

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	ANSWER ON BEHALF OF
Appellee	)	APPELLEE
	)	
v.	)	Crim.App. Dkt. No. 2024003704
	)	
Nathan M. RIVERA,	)	USCA Dkt. No. 26-0193/MC
Private First Class (E-2)	)	
U.S. Marine Corps	)	
Appellant	)	

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Issue Presented

DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN DENYING THE DEFENSE MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO NCIS?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2021). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2021).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of wrongful use of lysergic acid diethylamide, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Then, a panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The Military Judge sentenced Appellant to 48 months' confinement, reduction to E-1, and a dishonorable discharge. Appellant received 247 days' confinement credit. The Convening Authority took no action on the sentence, the Military Judge entered the Entry of Judgment into the Record, and except for the punitive discharge, the sentence was executed. The court below affirmed.

Statement of Facts

- A. The United States charged Appellant with wrongful use of a controlled substance and sexual assault.

The United States charged Appellant with one Charge and Specification of wrongful use of lysergic acid diethylamide, a Schedule I controlled substance, and one Charge with three Specifications of sexual assault—one for penetrating the Victim’s anus with his penis when he reasonably should have known she was asleep, one for penetrating her anus with his penis without her consent, and one for penetrating her vulva with his penis without her consent. (J.A. 83.)

- B. The Charges arose when Appellant had sex with a sleeping stranger while high on acid.

The Victim attended a Halloween party, which Appellant had also been invited to, though she had never met him before. (J.A. 296–98, 306–07.)

1. The Victim awoke to Appellant assaulting her.

During the party, she became uncomfortable when Appellant tried putting his arm around her as she sat on the couch next to him and another Marine. (J.A. 296–312). So, she went to her friend Corporal Booker’s room, lay down on the floor next to his bed, and fell asleep. (J.A. 311–12.) Corporal Booker was already asleep in the room, having imbibed to the point of vomiting earlier that night. (J.A. 308–09, 488–90.)

The Victim awoke to what she described as “an awful pain” in her anus, so she “grabbed on to a stand” with her left hand. (J.A. 317–18.) A later forensic exam documented an abrasion on her left hand. (J.A. 328–31, 567.) She felt a penis in her body and thighs touching her thighs from behind, so she “started squirming” to get away from the pain, which is when Appellant began to penetrate her vaginally. (J.A. 318–19.) The Victim testified that Appellant then pushed her hand away when she swatted at him to stop. (J.A. 318–19.)

2. The Victim reported Appellant’s crimes immediately.

She began screaming for Corporal Booker, but he did not rouse until after Appellant finished, allowing the Victim to get up and shake Corporal Booker awake. (J.A. 318–19.) Later analysis of a DNA swab from the Victim’s vagina revealed sperm “too numerous to count” matching Appellant’s DNA. (J.A. 529.)

Now awake, Corporal Booker testified the Victim was “crying,” “sad,” and “traumatized” when she said, “he raped me.” (J.A. 491–96.) After telling Corporal Booker what happened, the Victim fled to the bathroom, locked the door, and hid in a cubby to call her ex-boyfriend to take her to the hospital. (J.A. 321–22, 324–25, 490–93.) The ex-boyfriend testified she was “frantic and crying” on the phone. (J.A. 509.) At trial, the Victim explained that before she and her ex-boyfriend left for the hospital, she asked Corporal Booker for Appellant’s name because she did not know who he was. (J.A. 325–26, 566.)

C. Law enforcement interrogated Appellant.

After the Victim and other witnesses identified Appellant as the suspect, a Navy Criminal Investigative Service (“NCIS”) Special Agent interviewed Appellant. (J.A. 411–12.) He started the interview at about 1400 on October 15, 2022—over twelve hours after the Victim reported the incident. (J.A. 85, 94–95, 102–03, 423.) The entire interrogation lasted about an hour. (J.A. 85.) At the outset, the Agent collected biographical data and talked with Appellant about a variety of topics—including military jobs, tattoos, and tuition assistance. (J.A. 86–90.)

1. The Agent explained Appellant’s rights.

The Agent then turned the conversation to “an incident that occurred last night” and explained “it’s your right to tell us your side of the story.” (J.A. 90.) The Agent further explained that NCIS agents “collect facts, and we provide a report and those facts to your commanding officer,” who “consult[s] with his staff judge advocate” and “make[s] a decision.” (J.A. 90.) He advised, “I have found that commanding officers are not lenient, but they are more understanding when they’ve got a full picture.” (J.A. 90.)

The Agent then gave Appellant a written copy of the rights warning and told him to “read the rights out loud, and then . . . initial by each” of the rights. (J.A. 91.) The warning itself listed five separate rights, including:

3. I have the right to consult with a lawyer prior to any questioning. This lawyer may be . . . a military lawyer pointed to act as my counsel at no cost to me;

4. I have the right to have my retained lawyer and/or appointed military lawyer present during this interview; *and*

5. I may terminate this interview at any time, for any reason.

(J.A. 113) (emphasis added). Appellant read aloud, stopping after three and telling the Agent, “I’m a little iffy on 3.” (J.A. 91.)

The Agent then explained:

before we talk, you’ve got the right to go consult with a lawyer or have them present during this questioning. However, its not like the shows like—like SVU . . . where they’re like call your lawyer and have them come. [I]f you—if you lawyer (sic), we—we basically won’t have a conversation with you. We don’t get to hear your side of this story, ok? And we’ll just go with what we’ve got. So you’ve got that right. You can have them present. But we just—that’s not something we do. We—it’s not like the shows where we call somebody and the guy comes and we get in here with a little briefcase and slams it on the thing he says we’re done here, you know what I mean?

(J.A. 91.)

a. Appellant later alleged the rights warning confused him.

This explanation would later become the subject of Motions practice, the Appeal below, and this Appeal. (J.A. 1–82, 119–277.) At trial, Appellant submitted an Affidavit in support of his Motion to Suppress, claiming the explanation led him to believe he “did not have a right to have a lawyer present during the interview because that right does not apply to NCIS or [Appellant] as a

Marine.” (J.A. 117.) At trial, the Agent testified that if Appellant had returned with a lawyer, the Agent would have tried re-interviewing him. (J.A. 470.)

2. Appellant waived his rights.

After the Agent’s explanation, Appellant asked no follow-up questions and nodded to indicate he understood the right before initialing the last two rights.

(J.A. 85, 91–92.) He read aloud, “I understand my rights as related to me and as set forth above,” and then signed the waiver. (J.A. 92.) In addition to the rights

warning itself, by the time Appellant signed this waiver, the Agent had told him:

(1) “[Y]ou don’t have to talk to me. You can get a lawyer;” (2) “If you don’t want to talk, then you say I don’t want to talk. I want a lawyer;”¹ and (3) “You can stop talking at any point.” (J.A. 85 at 12:13, 91–92.)

3. Appellant first minimized his conduct but then made a series of admissions after signing a second rights waiver.

a. Appellant first minimized his conduct.

Appellant then spoke with the Agents. He first claimed he did not remember how he got home before later admitting, “there is a chance I could have driven back.” (J.A. 85, 95–96.) In a similar vein, he first claimed he did not remember anything between the time a woman on the couch with him went to sleep in

¹ The Transcript reads, “I don’t want to talk to lawyer,” but the context and recorded audio make it clear the Agent actually said “. . . I don’t want to talk. I want a lawyer.” (J.A. 85, 91.)

Corporal Bravo's room and the time he woke up with "a bunch of commotion going on" and "the girl crying." (J.A. 85, 102.) But later, when asked why he thought the Agents were talking to him, Appellant replied, "I think I may have done something that I . . . shouldn't have done," before clarifying he was "just afraid I harmed someone." (J.A. 85, 18.)

b. Appellant signed a second rights waiver after admitting to drug use.

When Appellant admitted drug use, explaining he "lost track of . . . what was going on" because he was drinking and "was also on two tabs of acid," the Agent paused the interview and reviewed Appellant's rights with him again, giving him another sheet to initial and sign. (J.A. 85, 103.) Appellant did so, almost immediately, without asking any additional questions. (J.A. 85.)

c. Appellant admitted his conduct.

After the second rights warning and further questioning, Appellant admitted, "I believe I penetrated her while I was, like, laying there with her." (J.A. 85, 105.) He ultimately said he believed she was asleep and that he believed he "stuck [his] dick in her vagina." (J.A. 85, 105.)

D. The Parties litigated the admissibility of Appellant's interview pretrial, and the Military Judge admitted it.

Appellant challenged the admissibility of his interview pretrial arguing—as he does here—that the Agent had "present[ed Appellant] with an 'either or'

decision,” and that that the warning implied the “right to have counsel present . . . does not apply here.” (J.A. 142–44.) The Military Judge issued a seventeen-page Ruling, finding that Appellant’s “waiver was voluntary, knowing, and intelligent[:.]” Appellant’s age, education, experience, intelligence, and the fact he was “alert, awake, responsive, and spoke intelligently” during the interrogation “indicate[d] he understood [his] rights and the consequences of waiving those rights.” (J.A. 274, 277.)

The Military Judge found the “Agent clearly [told] him more than once he ha[d] the right to request a lawyer,” “[n]othing the Agent told [Appellant] was factually untrue,” and Appellant “was not objectively misinformed about his right to counsel.” (J.A. 274–75.) He found the Agent’s explanation of Appellant’s right to counsel meant “as a practical matter, [it] is true” that “if [Appellant] invoked” his right to counsel “it would be the end of the interview.” (J.A. 274.) And although the Military Judge wrote that “ploys to mislead a suspect . . . do not render a statement involuntary,” he did not find that the Agent had misled, deceived, lied to, or otherwise tricked Appellant. (J.A. 274–75.) Rather, “if” the Agent’s “explanation of the right to an attorney was a factor in [Appellant’s] to waive his rights, it was a product of his own balancing and competing considerations.” (J.A. 274.) Finally, the Military Judge cited the second, drug-related rights waiver form as evidence Appellant understood his rights. (J.A. 276.)

- E. Appellant pled guilty to the Article 112a Specification, but contested the Article 120 Specification. The Members found him guilty and the Military Judge sentenced him.

Appellant pled guilty to the Article 112a Specification, but contested the Article 120 Specification. (J.A. 613, 616.) At trial, Trial Counsel argued “[t]he accused admitted he did it. The victim told you he did it. And the evidence shows you he did it.” (J.A. 568.) The Trial Counsel’s closing argument highlighted the Victim’s statements, as well as forensic evidence, and Appellant’s admissions. (J.A. 568–83.) For his part, Appellant argued the Victim’s statements were “improbable and inconsistent” and that he “was still under the influence of LSD during that interrogation.” (J.A. 584–605.)

The Members ultimately convicted Appellant of penetrating the Victim’s vulva with his penis without her consent. (J.A. 83, 613.) And the Military Judge sentenced him to a dishonorable discharge, 48 months’ confinement with 247 days’ credit, and reduction to E-1. (J.A. 614–15.)

- F. The Navy-Marine Corps Court of Criminal Appeals upheld the conviction.

The court below concluded the Military Judge did not abuse his discretion in admitting Appellant’s statement. *United States v. Rivera*, No. 202400304, 2025 CCA LEXIS 504, at *12 (N-M. Ct. Crim. App. Nov. 13, 2025).

Summary of Argument

The Military Judge did not abuse his discretion. First, he summarized the law correctly—“ploys” and “trickery” do not render a rights waiver involuntary *per se*. The “totality of circumstances” test still applies. But even if the Military Judge had recited an incomplete statement of the law, his finding that the Agent’s advisement was factually true and not coercive is not clearly erroneous. And finally, even if the agent misstated NCIS policy when he told Appellant he would just “go with what we’ve got,” he did not undermine any core *Miranda* principles in his explanation of rights. As a result, Appellant’s waiver was voluntary, knowing, and intelligent.

Argument

THE MILITARY JUDGE DID NOT ABUSE HIS
DISCRETION BECAUSE APPELLANT’S WAIVERS
WERE VOLUNTARY, KNOWING, AND
INTELLIGENT.

A. The standard of review is abuse of discretion.

Appellate courts review military judges’ rulings on suppression motions for an abuse of discretion. *United States v. Ramos*, 76 M.J. 372, 375 (C.A.A.F. 2017). Where such motions are based on allegations that rights’ warnings were not properly given, appellate courts “review the military judge’s findings of fact on a clearly-erroneous standard, and . . . conclusions of law,” such as whether a waiver was knowing, intelligent, and voluntary, are reviewed “de novo.” *Id.* On mixed

questions of law and fact, “a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.” *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

To be an abuse of discretion, the “challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (internal citations omitted). “[A] judge has a range of choices and will not be reversed so long as the decision remains within that range.” *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Moreover, appellate courts may “affirm a military judge if [their] ruling reached the correct result for the wrong reason.” *United States v. Vargas*, 83 M.J. 150, 156 (C.A.A.F. 2023) (citing *United States v. Bess*, 80 M.J. 1, 11–12 (C.A.A.F. 2020)).

B. Rights waivers must be voluntary, knowing, and intelligent.

“[T]here are two branches to the [rights] waiver analysis. First, was the waiver voluntary? And, second, was the waiver knowing and intelligent?” *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (internal citations omitted).

A voluntary waiver is “the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Id.* (internal quotations omitted). The voluntariness inquiry focuses on “police overreaching,” whereas the knowing-and-intelligent prong focuses on whether an appellant “understood his right to counsel and intelligently and knowingly relinquished it.” *Id.* (internal quotations omitted).

“Once it is determined that a suspect’s decision . . . was uncoerced, that he . . . knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid.” *Patterson v. Ill.*, 487 U.S. 285, 297 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). The failure to provide information, even useful information like an attorney’s efforts to make contact, does not render a waiver invalid because the Constitution does not require police “to supply a suspect with a flow of information to help him calibrate his self-interest.” *Moran*, 475 U.S. at 422.

The government need only prove a waiver’s validity by preponderance of the evidence. *Mott*, 72 M.J. at 330. *See also United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (preponderance of evidence standard for voluntariness).

Lastly, courts do “not examine *Miranda* warnings . . . as if construing a will or defining the terms of an easement.” *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). They only assess “whether the warnings reasonably convey” an appellant’s rights. *Id.*

C. Appellant’s rights waiver was voluntary: the totality of the circumstances shows an intelligent Marine who was not coerced, was not lied to and fully understood his rights.

Voluntariness asks whether an appellant’s will was overborne or whether their confession was the product of an essentially free and unconstrained choice by

the maker. *Lewis*, 78 M.J. at 453 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)) and *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)).²

Courts generally assess voluntariness first before assessing whether the waiver was “knowing and voluntary.” *See e.g. Patterson*, 487 U.S. at 292 (examining whether appellant “voluntarily answered questions” *after* receiving and waiving *Miranda* warnings *before* considering whether waiver “knowing and intelligent”); *Mott*, 72 M.J. at 330 (instructing service courts to examine voluntariness first).

To determine voluntariness, appellate courts look to the totality of the circumstances, including the characteristics of the accused and what was done or not done during the interrogation. *Lewis*, 78 M.J. at 453; *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002).

² *See also, Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (“The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion”); *United States v. Chatfield*, 67 M.J. 432, 439 (C.A.A.F. 2009) (“*Miranda* warnings are designed to prevent the inherent pressures resulting from an interrogator’s imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained”) (internal quotation omitted).

1. The Military Judge correctly recognized that alleged deception is just one part of the “totality” analysis.

- a. Deception is just one part of the “totality” analysis.

In *Colorado v. Spring*, the Court declined that appellant’s invitation to expressly rule “official ‘trickery’” could be “sufficient to invalidate his waiver” even if “there was no element of duress or coercion used to induce Spring’s statements.” *Colorado v. Spring*, 479 U.S. 564, 575 (1987) (assuming without deciding appellant’s “proposed distinction has merit”) (internal quotations omitted). And in *United States v. Anderson*, the Second Circuit explained that even if an “agent’s statements were false, misleading, or intended to trick and cajole the defendant into confessing, specific findings must be made that under the totality of the circumstances . . . the defendant’s will was overborne.” *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991).

- b. Where it exists, deception does not render a statement involuntary *per se*.

“Trickery does not make it impossible *per se* to find that a defendant voluntarily waived his rights.” *Anderson*, 929 F.2d 96, 99 (2d Cir. 1991). Because “*Miranda* forbids coercion, not mere strategic deception” and “[p]loys . . . that do not rise to the level of compulsion or coercion” do not violate *Miranda*. *Ill. v. Perkins*, 496 U.S. 292, 297 (1990) (citations omitted). “Generally, courts have held statements involuntary because of police trickery only when other aggravating

circumstances were also present.” *United States v. Farley*, 607 F.3d 1294, 1328 (11th Cir. 2010) (internal citations omitted); *see e.g. United States v. Giddins*, 858 F.3d 870, 884 (4th Cir. 2017) (waiver involuntary where police lied about appellant being subject of investigation and they falsely suggested he must waive rights to get car back).

Information that “could cause a suspect to misunderstand the nature of his constitutional right” could render a waiver invalid, but information which might “help him calibrate his self-interest in deciding whether to speak” cannot render the statement involuntary. *Spring*, 479 U.S. at 576–77³. In other words, a misrepresentation only renders a statement involuntary⁴ when it “directly negate[s] one of *Miranda*’s core protections.” *United States v. Morgan*, 143 F.4th 1264, 1276–79 (11th Cir. 2025) (appellant’s response voluntary even if agent “hiding her true intentions” when she asked who owned phone); *see also Farley*, 607 F.3d at

³ Deception can be relevant to both branches of the rights waiver analysis. *See, e.g., Spring*, 479 U.S. at 577 (deception did not affect waiver’s “voluntary and knowing nature”); *Farley*, 607 F.3d at 1330–31 (waiver was “knowing and voluntary”).

⁴ The *Morgan* court had already determined the agent violated *Miranda* by continuing to question post-invocation, but was assessing whether the statement was involuntary for purposes of its “fruits of the poisonous tree” analysis. *Id.* at 1276.

1330–31⁵ (trickery “not relevant to the constitutional validity of waiver unless . . . interfere[s] with . . . ability to understand . . . rights”); *cf. United States v. Erie*, 29 M.J. 1008, 1013 (A.C.M.R. 1990) (suppression proper because agents “vitiating” portion of warning by implying statements “off the record”). “[I]t makes no difference whether the . . . deception occurred before or after [the appellant] waived his rights.” *Farley*, 607 F.3d at 1330–31 (internal citations omitted).

So here, the Military Judge applied the correct law when he wrote that “ploys to mislead a suspect . . . do not render a statement involuntary,” and concluded that the totality of the circumstances show “[n]othing the Agent did rose to the level of compulsion or coercion.” (J.A. 274–75.) *See also* Section C.2., *infra*. Appellant’s argument 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” ignores decades of binding and persuasive precedent supporting the Military Judge’s accurate, if incomplete, statement of the law. (Appellant Br. at 24–25.)

⁵ The *Farley* court seems to have merged its analysis of “voluntary” and “knowing and intelligent,” holding the waiver at issue was “knowing and voluntary.” *See Farley*, 607 F.3d at 1331.

- i. Neither *Anderson* nor *Wysinger* establish a *per se* rule.

The *Anderson* court expressly applied the “totality of the circumstances” test and the court in *United States v. Wysinger* acknowledged that whether a warning “cause[d] a serious misunderstanding of one of the core *Miranda* rights” depended “on the context.” *Anderson*, 929 F.2d at 100; *United States v. Wysinger*, 683 F.3d 784, 800 (7th Cir. 2012).

So, when the *Anderson* court found the appellant did not voluntarily waive his rights it was not *just* because of the agent’s repeated misleading statements, but rather because those statements “contributed to the already coercive atmosphere.” *Anderson*, 929 F.2d at 100. The *Anderson* appellant was sitting in the back of a police car when the agent repeatedly presented him with a now-or-never choice to either waive his rights or cooperate in hopes of a future benefit. *Id.* at 97–100. The defendant in *Anderson* reacted to the pressure by screaming to another agent “I’m not the one you want. I have to talk to you . . .” *Id.* at 97.

Likewise, the *Wysinger* court’s determination^{7,8} an interrogation “should have been excluded” did not *just* rely on an “error in wording,” but rather a long

⁷ The *Wysinger* court cited the “knowing[] and intelligent[]” standard and did not make clear whether it was addressing voluntariness at all. *Wysinger*, 683 F.3d at 793, 798.

⁸ The *Wysinger* court already found the majority of the interview should have been suppressed because the appellant had invoked his rights nine minutes into the

course of conduct which included: (1) attempts “to divert [the appellant’s] attention from asserting his rights⁹,” (2) “repeatedly implying that ‘questioning’ had not yet begun,” (3) presenting the Appellant with “two choices, namely cooperating or being charged,” and (4) continuing to interrogate the appellant after the agents “clearly recognized [he] had asked for a lawyer. *Id.* at 800–03. So, “tactics, which may have been perfectly acceptable in the context of a proper warning, exacerbated the misimpression created by the botched warning.” *Id.* at 803.

Appellant’s reliance on *Wysinger* and *Anderson* to conclude the Agent’s allegedly “false and/or misleading” statements rendered his rights waiver per se involuntary is misplaced. (Appellant Br. at 20–24.)

- ii. There was no deception, so even if the Military Judge misstated the law, this Court should affirm because he reached the correct result.

Even if the Military Judge misstated the law about pre-waiver deception, he reached the correct result because—as described in greater detail, *infra*—Appellant’s waiver was voluntary, knowing, and intelligent, and this Court can affirm the Military Judge’s decision. *See Vargas*, 83 M.J. at 156.

interview. *Id.* at 793–96. It addressed the warnings when deciding whether to suppress the remaining nine minutes of the interview. *Id.* at 796–803.

⁹ One such attempt involved “slamming the table loudly, startling Wysinger and further diverting him.” *Id.* at 800–03.

2. The totality of the circumstances show the Military Judge was correct when he concluded that Appellant’s rights waiver was voluntary. Appellant concedes he was not “coerced” by foregoing the “totality analysis.”
 - a. Appellant declines to assess the totality of the circumstances, thereby conceding his will was not overborne.

Appellant does not assess the totality of circumstances of the entire interrogation. (Appellant Br. at 12–29); *Rivera*, 2025 CCA LEXIS 504. Instead, like the *Spring* appellant, he suggests the Agent’s explanation was so misleading it amounted to “deception” and rendered the rights waiver involuntary regardless of the other circumstances. *Compare* (Appellant Br. at 13–24), *with Spring*, 479 U.S. at 575; *see also* (J.A. 78) (arguing totality of circumstances irrelevant because voluntariness of waiver is separate analysis from voluntariness of subsequent statements).¹⁰ Specifically, Appellant now claims the Agent’s explanation of Appellant’s right to counsel—and the Military Judge’s “approval” of it—“conflicts as a matter of law with *Miranda* itself, which on its face requires that the two counsel rights must be advised as conjunctive, not disjunctive.” (Appellant Br. at 18, 21); *see also*; *Rivera*, 2025 CCA LEXIS 504.

¹⁰ *See Farley*, 607 F.3d at 1331 (citing *Hart v. AG*, 323 F.3d 884, 893 n.18 (11th Cir. 2003) (rejecting “distinction between the ‘waiver process’ and the ‘interrogation process,’ because the proper inquiry is the totality of circumstances” of whole interrogation, not just pre-waiver circumstances)).

By limiting his argument to the rights advisement, Appellant effectively concedes “there was no element of duress or coercion used to induce [his] statements.” *Spring*, 479 U.S. at 575; *see also* (Appellee’s Ans. at 16–23); *Rivera*, 2025 CCA LEXIS 504 (preponderance of evidence shows Appellant’s entire interrogation voluntary). And “[s]ince it is clear that after the *Miranda* warnings were given to [Appellant], he not only voluntarily answered questions without claiming his right to silence or his right to have a lawyer present to advise him but also executed a written waiver of his right to counsel during questioning,” the only remaining question is whether that waiver was “knowing and intelligent.” *Patterson*, 487 U.S. at 292.

b. The Military Judge was not clearly erroneous in finding the Agent did not deceive Appellant.

Disagreeing with a judge’s factual finding is not a basis for reversal where evidence supports the finding, especially given the high deference due to judges who articulate their reasoning on the record. *See, e.g., United States v. Rudometkin*, 82 M.J. 396, 400–01 (C.A.A.F. 2022).

Here, the Agent testified repeatedly that if the Appellant had asked for a lawyer he would have ended the interview but “would not facilitate or direct” the Appellant to defense counsel. (J.A. 173–74, 288.) This was consistent with his explanation to Appellant that NCIS does not have an on-call lawyer and “if you lawyer (sic), we—we basically won’t have a conversation with you . . . And we’ll

just go with what we’ve got.” (J.A. 91.) This does not contradict the Agent’s later testimony that he would have continued the interrogation with a defense counsel present—the additional explanation does not change the truth of his statement that the interrogation would end and the investigation would continue. (J.A. 470.) In sum, the evidence in the Record supports the Military Judge’s conclusion that “[n]othing the Agent told [Appellant] was factually untrue,” and Appellant “was not objectively misinformed about his right to counsel.” (J.A. 274–75, 470.)

- c. Even if the Agent misstated NCIS policy with respect to later interviews, the misstatement did not undermine a core *Miranda* right.

A misrepresentation only renders a statement involuntary when it “directly negate[s] one of *Miranda*’s core protections.” *Morgan*, 143 F.4th at 1276–79; *see also* Section C.1.b. *supra*. But as described *infra*, none of the Agent’s statements could have.

- i. The Agent’s statement that he would end the interview and “go with what we’ve got” did not undermine a core *Miranda* protection because there is not right to be interviewed at one’s own convenience.

“*Miranda* emphasized that it was not suggesting” police must provide attorneys for suspects, just that “[i]f the[y] . . . cannot,” they cannot “question a suspect unless he waives his right to counsel.” *Duckworth*, 492 U.S. at 204 (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)). In other words, *Miranda* does not

require police to interrogate a suspect—just to ensure a lawyer is present *if* they choose to interrogate a suspect who does not waive their right to have counsel present. *See id.*; *see also Arizona v. Youngblood*, 488 U.S. 51, 58–59 (1988) (“strongly disagree[ing] with the proposition” that the appellant’s constitutional rights were “violated when the police fail[ed] to use a particular investigatory tool”).

Even if the Agent misstated NCIS practice when he said, “we basically won’t have a conversation with you,” and “we’ll just go with what we’ve got,” he did not misrepresent “the nature of [Appellant’s] constitutional right—‘his right to refuse to answer any question which might incriminate him.’” (J.A. 91–92); *Spring*, 479 U.S. at 576. Because *Miranda* does not create a right to be interrogated—just the right to have an attorney present *if* police choose to use that “particular investigatory tool.” *Youngblood*, 488 U.S. at 59. Police are free to decide *not* to attempt an interrogation with a lawyer in the room. *See id.* The Agent’s comments could not “negate” a right that does not exist at all. (*Cf.* Appellant’s Br. at 16–18.)

- ii. The Agent’s use of “or” did not misrepresent the nature of Appellant’s right to have an attorney present for questioning.

Miranda recognized the “right to the presence of an attorney” during questioning and the right to appointment of an attorney before questioning.

Miranda, 384 U.S. at 474–79. It did not, however, create a right to consult with an attorney independent of questioning. *See id.* And, in *Florida v. Powell*, the Supreme Court seemingly acknowledged that “consulting” with a lawyer and having one present are virtually the same thing because a requirement to “exit and reenter the interrogation room between each” consultation would be “unlikely” and “counterintuitive.” *Florida v. Powell*, 559 U.S. 50, 62–63 (2010).

In that case, police warned the suspect: (1) “You have the right to talk to a lawyer before answering any of our questions . . .;” and (2) “You have the right to use any of these rights at any time you want during this interview.” *Id.* at 54.

Florida’s Supreme Court found those warnings misleading because they “suggested Powell could ‘only consult with an attorney before questioning’” but did not make it clear he was entitled “to counsel’s presence throughout the interrogation.” *Id.* at 55 (quoting *State v. Powell*, 998 So. 2d 531, 541 (Fla. 2008)). The Supreme Court reversed—the warnings “were sufficiently comprehensive and comprehensible when given a commonsense reading.” *Id.* at 63.

As in *Powell*, a “commonsense reading” of the rights warning demonstrates they conveyed the essential message: you can have a lawyer. It is just as “counterintuitive” to conclude that a suspect could have a lawyer present but not consult him before questioning as it is to envision a scenario in which a suspect must “exit and reenter the interrogation room between each” consultation.

Compare Powell, 559 U.S. at 62–63, *with* (Appellant’s Br. at 20–24). Reading the Agent’s conversational “or” to create a dichotomy would amount to “examin[ing] the . . . warnings as if construing a will or defining the terms of an easement,” which is exactly what the court warned against in *Duckworth*. 492 U.S. at 203.

Finally, Appellant’s own Affidavit belies his argument. *See* J.A. 117. In Appellant’s Affidavit, he says nothing about the word “or,” a “dichotomy,” or a “false choice;” rather, he claims the rights warnings led him to believe “the right to consult . . . and the right to have an attorney present . . . only applies to civilian law enforcement, not NCIS . . .” or him “as a Marine.” (J.A. 117.) In sum, the Agent’s explanation that “you’ve got the right to go consult with a lawyer or have them present during this questioning” combined with the written rights waiver clearly conveyed the right to counsel. (J.A. 91, 113.)

- iii. This case is distinguishable from both *Wysinger* and *Anderson* because the totality of the circumstances demonstrates Appellant understood his rights and was not coerced in any way.

As discussed in Section C.1.b.ii., *supra*, neither *Wysinger* nor *Anderson* relied on the Agent’s misstatements alone. Both looked to a misstatement combined with a coercive environment. *See* Section C.1.b.ii. *supra*.

Here, as discussed *infra*, there is no evidence of coercion. *See* Section C.4. *infra*. Rather than divert Appellant’s attention from the rights, like the *Wysinger* agent, the Agent in Appellant’s case reminded Appellant of his right to remain

silent no fewer than six¹² times. (J.A. 85, 91–92.); *Wysinger*, 683 F.3d at 801–03. And even if the Agent’s “or” misstated the right, he did not compound the error by repeating the misstatement as the *Anderson* agent did. *Anderson*, 929 F.2d at 97, 100. Finally, this Agent’s statement that commanders “are not lenient, but they are more understanding” three minutes before the “or” is nothing like the explicit, repeated now-or-never threats in *Anderson*. (J.A. 85, 90–91), *Anderson*, 929 F.2d at 97, 100.

¹² The Agent informed Appellant of his right to remain silent and to have counsel at least six times before substantively questioning him: once orally before presenting Appellant with the 31(b) waiver, once more via the written rights’ advisements that Appellant initialed by, twice more after Appellant stated he was “iffy on 3” but before the “SVU” conversation began, once again after Appellant finished initialing by his individual rights, and one last time when the Agent confirmed Appellant had read the paragraph waiving his rights out loud before signing it. (J.A. 85, 91–92.) He even reiterated Appellant’s rights one more time after Appellant spontaneously disclosed drug use. (J.A. 103–04.)

- iv. Tempia cannot be reconciled with subsequent, binding case law. But even if Tempia is still good law, it did not purport to require an on-call attorney.

In *United States v. Tempia*, 16 C.M.A. 629 (C.M.A. 1967), a pre-*Duckworth* opinion issued less than a year after *Miranda*, the court found warnings inadequate where a staff judge advocate “specifically told [the] accused no attorney would be appointed to represent him in any law enforcement investigation.” *Id.* at 637. But side-by-side comparison shows the warning in *Tempia* is identical in substance to the warning upheld in *Duckworth*:

Major Hogue . . . told [the] accused he . . . had the right to employ civilian counsel; would be given a reasonable time to do so; and that civilian counsel would be entitled to appear with him at the investigation. In addition, Hogue advised him of his rights under Code, supra, Article 31 . . . but . . . told him no military lawyer would be appointed to represent him during the OSI investigation or any investigation by the law enforcements agents on this base [unless charges were] referred to an investigation under Article 32b. ¹³	You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.
<i>Tempia</i> , 16 C.M.A. at 632.	<i>Duckworth</i> , 492 U.S. at 198.

¹³ Also like in *Duckworth*, the appellant in *Tempia* “filled out a written form” indicating he had been advised of all the same rights. *Compare Tempia*, 16 C.M.A. at 632, with *Duckworth*, 492 U.S. at 197–98.

Tempia’s holding that the staff judge advocate’s warning was inadequate is impossible to reconcile with *Duckworth*’s holding and the decades of subsequent precedent concerning when the right to appointed counsel attaches in the military. *See, e.g., United States v. Harvey*, 37 M.J. 140, 141–42 (C.A.A.F. 1993) (“focus” of investigation “by itself does not ripen into a Sixth Amendment right to counsel,” which does not attach until charges preferred); *United States v. Flanner*, 85 M.J. 163, 176 (C.A.A.F. 2024) (same) (citing *Harvey*, 37 M.J. at 141).

Even if *Tempia* is still good law, that court felt the staff judge advocate implied the appellant could not consult with an attorney unless he could pay for one himself. *Id.* at 637. But here—as the Military Judge concluded—the Agent’s statement only implied the interview would end if Appellant invoked. (J.A. 275.) In sum, Appellant’s reliance on *Tempia* is misplaced, and the Military Judge’s Findings about the truthfulness of the Agent’s explanation were not clearly erroneous.

3. The Agent did not otherwise coerce Appellant.

Even though Appellant foregoes the totality of the circumstances analysis, this Court should not. *See* Section C.2.a.. *supra*. Courts consider, “the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.” *Lewis*, 78 M.J. at 453 (quoting *Freeman*, 65 M.J. at 453). A ten-hour interrogation was voluntary in

Freeman, as was an after-midnight interrogation in *United States v. Henderson*. *United States v. Freeman*, 65 M.J. 451, 455 (C.A.A.F. 2008); *United States v. Henderson*, 52 M.J. 14, 16 (C.A.A.F. 1999).

Here, the mid-day questioning lasted just over one hour, and the entire recorded interaction is less than three. (J.A. 85.) The Agents offered Appellant bathroom breaks and water and there was no yelling, screaming, physical violence, or threats. (J.A. 85, 110.) The Agents made no promises, and their questions were almost all open-ended. (J.A. 85–112.) And, as outlined in Section C.2, *supra*, they did not employ lies or trickery. (J.A. 85–112.)

4. Appellant’s behavior did not indicate coercion.

Courts also assess an appellant’s own behavior to assess whether “he felt coerced or pressured into making a statement.” *See Lewis*, 78 M.J. at 454. So, in *Lewis* and *Freeman*, the courts concluded the interviews were voluntary when the “[a]ppellant[s] ‘never complained . . . never asked for an attorney, [and] never asked to stop the interview or leave.’” *Id.* at 454 (quoting *Freeman*, 65 M.J. at 454). And in *Henderson*, and *United States v. Washington*, the court held the appellants’ statements were voluntary, in part, because their admissions were made in such a way as to minimize their culpability. *Henderson*, 52 M.J. at 18; *United States v. Washington*, 46 M.J. 477, 482 (C.A.A.F. 1997).

Appellant never complained about his treatment, tried to leave, or tried to invoke his rights. (J.A. 85–112.) In fact, after being told he was suspected of sexual assault, he still bantered and laughed with the Agents. (J.A. 85, 92–93.) And the Military Judge found Appellant “was able to consider his full panoply of rights” when the Agent presented him with the second waiver, following Appellant’s statements about his drug use, so his re-waiver was “further evidence that [Appellant] knew, understood, and voluntarily waived his rights.” (J.A. 276.)

Further, like the *Washington* and *Henderson* appellants, Appellant was initially evasive—attempting to conceal that he drove home drunk. (J.A. 85, 95–98.) Lastly, even after the bulk of the interrogation, Appellant was amenable to the Agents getting evidence from his barracks once they were done. (J.A. 85, 108.) Thus, his behavior throughout the interrogation weighs in favor of voluntariness.

5. Appellant’s characteristics weigh in favor of voluntariness.

An appellant’s relevant characteristics include his age, education, intelligence, literacy, and any mental impairments. *See Lewis*, 78 M.J. at 453 (citing *Freeman*, 65 M.J. at 453). Courts also consider an appellant’s intoxication during the interview. *See, e.g., United States v. Loving*, 41 M.J. 213, 241–43 (C.A.A.F. 1994).

The *Lewis* court saw no “serious red flags” even though a recruiter said the appellants’ General Technical (GT) score of ninety-two made him a “dud[:.]”

“there was no evidence he could not read and write,” he had a high school education, and six years of military service. 78 M.J. at 452–54. And the *Loving* court rejected the appellant’s claim that his lawyers should have challenged his confession as involuntary because a witness²² said he was “extremely intoxicated and high” the night before the interrogation. *Loving*, 41 M.J. at 229–30, 241–43. The court called the objection “baseless,” noting the appellant “had been at work for 8 hours” before the interrogation and had given “a detailed and coherent confession.” *Id.* at 243.

Here, Appellant’s GT score was thirty-four points higher than the *Lewis* appellant’s, he studied mechanical engineering before enlisting, and he read the rights warning sheet aloud. (J.A. 89–90, 118.) Thus, his characteristics do not raise any “red flags” that would make him susceptible to coercion. And, like *Loving*, Appellant had ample time to sober up before his interview, which came seventeen hours after his alcohol and drug²³ use, during which time he vomited and slept. (J.A. 86, 94–95, 102–103.) He, like *Loving*, also appeared “fully oriented and engaged in the conversation,” and did not appear to have experienced any

²² The witness did not testify but rather submitted a post-trial affidavit. *Loving*, 41 M.J. at 241.

²³ Appellant admitted he took “two tabs of” lysergic acid diethylamide (LSD). (J.A. 103.)

hallucinations. (J.A. 85, 262, 277.) In sum, Appellant’s characteristics did not make him especially susceptible to having his will overborne.

D. Appellant’s waiver was knowing and intelligent.

Appellant does not argue the Agent coerced his waiver and the evidence shows the Agent did not trick him into signing it. *See* Section C. *supra*. So the dispositive question is whether he knowingly and intelligently waived his rights. *See Patterson*, 487 U.S. at 292.

As discussed in Section B., *supra*, the knowing-and-intelligent test focuses on whether the appellant “fully underst[ood] the nature of the right and how it would likely apply in general in the circumstances.” *Mott*, 72 M.J. at 330. Courts consider the totality of the circumstances, including “the [appellant’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.” *Mott*, 72 M.J. at 330; *see also Edwards v. Ariz.*, 451 U.S. 477, 482 (1981).

1. Appellant’s experience, background, and conduct indicate his waiver was knowing and intelligent.

As established previously, Appellant’s age, education, intelligence, and prior military service indicate a high capacity to understand the rights presented to him. *See, supra*, Section C.3–5.

2. Appellant understood the consequences of making statements to law enforcement without first consulting an attorney.

In *Patterson*, the appellant read and signed rights waiver with an agent and then later that day—after he had been indicted—he reviewed the same form with an assistant state attorney. *Patterson v. Ill.*, 487 U.S. at 288–89.

The form contained five specific warnings . . . to make [the appellant] aware of his right to counsel and of the consequences of any statement he might make to police. [The agent] read the warnings aloud, as [the appellant] read along with him. [The appellant] initialed each of the five warnings, and signed the waiver form. [The appellant] then gave a lengthy statement to police officers concerning the . . . murder.

Patterson v. Ill., 487 U.S. at 288. On appeal, Patterson argued the waiver was not “knowing and intelligent” because even though it addressed his Fifth Amendment rights, it did not specifically address the “broad protection of counsel” under the Sixth Amendment and did not explain “the gravity of [his] situation.” *Id.* at 294 (internal citations omitted). The Court disagreed, holding the appellant had been “sufficiently apprised” of his right to counsel “and of the consequences of abandoning” that right, such that his waiver was “a knowing and intelligent one.” *Id.* at 296.

As in *Patterson*, Appellant’s waiver was not merely knowing and voluntary; it was a repeated, deliberate choice. By signing two separate *Miranda* waiver forms, Appellant affirmed his understanding of each enumerated right—twice. (J.A. 113–114.) He acknowledged his right to counsel “and the consequences of

abandoning” it—twice. (J.A. 85, 113–114); *Patterson*, 487 U.S. at 296. On the first form, the Agent had Appellant initial next to each individual right, demonstrating a deliberate, line-by-line consideration of the privileges he was about to waive. (J.A. 85, 113.) Beyond the written waivers, the Agent repeatedly reminded Appellant of his rights. (J.A. 85, 92–93.) This combination of dual written waivers, individual initialing, signing twice, and constant verbal reminders far exceeds the single advisement required by law. *See United States v. Nelson*, 82 M.J. 251, 256–57 (C.A.A.F. 2022). Finally, as discussed in Section C., *supra*, nothing the agent said undermined the warnings.

Appellant was not confused and the Military Judge correctly ruled that he repeatedly and deliberately chose to knowingly and intelligently waive his rights.

E. If this Court decides the Military Judge erred, the error was harmless beyond a reasonable doubt.

Constitutional errors—including Article 31(b) violations that also violate the Constitution—are reviewed for harmlessness beyond a reasonable doubt. *Mott*, 72 M.J. at 332; *United States v. Evans*, 75 M.J. 302, 305 (C.A.A.F. 2016) (citing *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006)). Custodial interrogations—like the one in this case—implicate an appellant’s Fifth Amendment rights under *Miranda*. *See Evans*, 75 M.J. at 305. As a result, the “harmless beyond a reasonable doubt” standard applies to this case.

Courts applying the standard ask whether “there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *Mott*, 72 M.J. at 332. A “reasonable possibility” is illuminated by *Arizona v. Fulminante*, 499 U.S. 279 (1991), *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000), and *United States v. El Shafie Elsheikh*, 103 F.4th 1006 (4th Cir. 2024).

In *Fulminante*, the court held admission of the involuntary confession was not harmless beyond a reasonable doubt because, without it, “it [was] unlikely that Fulminante would have been prosecuted at all, because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict.” 499 U.S. at 297.

But in *Swift*, even though the court held the military judge erred in admitting the appellant’s statements, it was still “satisfied beyond a reasonable doubt that [the] appellant was not prejudiced as to” his bigamy and false statement convictions where there was “sufficient evidence to find [him] guilty of [those] specification[s] without any reliance upon any of [his] unwarned statements.” 53 M.J. at 454.

And in *Elsheikh*—where the appellant had contested his association with a terrorist group—the court held that even if the trial court erred in admitting his “false identity statements,” the admission of his “consciousness of guilt” evidence was harmless beyond a reasonable doubt because the statements took up a small

portion of the record and were “cumulative of other direct and circumstantial evidence establishing [the appellant’s] guilt.” *Elsheikh*, 103 F.4th at 1013–14.

1. Like in *Swift* and *Elsheikh*, and unlike *Fulminante*, there was sufficient evidence to convict Appellant even absent his admissions.

As in *Elsheikh* and *Swift*, the United States here provided ample evidence of Appellant’s guilt. This included the Victim’s uncontroverted testimony that she never met Appellant before the house party, nor cuddled, flirted, or interacted with him much at all during the party. (J.A. 306–12, 580.) A screenshot from her phone corroborated her testimony that she did not know Appellant’s name and had to ask a friend to write it in her phone after the assault. (J.A. 326–28, 566.)

Two other witnesses testified to her immediate outcry afterwards: she was “screaming and crying” and “frantic”—telling one that “he raped me” and asking the other for help getting her to the hospital for a sexual assault exam. (J.A. 492–96, 509–11.) And DNA testing confirmed the penetrative act. (J.A. 524–28.) In sum, Appellant’s admissions were “cumulative of other direct and circumstantial evidence establishing [his] guilt.” *Elsheikh*, 103 F.4th at 1013–14.

2. Appellant’s conviction for vaginal penetration over anal penetration does not constitute prejudice.

The DNA results made it clear Appellant had penetrated the Victim’s vulva: the density of sperm in her vagina was consistent with “a full ejaculation” and the overwhelming majority of male DNA came from Appellant. (R. 1264–69.) But

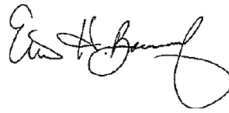
those same results left open the possibility that Appellant's DNA appeared on the Victim's anus because it had "liquifie[d]" and drained there from her vagina. (R. 1271-73.) So, while Appellant claims his admission likely contributed to the conviction on Specification 1, his admission was cumulative of the DNA evidence and the Victim's statements. (*Cf.* Appellant's Br. at 31.)

Conclusion

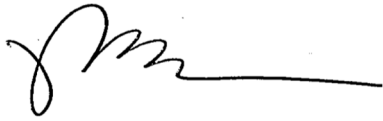
The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.



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A handwritten signature in black ink, appearing to read 'PJC', with a stylized flourish at the end.

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