

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

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

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 202400058

USCA Dkt. No. 26-0139/NA

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

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Issue Presented

Whether the Convening Authority violated Appellant's Due Process right to trial before a members panel by referring his charge to a military judge-alone special court-martial pursuant to Article 16, UCMJ, and RCM 201.

Statement of Statutory Jurisdiction

Appellant timely filed a notice of appeal of his conviction at special court-martial.¹ The lower court had jurisdiction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).² This Court has jurisdiction under Article 67(a)(3), UCMJ.³

Statement of the Case

A special court-martial consisting of a military judge alone pursuant to Article 16(c)(2)(A), UCMJ, convicted Appellant, contrary to his plea, of one specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ.⁴ The Military Judge sentenced him to reduction by one pay grade to E-3.⁵ The Convening

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 10 U.S.C. § 867(a)(3) (2024).

⁴ R. at 7; R. at 468.

⁵ R. at 543.

Authority approved the findings and sentence, and the Military Judge entered it into judgment.⁶

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 Appellant's pre-trial suppression motion.⁷ The Government moved the lower court for panel and en banc reconsideration on September 29, 2025, which the lower court denied on December 30, 2025.⁸ Appellant was served with the decisions of the lower court on the same dates those decisions were issued. The Navy Judge Advocate General (JAG) certified one issue unrelated to the one discussed herein to this Court on February 26, 2026, docketed as case number 26-0138/NA.⁹ Appellant timely petitioned this Court for review of the instant issue on February 27, 2026.¹⁰

Statement of Facts

Appellant filed a pre-trial Motion to Dismiss the sole Charge and Specification because referral to a military judge-alone special court-martial under

⁶ Convening Authority's Action, Jan. 19, 2024; Entry of J., Feb. 3, 2024.

⁷ *United States v. Eneliko*, No. 202400058, slip op. at 9 (N-M. Ct. Crim. App. Aug. 28, 2025).

⁸ Order Den. the Government's Mot. for Recons., *United States v. Eneliko*, No. 202400058 (N-M. Ct. Crim. App. Dec. 30, 2025) (en banc).

⁹ Corrected Docketing Notice, *United States v. Eneliko*, No. 26-0138/NA (C.A.A.F. Feb. 26, 2026).

¹⁰ Pet. for Grant of Review, Feb. 27, 2026.

Article 16(c)(2)(A), UCMJ, violated his Due Process rights.¹¹ Specifically, Appellant asserted that precluding his ability to elect a trial by a panel of court members violated his historic and fundamental Due Process right to such a panel.¹² Appellant additionally asserted that because of the additional attendant penalties he faced if convicted, this Charge and Specification constituted a “serious” offense and not a “petty” offense—entitling him to a trial by a panel of court members under Supreme Court jurisprudence.¹³ The Military Judge denied Appellant’s motion in a written ruling.¹⁴ Appellant nonetheless proceeded with a contested trial before the Military Judge.¹⁵ Appellant appealed this Due Process issue as an Assignment of Error to the lower court. The lower court considered it and found it did not “require discussion or relief.”¹⁶

¹¹ Appellate Ex. XIII at 1.

¹² *Id.* at 2-3, 6.

¹³ *Id.* at 4-6.

¹⁴ Appellate Ex. XXXI at 1.

¹⁵ R. at 247.

¹⁶ *Eneliko*, slip op. at 2 n.2.

Reasons to Grant Review

This Court should reconsider its decision in *United States v. Wheeler* and rule that military service members have a Due Process right to a members panel.

Or, at a minimum, this Court should decide whether service members have a Due Process right to a members panel when the charged offense carries the attendant penalty of loss of Second Amendment rights.

Appellant acknowledges that this Court's recent decision in *United States v. Wheeler* held that there is "no Fifth Amendment due process right to a trial before a panel of members where the military judge-alone special court-martial forum limited the maximum confinement that could be adjudged to six months and precluded a punitive discharge."¹⁷ He submits this Petition, however, in order to preserve this issue for the purposes of further appeals, and because Appellant asserts that *Wheeler* was incorrectly decided. Appellant's case is also distinguishable from *Wheeler* because his conviction is a serious offense in that it carries the attendant penalties of: (1) terminating nearly all his Second Amendment rights to keep and bear arms; and (2) mandatory processing for separation from the Navy with the potential for an

¹⁷ *United States v. Wheeler*, 85 M.J. 70, 80 (2024).

Other Than Honorable discharge.¹⁸ These penalties are approximate in severity to confinement greater than six months.¹⁹ Therefore, the Military Judge’s denial of Appellant’s pre-trial motion to dismiss for this Due Process violation was error.²⁰ Additionally, Appellant hereby incorporates all legal arguments raised in his pre-trial motion.²¹

¹⁸ *See id.* at 72 (convicted of sleeping on post); 18 U.S.C. § 922(d)(3), (g)(3) (2024) (criminalizing the sale, disposition, shipment, or transportation of any firearm to, and the possession of any firearm in or affecting interstate commerce by, any person who is an unlawful user of any controlled substance); U.S. CONST. amend. II (“the right of the people to keep and bear Arms, shall not be infringed.”); Statement of Trial Results, Nov. 30, 2023, Section G (the Military Judge checked “Yes” that a firearm possession is triggered in accordance with 18 U.S.C. § 922.); U.S. DEP’T OF NAVY, NAVPERS 15560D, NAVAL MILITARY PERSONNEL MANUAL (MILPERSMAN) 1910-146, SEPARATION BY REASON OF MISCONDUCT – DRUG ABUSE ch. 69, para. 2, 5 (Oct. 9, 2019).

¹⁹ *See United States v. Nachtigal*, 507 U.S. 1, 6 (1993) (offenses that carry additional penalties that “approximate the severe loss of liberty caused by imprisonment for more than six months” make an offense “serious” enough to constitutionally entitle a criminal defendant to a jury trial).

²⁰ Appellate Ex. XXXI at 1.

²¹ *See* Appellate Ex. XIII.

Conclusion

Accordingly, Appellant respectfully requests that this Court grant his petition for review in order to reconsider and overrule its decision in *Wheeler*, or, alternatively, consider whether *Wheeler* applies when the charged offense carries the collateral consequences of the loss of Second Amendment rights and mandatory processing for separation from the military.

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Appendix

A. *United States v. Eneliko*, No. 202400058, slip op. (N-M. Ct. Crim. App. Aug. 28, 2025).

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division, at Code46-DAC@us.navy.mil, and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at Joshua.D.Ricafrente.civ@us.navy.mil on March 31, 2026.

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Certificate of Compliance with Rules 21(b) and 37

This Supplement complies with the type-volume limitations of Rule 21(b) because:

This Supplement contains 1,542 words.

This Supplement complies with the typeface and type style requirements of Rule 37.

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This opinion is subject to administrative correction before final disposition.

United States Navy - Marine Corps
Court of Criminal Appeals

Before
GROSS, GERRITY and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

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

No. 202400058

Decided: 28 August 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Michael F. Whitican

Sentence adjudged 30 November 2023 by special court-martial tried at Naval Base Bremerton, Washington, consisting of military judge alone. Sentence in the Entry of Judgment: reduction to E-3.

For Appellant:
Lieutenant Raymond E. Bilter, JAGC, USN

For Appellee:
Captain Jacob Carmin, USMC (argued and on brief)
Major Mary Claire Finnen, USMC (on brief)

**This opinion does not serve as binding precedent, but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedure 30.2.**

PER CURIAM:

Appellant was convicted, contrary to his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹

Appellant raises two assignments of error (AOE): (1) whether the military judge abused his discretion by not suppressing Appellant's statements to law enforcement; and (2) whether the military judge violated the confrontation clause when he admitted, over defense objection, drug lab documents based on the testimony of the Government's surrogate drug lab expert.² We find merit in Appellant's first AOE and set aside the findings and sentence. Because we find merit in the first AOE, we do not address the second AOE.

I. BACKGROUND

On 17 May 2023, a member of Appellant's chain of command escorted him to a mental health appointment at Naval Hospital Bremerton. The escort was then ordered to take Appellant to the Naval Criminal Investigative Service (NCIS) spaces where he met Detective Whiskey and Special Agent Peters with the Criminal Investigation Division (CID) and NCIS, respectively.³

¹ 10 U.S.C. § 912a.

The Court recognizes Mr. Jimmy Murphy for his assistance and outstanding work on this case. Mr. Murphy joined us as an intern from Notre Dame Law School.

² Appellant also asserted a third AOE in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which we rephrase to: whether the convening authority violated Appellant's due process right to a trial before members by referring this charge to a military judge alone special court-martial in accordance with Article 16(c)(2)(A), UCMJ. We considered this matter and find it does not require discussion or relief. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

³ All names in this opinion, other than Appellant, counsel, and the military judge, are pseudonyms.

Detective Whiskey was the lead investigator and conducted the interview regarding an allegation that Appellant had wrongfully used cocaine.⁴ The interview lasted approximately 28 minutes.⁵ Detective Whiskey began the interview by building rapport and asking Appellant about his previous mental health appointment, stating “[e]verything okay, I’m sure – I hope.”⁶ When Appellant said the appointment was at the “Brem hospital,” the detective said “Well, I hope everything’s working out for you.”⁷ Detective Whiskey then began asking Appellant for biographical data.⁸

Once he had collected the data and asked Appellant about his parents and what they do for a living, Detective Whiskey, without providing an Article 31(b) rights advisement, changed the questions in the interview to focus on the alleged criminal activity:

Detective Whiskey: I’m gonna read you your rights here in a second, but understand – you understand what you’re here for?

Appellant: No, not exactly.

Detective Whiskey: Urinalysis.

Appellant: Okay.⁹

Detective Whiskey: Okay. And just to let you know, we’re here to try to help you through this whole thing.

Appellant: Absolutely.

Detective Whiskey: Okay. 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. Okay?

⁴ Pros. Ex. 2.

⁵ Pros. Ex. 2.

⁶ Pros. Ex. 2; App. Ex. XLIV at 1.

⁷ Pros. Ex. 2.

⁸ Pros. Ex. 2.; App. Ex. XLIV at 2.

⁹ The military judge noted in his ruling that Appellant also nodded his head in acknowledgment at this time. App. Ex. XXXII.

Appellant: Okay.¹⁰

The Detective then immediately provided Appellant his Article 31(b) rights advisement both verbally and in writing.¹¹ Appellant waived his 31(b) rights and subsequently confessed to the wrongful use of cocaine.¹²

Appellant filed a timely pretrial motion to suppress all statements he made on 17 May 2023 to law enforcement investigators.¹³ Appellant challenged the knowing, intelligent, and voluntary nature of his rights waiver and statement.¹⁴ The military judge denied Appellant's motion to suppress his statements, as well as a subsequent reconsideration motion filed by Appellant prior to trial.¹⁵

At trial, Appellant pleaded not guilty and sought to undermine not only his statements to Detective Whiskey but also to attack the credibility of the Naval Drug Screening Laboratory's (NDSL) testing process and results.¹⁶ He introduced evidence challenging the chain of custody for his urine sample. In addition, he obtained concessions from the Government's drug lab expert that many, if not all, of the Government employees involved in the testing of his sample had been decertified one or more times for not following the NDSL's standard operating procedures.¹⁷ The Government relied heavily on Appellant's statements during its closing argument.¹⁸

Additional facts necessary to resolve Appellant's AOE are discussed below.

¹⁰ Pros. Ex. 2; App. Ex. XLIV at 9-10.

¹¹ App. Ex. XLIV at 10-13.

¹² App. Ex. XLIV at 12.

¹³ App. Ex. XIV.

¹⁴ App. Ex. XIV at 7; R. at 173.

¹⁵ App. Ex. XXXII.

¹⁶ R. at 247.

¹⁷ R. at 440.

¹⁸ R. at 459-60.

II. DISCUSSION

1. *Standard of Review*

We review the military judge’s ruling on Appellant’s motion to suppress for an abuse of discretion.¹⁹ The abuse of discretion standard recognizes that a judge has a wide range of choices and will not be reversed so long as the decision remains within that range.²⁰ Under an abuse of discretion standard, “[w]e will not overturn a military judge’s evidentiary decision unless that decision was ‘arbitrary, fanciful, clearly unreasonable,’ or ‘clearly erroneous.’”²¹ Whether Appellant voluntarily, knowingly, and intelligently waived his Article 31(b) rights are questions of law that we review de novo.²² In this case, we look specifically as to whether or not the military judge properly examined the totality of the circumstances to determine if Appellant’s waiver of his rights was not only voluntary, but also knowing and intelligent.

2. *Law*

a. *Article 31(b)*

Article 31(b), UCMJ, requires a rights advisement when (1) a person subject to the UCMJ is (2) interrogating or requesting any statement (3) from an accused or person suspected of an offense, and (4) the questions can elicit a response about an offense of which the person questioned was accused or suspected.²³

b. *Waiver of 31(b) Rights*

Edwards v. Arizona established that courts must treat the issues of voluntariness and knowing and intelligent waiver as “discrete inquiries.”²⁴ These separate analyses address fundamentally different constitutional concerns. The voluntariness inquiry examines whether the waiver was “the product of a

¹⁹ *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

²⁰ *United States v. Wilson*, 84 M.J. 383, 390–91 (C.A.A.F. 2024).

²¹ *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citing *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

²² *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019).

²³ 10 U.S.C. § 831(b); See *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnotes omitted) (citing *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006)).

²⁴ *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

free and deliberate choice rather than intimidation, coercion, or deception.”²⁵ The inquiry into whether a rights waiver was knowing and intelligent determines whether the accused “understood his right to counsel and intelligently and knowingly relinquished it.”²⁶ The accused must have “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”²⁷

In *United States v. Mott*, the Court of Appeals for the Armed Forces (CAAF) embraced the *Edwards* analysis and held that “the military judge abused his discretion by failing to analyze as a matter of law whether [a]ppellant could and did knowingly and intelligently waive his rights” in addition to whether the waiver was voluntary in accordance with *Edwards*.²⁸ The waiver analysis must examine the totality of circumstances, including “the accused’s age, experience, education, background, and intelligence, and [his] capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”²⁹ 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.

The CAAF found the military judge addressed the voluntariness standard but failed to conduct the full separate analysis that *Edwards* requires for knowing and intelligent waiver based on the facts of the case.³⁰ The military judge in *Mott* “erred when he addressed whether [a]ppellant’s waiver was knowing and intelligent solely as a conclusory finding of fact, rather than as a conclusion of law” as the legal analysis must examine how specific circumstances relate to constitutional principles.³¹

²⁵ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

²⁶ *Edwards*, 451 U.S. at 484.

²⁷ *Berghuis v. Thompson*, 560 U.S. 370, 382-83 (2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 427 (1986)).

²⁸ *United States v. Mott*, 72 M.J. 319, 326 (C.A.A.F. 2013).

²⁹ *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

³⁰ *Mott*, 72 M.J. at 331; see *United States v. Connelly*, 479 U.S. 157, 168 (1986).

³¹ *Mott*, 72 M.J. at 332; see *United States v. Freeman* 65 M.J. 451, 453 (C.A.A.F. 2008).

3. Analysis

a. Detective Whiskey's pre-right's advisement comments

As an initial matter, we note that in conducting his analysis of Appellant's motion to suppress, the military judge failed to consider important facts in his ruling. Prior to the interrogation, Detective Whiskey knew Appellant tested positive on a urinalysis and was suspected of a crime—wrongful use of cocaine, in violation of Article 112a, UCMJ. Appellant was escorted by a master-at-arms to NCIS to be interrogated about this crime. The initial questioning related to Appellant's background and building rapport, but then Detective Whiskey changed the direction of the interrogation to focus on the crime Appellant was suspected of committing. Detective Whiskey could have provided Appellant's Article 31(b) rights at any point during the initial portion of the interrogation, but instead waited to do so.

Detective Whiskey, instead of providing Appellant his 31(b) rights, stated "I'm gonna read you your rights here in a second, but understand – you understand what you're here for?" This question could have violated Article 31(b), because the question tends to elicit an incriminating response. Appellant responded "No, not exactly." Again, at this time, Detective Whiskey could have read Appellant his rights, but instead followed with "[u]rinalysis" which elicited a response from Appellant: "[o]kay" with an affirmative head nod. The military judge did not analyze whether this exchange occurred in violation of Article 31(b).³² After having laid the groundwork for the interrogation, Detective Whiskey also stated immediately prior to Appellant's reading and waiver of his Article 31(b) rights, "[w]e're here to try and help you through this whole

³² Appellant did not specifically challenge these questions either at trial or on appeal, and so we would review the military judge's admission of these statements for plain error, if at all, if it was only Appellant's responses to these questions at issue. However, we note for practitioners that several courts have found that an investigator's query to a suspect "do you know why you are here" has been found to be an interrogation under the circumstances. *See, e.g., State v. Spain*, 602 N.E.2d 775, 777 (1992); *People v. Thomas*, 2016 NY Slip Op 26024, 27 N.Y.S.3d 815, 821 (Cnty. Ct.) ("While 'Do you know why you're here' is perhaps a question routinely posed to suspects being interviewed by law enforcement, the court finds that based on the specific facts presented here, the defendant was entitled to be advised of his *Miranda* rights before being asked that question and the pre-*Miranda* statements are suppressed.").

thing . . . [w]e can't help you if you can't, you know, tell us what happened and you can't, you know, help us out.”³³

b. Mott analysis for knowing, intelligent, and voluntary waiver

Applying *Mott's* framework to this case reveals that the military judge failed to address the totality of the circumstances prior to the Article 31(b) rights being waived to determine if there was a knowing, intelligent, and voluntary waiver of rights. Specifically, the military judge did not address the propriety or any impact of Detective Whiskey's questions preceding Appellant's waiver of his Article 31(b) rights. The military judge also did not analyze the impact of Detective Whiskey's statement as to the help he could provide Appellant if he spoke to them and helped them out on whether Appellant was able or did then make a knowing and intelligent waiver of his rights.³⁴ In his ruling, the military judge did not analyze these issues in assessing the totality of the circumstances for the waiver and admission of the rest of Appellant's statements into evidence. Notably, the parties presented no testimony on the issue of Appellant's waiver other than the video of the interrogation and two post-hoc affidavits submitted in support and against Appellant's motion to suppress.

Without deciding whether Appellant made a voluntary, knowing and intelligent waiver of his Article 31(b) rights, we find 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.

Having found the military judge erred in failing to consider the totality of the circumstances to determine not only whether Appellant's rights waiver was voluntary, but also whether it was knowing and intelligent, we must test for prejudice to determine whether the improperly admitted evidence was

³³ App. Ex. XXXII. In argument, Appellate Government Counsel conceded there was little help that NCIS could have provided Appellant, which the military judge did not analyze to determine the potential impact on Appellant's waiver.

³⁴ We note that the military judge's finding of fact that "there is *no evidence* to suggest that the accused was 'threatened, tricked, or cajoled' into waiving his rights" was clearly erroneous. As this appeal amply shows, there was at least *some* evidence of trickery or cajoling. The military judge's failure, therefore, to analyze this evidence under *Mott's* framework in assessing the whether Appellant's waiver of rights was both voluntary *and* knowing and intelligent leaves us without a sufficient record to review the military judge's decision.

harmless beyond a reasonable doubt. As the CAAF has set forth, the question we must ask is whether there is a reasonable possibility that Appellant’s confession, which was a large focus of the Government’s closing argument, “might have contributed to the conviction.”³⁵ Here, we find that the admission of Appellant’s statement was not harmless beyond a reasonable doubt. The only evidence of Appellant’s drug use, other than his confession, was the urinalysis, and Appellant vigorously attacked those results. While we acknowledge that a positive urinalysis alone may suffice to prove a charge for wrongful use of cocaine, we cannot say that there is no reasonable probability that Appellant’s confession might have contributed to his conviction. Therefore, failing to analyze the totality of the circumstances in this case to determine if Appellant’s waiver of his rights was knowing and intelligent was not harmless.

III. CONCLUSION

After careful consideration of the record, the briefs of appellate counsel, and the oral arguments of appellate counsel, we hold that the military judge abused his discretion by failing to analyze the totality of the circumstances involving the waiver of Appellant’s Article 31(b) rights in accordance with *Mott*. The finding of guilty and the sentence are **SET ASIDE**. A rehearing is authorized.



FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

³⁵ See *Mott*, 72 M.J. at 333.