

¹⁵¹ *Id.* (quoting and citing MCM, MIL. R. EVID. 305(e)(1)).

¹⁵² 1 MILITARY RULES OF EVIDENCE MANUAL § 300.01 (2025) (“Unlike typical state or federal evidence codes, Section III of the Military Rules of Evidence is a unique attempt to codify some of the most important topics surrounding Fourth, Fifth, and Sixth Amendment criminal litigation.”); *see also id.* § 300.02 (“Military Rules of Evidence 301-306, 311-317, and 321 . . . represent a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eye-witness identification.” (reprinting the MIL. R. EVID. Drafters’ Analysis from 1980)).

¹⁵³ J.A. 218 (quoting and citing *Mott*, 72 M.J. at 330; *Edwards*, 451 U.S. at 484) (emphasis added).

five-page “Discussion” section of his ruling (albeit with mostly erroneous conclusions).¹⁵⁴ He concluded, “the evidence reveals that his rights were appropriately explained to him both orally and in writing and the accused made a *knowing, intelligent, and voluntary choice to waive* them”¹⁵⁵ This is an unequivocal ruling on the two-prong *Edwards* test. While this ruling was insufficient, as discussed above, it is a ruling nonetheless that the lower court then reviewed for a sufficient *Edwards* analysis under this Court’s controlling precedent in *Mott*.¹⁵⁶ Review of issues of law such as this is exactly how appellate review of courts-martial are supposed to be conducted.¹⁵⁷

Further, it belies logic that the Military Judge would spend a paragraph in his “Statement of the Law” section reciting and distilling law and precedent about a legal issue he did not think applied to his ruling. The above-quoted aspects of his ruling also indicate the Military Judge (correctly) held the Government to its well-established burden to prove the admissibility of Appellee’s confession in light of Appellee’s motion to suppress that confession based on the theory of an invalid rights waiver. As elaborated on above, that admissibility burden involves satisfying *both* prongs of the *Edwards* test. The lower court reviewed the

¹⁵⁴ J.A. 218-22.

¹⁵⁵ J.A. 221-22 (emphasis added).

¹⁵⁶ See Argument Section A, *supra*.

¹⁵⁷ See Argument Section C.2.c), *infra*.

correctness of the Military Judge’s ruling and legal conclusion, made in response to Appellee’s suppression motion, under the controlling precedent of *Mott*.

Therefore, this issue was not waived at the trial level, as it was—at a minimum—“a species of the same legal theory” raised before the trial court, if not the same legal theory of several preserved theories.¹⁵⁸

Finally, in arguing to this Court that Appellee waived this issue, the Government emphasizes the purpose of the waiver doctrine is “so that the government has the opportunity to present relevant evidence that might be reviewed on appeal” and “to support an informed ruling” by the military judge.¹⁵⁹ Yet the Government states, “here the Military Judge explicitly analyzed *all the factors* that pertain to voluntary *and* knowing, intelligent waiver.”¹⁶⁰ On the one hand, the Government appears to assert the Record is not developed enough and the lower court erred in holding the Military Judge to the *Mott* standard of analyzing both prongs of the *Edwards* test due to Appellee’s waiver.¹⁶¹ But on the other hand, it states the Military Judge “cited the correct caselaw and rule,” “further made specific findings,” “analyzed *all the factors* that pertain to voluntary *and* knowing, intelligent waiver,” and “concluded that [Appellee’s] rights were

¹⁵⁸ See *Griffith*, 867 F.3d at 1277-78.

¹⁵⁹ Appellant’s Br. at 11 (quoting *Perkins*, 78 M.J. at 391; *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005)).

¹⁶⁰ Appellant’s Br. at 28 (emphasis added).

¹⁶¹ See Appellant’s Br. at 8, 11, 22, 26, 28 (emphasis added).

appropriately explained and Appellee ‘made a knowing, intelligent . . . choice to waive them’” all for the very legal issue the Government asserts Appellee waived.¹⁶² It cannot be both.

b) Even if this Court finds Appellee did not assert in his pre-trial suppression motion that he did not knowingly and intelligently waive his rights, this Court should still hold *Mott* applies if an accused challenges the constitutionality of a rights waiver.

This Court and the Supreme Court have both held, “the accused’s statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact *knowingly* and *voluntarily* waived *Miranda* rights.”¹⁶³ The plain language conditional phrasing—that an accused’s admission is “*inadmissible . . . unless*”—inherently creates a presumption of inadmissibility that the Government must overcome by a preponderance of the evidence.¹⁶⁴ As this Court made clear, “*in addition to showing* that the waiver was *voluntary* in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, the government *must also demonstrate* that the accused understood his right to counsel and intelligently and knowingly relinquished it.”¹⁶⁵ And there is no dispute that Appellee’s pre-trial suppression

¹⁶² Appellant’s Br. at 26-28 (quoting J.A. 221) (emphasis added).

¹⁶³ *Mott*, 72 M.J. at 330 (quoting *Berghuis*, 560 U.S. at 382) (emphasis in original).

¹⁶⁴ *See id.* (“The government must show waiver by a preponderance of the evidence.”) (emphasis added).

¹⁶⁵ *Id.* (quotations and citations omitted).

motion challenged the validity of his rights waiver on voluntariness grounds.¹⁶⁶

Thus, when an accused challenges the constitutionality of his rights waiver, as Appellee did here, the Government has the burden to satisfy *the entire* legal standard.

The Government argues, “Appellee’s failure to move to suppress at trial . . . on grounds that his waiver was not knowing and intelligent, waived appellate review . . . for that issue.”¹⁶⁷ Undersigned counsel is unaware of any binding authority that says the Government only has to satisfy one prong of their admissibility burden based upon how an accused articulates his objection to an unconstitutional rights waiver. And the Government cites no binding authority that unequivocally stands for that proposition.

United States v. Mott appears to state the opposite. There, the appellant’s “suppression motion was based on knowing and intelligent waiver, and not voluntariness.”¹⁶⁸ The *Mott* Court held the military judge there “abused his discretion in his analysis. The military judge did not apply the *Edwards* framework, which requires a separate analysis of voluntary waiver and knowing

¹⁶⁶ See, e.g., Appellant’s Br. at 13-14 (quoting J.A. 181, Appellee’s suppression motion) (“The . . . waiver of Article 31 rights and admission by [Appellee]—who was already in a state of mind that would make him susceptible to coercion—were involuntary.”).

¹⁶⁷ Appellant’s Br. at 14.

¹⁶⁸ *Mott*, 72 M.J. at 331 (emphasis added).

and intelligent waiver.”¹⁶⁹ Contrary to the Government’s interpretation, nowhere in *Mott* did this Court hold that a military judge only has to analyze the prong of the *Edwards* test an accused raises.¹⁷⁰ Instead, this Court repeatedly emphasized military judges must apply and analyze *both* prongs of the *Edwards* test in ruling on a suppression motion involving a rights waiver.¹⁷¹

Additionally, in *Berghuis v. Thompkins*, which this Court quoted and incorporated in *Mott*, the Supreme Court noted that in the accused’s suppression motion, “[h]e argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary.”¹⁷² In treating each as three distinct legal theories, the assertion “that he had not waived his right to remain silent” was enough for the Supreme Court to hold that the prosecution had the burden to prove both a knowing *and* voluntary waiver: “Even

¹⁶⁹ *Id.*

¹⁷⁰ Appellant’s Br. at 22 (“The Military Judge was not required to separately analyze knowing and intelligent because Appellee never made known to the military judge the specific basis for such an objection.”) (quotations and alterations omitted).

¹⁷¹ *Mott*, 72 M.J. at 327 (“*Edwards*, however, requires that a waiver of rights be knowing and intelligent, and not merely voluntary.”), 330 (“Voluntariness of consent and knowing waiver are two distinct and ‘discrete inquiries;’” and “In sum, there are two branches to the waiver analysis. First, was the waiver voluntary? And, second, was the waiver knowing and intelligent?”), 332 (“the *Edwards* requirement of distinct inquiries into *both* knowing and voluntary waiver”) (emphasis added).

¹⁷² *Id.* at 330; *Berghuis*, 560 U.S. at 376.

absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly *and* voluntarily waived [*Miranda*] rights' when making the statement."¹⁷³

Accordingly, this Court should decline the Government's invitation to require an accused's suppression motion to invoke one or both specific prongs of the *Edwards* admissibility test to preserve appellate review over whether the entire test was satisfied.¹⁷⁴ Not only would this be inconsistent with *Berghuis* and *Mott*, it would effectively overrule this Court's precedent that "talismanic words" need not be invoked.¹⁷⁵ More importantly, requiring a pre-trial suppression argument from an accused with such surgical precision effectively nullifies the Government's preponderance burden to demonstrate admissibility of a confession obtained during a custodial interrogation—as required by the Supreme Court and the MREs.¹⁷⁶ The test for admissibility of this kind of evidence has two prongs. It stands to reason that if a legal test has two prongs, both must be satisfied otherwise the facts fail the test. Logically, if the Government is only required to demonstrate admissibility for one prong, based on how an accused articulates his objection,

¹⁷³ *Berghuis*, 560 U.S. at 382 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)) (alteration in original) (emphasis added).

¹⁷⁴ See Appellant's Br. at 13-14.

¹⁷⁵ *Blackburn*, 80 M.J. at 209-10.

¹⁷⁶ *Berghuis*, 560 U.S. at 384; MCM, MIL. R. EVID. 304(f)(6).

then the Government is not being held to its burden for the whole admissibility test.

Thus, even if this Court finds Appellee only challenged the voluntariness of his rights waiver, it should still hold the Government to its burden to prove both prongs of the *Edwards* admissibility test, making *Mott* applicable to the Military Judge's ruling.

c) Whether Appellee squarely raised on appeal the *Mott* issue on which the lower court granted relief is irrelevant because the lower court had authority to review this preserved issue under its Article 66, UCMJ, powers.

As a threshold matter, a *Mott* error is uniquely an appellate issue because *Mott* is solely about the sufficiency of a military judge's suppression ruling.¹⁷⁷ This issue can only be addressed *after* the military judge rules at trial. In analyzing a *Mott* error, the reviewing court only looks at whether the military judge's ruling sufficiently applied both prongs of the *Edwards v. Arizona* test—it does not apply the facts presented at trial to decide the underlying issues before the military judge.¹⁷⁸ Thus, it is unsurprising the Government has not “suggested that their

¹⁷⁷ *Mott*, 72 M.J. at 331-32.

¹⁷⁸ *See id.* at 332 (“[W]e do not reach a conclusion as to whether the confession in this case could be admissible -- only that it was not properly admitted in this case.”) (emphasis in original).

ability to litigate the case before this Court has been prejudiced in any way by the fact that [Appellee] failed to raise the issue before the NMCCA.”¹⁷⁹

The Government argues, “Appellee’s failure to move to suppress . . . in briefing at the lower court on grounds that his waiver was not knowing and intelligent, waived appellate review . . . for that issue.”¹⁸⁰ But the *Mott* error on which the lower court granted relief is an issue of law. As the following case law demonstrates, an issue of law not specifically raised on appeal (but preserved at the trial level) is treated as forfeiture, not waiver. As Chief Judge Baker explained, “an accused cannot silently waive appellate review of plain error.”¹⁸¹ This makes sense. “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’”¹⁸² A forfeited matter is reviewable for plain error.¹⁸³

On appeal, assignment of error briefs only *raise* issues. These appellate briefs do not state all issues not raised are being affirmatively waived by an appellant. Neither the assignment of error brief nor reply brief in this case ever

¹⁷⁹ See *United States v. RosarioMartinez*, No. 25-0102/MC, slip op. at 9-10 (C.A.A.F. June 2, 2026) (reaffirming this Court’s authority to specify an issue not raised by an appellant).

¹⁸⁰ Appellant’s Br. at 14.

¹⁸¹ *Gladue*, 67 M.J. at 314 (Baker, J., concurring).

¹⁸² *Id.* at 313 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

¹⁸³ *Id.* (citing *Harcrow*, 66 M.J. at 156; *Olano*, 507 U.S. at 733-34).

made an affirmative waiver of any issues not specifically raised.¹⁸⁴ Also, the lower court could have asked during oral argument if the *Mott*-specific issue was being raised or waived. The lower court asked neither question. All this shows why appellate practice and procedure is inherently different from that at the trial level where a trial judge asks a trial defense counsel if they have any objection to what is going on during key phases of the trial.

Accordingly, this Court’s case law reflects the difference between the Courts of Criminal Appeals’ (CCA) authority and trial courts-martial through its long-standing interpretation of Article 66, UCMJ, which still applies to issues of law despite the recent statutory changes. The CCAs “have a broad mandate to review the record unconstrained by an appellant’s assignments of error[.]”¹⁸⁵ “The [CCAs] may address prejudicial errors on its own motion and is not limited to the matters, if any, discussed in appellee’s submission to that court.”¹⁸⁶ “Nothing in either [then-]Article 66(c) or Article 59(a) precludes the [CCAs] from identifying prejudicial error without regard to the nature or quality of an accused’s submission on appeal.”¹⁸⁷ Further:

[t]he legislative history makes it clear that Congress intended the CCAs to serve as appellate bodies independent of the Judge Advocate

¹⁸⁴ J.A. 10-58, 99-117.

¹⁸⁵ *United States v. Roach*, 66 M.J. 410, 414 (C.A.A.F. 2008) (quoting *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998)).

¹⁸⁶ *United States v. Finster*, 51 M.J. 185, 188 (C.A.A.F. 1999).

¹⁸⁷ *Id.*

Generals and Government appellate attorneys. The CCAs are intended to not only uphold the law, but provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility. For this reason, Congress endowed the CCAs with authority to find facts as well as address questions of law. As this Court has often noted, such authority is awesome, including as it does 'broad factfinding power and *plenary de novo power to review questions of law*.'¹⁸⁸

These holdings were based on the previous version of Article 66 that said, the CCAs "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."¹⁸⁹ For the below reasons, however, these holdings are still good law as they pertain to questions of law.

In interpreting such statutory language, this Court "appl[ies] traditional canons of statutory construction."¹⁹⁰ "Statutory construction begins with a look at the plain language of a rule."¹⁹¹ "[T]he plain language of a statute will control unless it leads to an absurd result."¹⁹² This Court interpreted the plain language of the previous version of Article 66 as being comprised of three independent

¹⁸⁸ *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004) (citing *United States v. Duncan*, 38 M.J. 476, 479 n.7 (C.M.A. 1993); *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990)) (emphasis added).

¹⁸⁹ *Finster*, 51 M.J. at 188 (quoting 10 U.S.C. § 866(c) (1994)).

¹⁹⁰ *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

¹⁹¹ *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)).

¹⁹² *King*, 71 M.J. at 52 (citing *Lewis*, 65 M.J. at 88).

components: “Broken into its constituent parts, this statutory language provides that a CCA may affirm only such findings and sentence that it: (1) *finds correct in law*; (2) finds correct in fact; and (3) determines, on the basis of the entire record, should be approved.”¹⁹³ “The first prong pertains to errors of law and, as such, it also implicates Article 59(a). The second and third prongs do not involve errors of law”¹⁹⁴

Congress significantly changed this statutory language in 2021.¹⁹⁵ Yet the following chart shows the applicable statutory language for this case has not changed:

Previous Article 66(c) ¹⁹⁶ (the stricken language was removed to form the current version)	Current Article 66(d)(1)(A) ¹⁹⁷
“ The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. ”	“The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B).”

¹⁹³ *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), *superseded by statute on other grounds*, *United States v. Valentin-Andino*, 85 M.J. 361, 366 (C.A.A.F. 2025)) (emphasis added).

¹⁹⁴ *Tardif*, 57 M.J. at 224.

¹⁹⁵ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3611 (2021).

¹⁹⁶ 10 U.S.C. § 866(c) (2012). Prior to the 2021 amendment, this subsection was subsequently recodified as 10 U.S.C. § 866(d)(1) but kept the same language at issue verbatim. *See United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (quoting the same as 10 U.S.C. § 866(d)(1) (2018)).

¹⁹⁷ 10 U.S.C. § 866(d)(1)(A) (2024).

While it is indisputable that components (2) and (3) of the previous Article 66(c) are now abrogated due to Congress enacting the new statutory scheme codified in Article 66(d)(1)(B) and Article 66(e), the language of component (1) persists in the current version of Article 66(d)(1)(A). When Congress “adopt[s] the language used in the earlier act, Congress ‘must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.’”¹⁹⁸

Additionally, deleting the “should be approved” language is of no consequence. This Court already identified that the “should be approved” language was a separate (third) component of the statutory language from the (first component) “correct in law” language.¹⁹⁹ And that “third prong[] do[es] not involve errors of law”²⁰⁰ While this Court made clear:

the words ‘should be approved’ do have some meaning, [] we reject the proposition that the ‘should be approved’ clause . . . means only that the lower court can adjust findings and sentences that are incorrect in law or fact, at least as the standards for legal and factual sufficiency are ordinarily understood. That approach both fails to afford independent meaning to ‘should be approved’ and renders it surplusage, as a CCA

¹⁹⁸ *Stone v. INS*, 514 U.S. 386, 397 (1995); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 322 (2012) (“If a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort, or even uniform construction by inferior courts . . . they are to be understood according to that construction.”).

¹⁹⁹ *Nerad*, 69 M.J. at 141; *Tardif*, 57 M.J. at 224.

²⁰⁰ *Tardif*, 57 M.J. at 224.

clearly may not approve a legally or factually insufficient finding . . .
²⁰¹

Logically, the now-deleted “should be approved” clause leaves this Court’s interpretation of the “correct in law” clause undisturbed because the two clauses were always independent. The CCAs had the power to disapprove a guilty finding based on a prejudicial error of law under the “correct in law” clause—*not* the “should be approved” clause.²⁰² Finally, holding that a CCA cannot review and grant relief for a prejudicial error of law that it finds would be antithetical to the current Article 66 plain language that a CCA “may affirm *only* such findings of guilty as the Court *finds correct* in law.”²⁰³

In sum, the case law interpreting the language that remains the same in Article 66 should also persist as it pertains to questions of law. Under that case law, the lower court has “plenary de novo power to review questions of law” and grant relief for a prejudicial error of law regardless of the issues raised to that court by an appellant.²⁰⁴ The issue in this case—whether the Military Judge rendered a legally sufficient ruling about whether Appellee’s rights waiver was valid—is a

²⁰¹ *Nerad*, 69 M.J. at 145 (citations omitted).

²⁰² *See Tardif*, 57 M.J. at 224.

²⁰³ 10 U.S.C. § 866(d)(1)(A) (2024).

²⁰⁴ *Jenkins*, 60 M.J. at 29; *Roach*, 66 M.J. at 414; *Tardif*, 57 M.J. at 224; *Finster*, 51 M.J. 188; *May*, 47 M.J. at 481.

question of law.²⁰⁵ Thus, the lower court did not err in reviewing the Military Judge’s ruling for compliance with *Mott* and granting relief on that ground.

3. If this Court decides to rule on the rights waiver’s validity, Appellee’s rights waiver was neither knowing and intelligent, nor voluntary.

a) Appellee’s rights waiver was not knowing and intelligent.

As discussed above, a knowing and intelligent waiver is one where the accused has “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”²⁰⁶ But “the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.”²⁰⁷

[T]he accused must ‘fully understand[] 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. A defendant, for example, may waive his right to remain silent . . . even if the defendant does not know the specific questions the authorities intend to ask.’²⁰⁸

Here, the Detective’s pre-advisement statements created confusion about how Appellee’s right to remain silent would likely apply in general in the

²⁰⁵ See *Mott*, 72 M.J. at 321 (reviewing whether a military judge issued a legally sufficient suppression ruling); 10 U.S.C. § 867(c)(4) (2024) (“The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.”).

²⁰⁶ *Mott*, 72 M.J. at 330 (quoting *Berghuis*, 560 U.S. at 382-83).

²⁰⁷ *Id.* (quoting *Colorado v. Spring*, 479 U.S. 564, 574 (1987)).

²⁰⁸ *Id.* (quoting *United States v. Ruiz*, 536 U.S. 622, 629-30 (2002)) (emphasis and alterations in original).

circumstances. Those statements also created an additional (false) circumstance. By telling Appellee, “we’re here to try to help you through this whole thing. . . . [B]ut we can’t help you if you can’t . . . tell us what happened and . . . help us out,” the Detective: (1) implied that if Appellee waives his right to remain silent, the Detective *would* help him; and (2) asserted that if Appellee invoked his right to remain silent, the Detective *could not* help him.²⁰⁹

These false statements created the perception that Appellee’s right to remain silent would apply to whether he receives “help” from law enforcement. This perception is contrary to the advisement he received that statements he made could be used against him in a trial by court-martial. In other words, this gave Appellee the impression that his right to remain silent could apply in two distinct ways, instead of only applying in the way explained to him in the rights advisement. Being presented with the assertion that by talking he would receive “help” juxtaposed against the consequence that talking could be used *against* him, is inherently confusing. Thus, Appellee could not “fully understand[] the nature of the right and how it would likely apply in general in the circumstances” because the Detective’s statements affirmatively altered that understanding.²¹⁰ Therefore, Appellee’s rights waiver was not knowing and intelligent.

²⁰⁹ J.A. 153, 214.

²¹⁰ *Mott*, 72 M.J. at 330 (quoting *Ruiz*, 536 U.S. at 629-30) (emphasis and alterations in original).

b) Appellee's rights waiver was not voluntary.

The Military Judge also abused his discretion in not suppressing Appellee's statements because the Detective used unlawful inducement, trickery, and cajoling *prior* to reading Appellee his rights by stating "[a]nd just to let you know we're here to try to help you through this whole thing. . . . [B]ut we can't help you if you can't . . . tell us what happened and . . . help us out."²¹¹

Military Rule of Evidence 304 states that "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 . . . unlawful inducement" is an "involuntary statement" *per se*.²¹² While law enforcement are allowed to misrepresent facts and use trickery as a tactic in attempting *to elicit a confession* from a criminal suspect,²¹³ the Supreme Court squarely held in *Miranda* that "*any* evidence that the accused was . . . tricked, or cajoled *into a waiver* will, of course, show that the defendant did not voluntarily waive his privilege."²¹⁴

²¹¹ J.A. 153, 214.

²¹² MCM, MIL. R. EVID. 304(a)(1)(A).

²¹³ *See, e.g., Frazier v Cupp*, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."); *United States v. Sojfer*, 47 M.J. 425, 428-30 (C.A.A.F. 1998) (holding confession was voluntary despite misrepresentations and trickery NCIS agent employed during interrogation).

²¹⁴ *Miranda*, 384 U.S. at 476 (emphasis added).

While the Supreme Court held in *Colorado v. Spring* that certain pre-warning *omissions* by law enforcement did not amount to unlawful trickery,²¹⁵ the Court clarified that it was not addressing whether a pre-warning “*affirmative misrepresentation*” would invalidate a rights waiver under *Miranda*.²¹⁶ Accordingly, finding that pre-warning misrepresentations invalidate the voluntariness of a rights waiver is a reasonable and consistent application of *Miranda*’s straightforward trickery prohibition.²¹⁷

In *United States v. Giddins*, the Fourth Circuit held that law enforcement “affirmatively misled [the appellant] as to the true nature of the investigation” before his rights advisement by falsely replying that [he] was “not in trouble.”²¹⁸ The court “[had] no doubt that Giddins was in trouble when he asked both [detectives] whether he was,” and found that the detectives’ “deceit thus constitute[d] coercion.”²¹⁹ The court conducted a totality of the circumstances analysis to determine if the coercion rose “to a level such that [Giddins’] will [was] overborne [and] his capacity for self-determination critically impaired.”²²⁰

²¹⁵ *Spring*, 479 U.S. at 576.

²¹⁶ *Id.* at 576 n.8. Based on undersigned counsel’s research, it appears both the U.S. Supreme Court and this Court have not answered this question.

²¹⁷ *Miranda*, 384 U.S. at 476.

²¹⁸ *United States v. Giddins*, 858 F.3d 870, 884 (4th Cir. 2017).

²¹⁹ *Id.* (internal quotations removed).

²²⁰ *Id.* at 885.

The court considered: (1) “Giddins was in custody, although not subject to formal arrest;” (2) interviewed at “a police station under false pretenses;” and (3) had a criminal record/prior experience with the criminal justice system.²²¹ While there were some factors that would support that Giddins’ statements were voluntary, the court concluded his “Miranda waiver and statements were involuntary and the result of police coercion.”²²²

Similarly, the appellant’s statements in *United States v. Patterson* were also found to be involuntary.²²³ Applying a totality of the circumstances test, the lower court considered NCIS’ mischaracterization of the appellant’s rights advisement as being “just a piece of paper,” and misleading statements that the appellant was not being accused of a crime, when in fact he was.²²⁴ The lower court also weighed the “coercive effect” of the appellant’s regimental XO’s “directive to answer [law enforcement’s] questions,” and NCIS’ repeated references to reporting back to the appellant’s command.²²⁵ *Patterson*—as in *Giddins*—held that under the circumstances, the “[a]ppellant’s capacity for self-determination was critically

²²¹ *Id.*

²²² *Id.*

²²³ *United States v. Patterson*, No. 202200262, 2024 CCA LEXIS 130, *19 (N-M. Ct. Crim. App. Apr. 4, 2024).

²²⁴ *Id.* at *18.

²²⁵ *Id.*

impaired and his will was overborne.”²²⁶ Therefore, the appellant’s waiver and subsequent statements were found to be involuntary.²²⁷

Here, the Detective’s actions are akin to the coercive actions of law enforcement in *Giddins and Patterson*.²²⁸ Prior to reading Appellee his Article 31(b) rights, the Detective stated, “I’m gonna read you your rights here in a second . . .” and asked “[do] you understand what you’re here for?”²²⁹ When Appellee replied in the negative, the Detective replied “Urinalysis . . . Okay. And just to let you know *we’re here to try to help you* through this whole thing,”²³⁰ and “but we can’t help you if you can’t . . . tell us what happened and . . . help us out.”²³¹ The Detective repeated this sentiment to Appellee more than once after the rights advisement: “So, like I said before, *we’re here to try to help you* through this. Okay? It’s pretty evident. Right?” and “So, right now, it’s about navigating through this whole thing, and hopefully you can help us, and *we will try to help you*.”²³²

²²⁶ *Id.* at *19.

²²⁷ *Id.*

²²⁸ *See id*; *Giddins*, 858 F.3d at 885; *see also United States v. Lewis*, 78 M.J. 602, 609 (A. Ct. Crim. App. 2018) (stating “Coercive activity includes trickery . . .”).

²²⁹ J.A. 152, 214.

²³⁰ J.A. 152-53 (emphasis added).

²³¹ J.A. 153, 214.

²³² J.A. 157 (emphasis added).

But the Detective and the NCIS agent were not there to *help* Appellee. Their purpose for being there was quite the opposite. They were there in their law enforcement capacities to attempt to elicit a confession from him and to potentially utilize him in a subsequent undercover drug operation.²³³ The Detective’s statements that they were there to *help* Appellee were made to *trick* and *cajole* Appellee into waiving his rights and making an incriminating statement. The detective used insincere language to elicit a specific response and action from Appellee. That is, by definition, “cajoling.”²³⁴

Under the totality of the circumstances, the trickery, cajoling, and deception the Detective used was enough to critically impair Appellee’s capacity for self-determination and for his will to be overborne.²³⁵ First, Appellee was only twenty-two years old at the time and had been “spiraling down into . . . a depress[ed] state.”²³⁶ While the Military Judge noted that Appellee had served in the Navy for approximately two and a half years, and scored a forty-nine on the Armed Forces Qualification Test (AFQT), these factors do not overwhelmingly weigh in support of finding Appellee’s will was not overborne.²³⁷ To the contrary, as *Patterson*

²³³ J.A. 171-73.

²³⁴ *Cajole*, AMERICAN HERITAGE DICTIONARY (5th ed. 2022) (defining cajole as “to elicit or obtain by flattery, gentle pleading, or insincere language”).

²³⁵ See *Patterson*, 2024 CCA LEXIS 130, at *19; *Giddins*, 858 F.3d at 885.

²³⁶ J.A. 213, 215.

²³⁷ J.A. 213, 216.

held, “difficult undergraduate studies and standardized test scores” do not in themselves determine voluntariness.²³⁸

Second, Appellee was escorted from a mandatory mental health appointment directly to the interrogation with criminal investigators.²³⁹ Weighing this with the Detective’s statements that they were there to *help*, the coercive effect of the interrogation on Appellee is evident.²⁴⁰ Therefore, Appellee’s will was overborne, and his rights waiver and subsequent statements were involuntary.²⁴¹

i. The Military Judge abused his discretion by overlooking the coercive effect of the Detective’s statements.

The Military Judge abused his discretion by finding that there was no trickery and that Appellee’s waiver and statements to law enforcement were voluntary.²⁴² An abuse of discretion occurs when the “trial court’s findings of fact are clearly erroneous or if the court’s decision is influenced by an erroneous view of the law.”²⁴³

Here, the Military Judge characterized four instances of coercive statements as law enforcement merely “mention[ing] that their role was to ‘help’ the

²³⁸ *Patterson*, 2024 CCA LEXIS 130, at *18.

²³⁹ J.A. 213.

²⁴⁰ *See Patterson*, 2024 CCA LEXIS 130, at *19.

²⁴¹ *See id.*

²⁴² J.A. 212.

²⁴³ *Mott*, 72 M.J. at 329 (quoting *Freeman*, 65 M.J. at 453).

accused.”²⁴⁴ As analyzed above, these statements—taken in conjunction with Appellee’s (1) age, (2) mental state, and (3) being physically escorted directly from a mental health appointment to a subsequent interrogation by criminal investigators—were sufficient “to critically impair the Appellant’s capacity for self-determination [and] for his will to be overborne.”²⁴⁵

ii. The Military Judge misapplied the protections of Article 31(b) and *Miranda*.

The Military Judge held “the specific circumstances do not reveal that the use of [the term ‘help’] in the context in which it was used somehow suggest . . . that they were attempting to trick or deceive the accused into making involuntary statements under the gui[s]e of providing medical care.”²⁴⁶ This finding fails to recognize that the Detective’s purported “help” was merely a ruse to trick and cajole Appellee into waiving his rights and incriminating himself.²⁴⁷ The Detective used this tactic to cloud the interrogation’s purpose—which was to induce Appellee into waiving his rights and incriminating himself. Using such insincere language immediately preceding a rights advisement serves no other purpose than to attempt to detract from the purpose of that rights advisement and to induce a suspect *to waive* his rights. In fact, the statements did mislead and deceive

²⁴⁴ J.A. 220.

²⁴⁵ See *Patterson*, 2024 CCA LEXIS 130, at *19.

²⁴⁶ J.A. 220.

²⁴⁷ J.A. 216.

Appellee because their purpose of having him *waive his rights* would not *help* him in any sense of the word. Rather, it would (and did) do the opposite.

The Government argues, “Detective Watson’s statements—and their caveat—were not insincere because they were correct. Detective Watson merely contextualized the range of options Appellee had: be forthcoming and potentially receive pay [for being an undercover informant] and a less punitive exit from the Navy; or obfuscate and receive no such benefits.”²⁴⁸

Yet this ignores two facts: (1) the “caveat” of “no guarantees” and the offer of benefits for potentially being an undercover informant all occurred *after* Appellee had waived his rights; and (2) Detective Watson was not actually there to try to help *Appellee* (as opposed to helping *law enforcement* build its case against him). But even setting that aside, the facts the Government cites do not make Detective Watson’s statements less deceitful. And the Government cites no authority for the proposition that the statements were, in fact, true.²⁴⁹

Specifically, there is nothing to show that Detective Watson had any authority to make Appellee an undercover operative, much less pay Appellee money from official government funds to do so. Any undercover drug activity

²⁴⁸ Appellant’s Br. at 35.

²⁴⁹ *See id.*

would ordinarily be executed pursuant to a grant of immunity, which, by law, the detective and the agent had no authority to grant.²⁵⁰

Regardless, the notion that making undercover drug deals for law enforcement can help a suspect is dubious at best. It is an undertaking that inherently presents the potential for physical danger to the undercover informant—particularly if the informant’s motives are discovered by the drug dealer. Further, whether or not a service member confesses to a crime does not entitle him to a “range of options,” as the Government appears to assert, but rather significantly narrows those options by virtually ensuring his conviction of the crime to which he confesses.²⁵¹ There is only one entity that is truly *helped* when a service member confesses to a crime: the Government.

Therefore, the Military Judge’s finding that “[t]here is *no* evidence to suggest that the accused was ‘threatened, tricked, or cajoled’ into waiving his rights or making admissions” was clearly erroneous.²⁵² The ruling was an abuse of discretion, as it was based on a clearly erroneous finding of fact, “a

²⁵⁰ See MCM, R.C.M. 704(c) (discussing that only a general court-martial convening authority or the United States Attorney General can grant immunity, or their proper designee).

²⁵¹ See Appellant’s Br. at 35.

²⁵² J.A. 221 (quoting *Miranda*, 384 U.S. at 476) (emphasis added).

misapprehension of the applicable law[,] and the military judge’s findings failed to address the relevant considerations.”²⁵³

Conclusion

For the foregoing reasons, this Court should affirm the lower court’s decision.

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²⁵³ *Mott*, 72 M.J. at 329 (quoting *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986)) (quotations and alterations omitted).

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I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division (Code 46), at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity (Code 40), at Joshua.D.Ricafrente.civ@us.navy.mil on June 9, 2026.

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