IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 202300134
Brandon K. FLANNER, Staff-Sergeant (E-6) U.S. Marine Corps Appellee	)	USCA Dkt. No.

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Issue Appealed

DID THE MILITARY JUDGE ABUSE HER DISCRETION WHEN SHE SUPPRESSED APPELLEE'S NON-CUSTODIAL, PRE-PREFERRAL, SELF-SCHEDULED INTERVIEW WITH LAW ENFORCEMENT IN WHICH APPELLEE WAIVED THE RIGHTS TO COUNSEL AND TO REMAIN SILENT?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 62(a)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(B) (2016), because the United States timely appealed the Military Judge's Ruling granting Appellee's Motion to suppress Appellee's interview. This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2016).

Statement of the Case

The Convening Authority referred two Charges against Appellee to a general court-martial, alleging one Specification of larceny, one Specification of making a false claim, and one Specification of using a forged signature in connection with a claim, in violation of Articles 121 and 124, UCMJ, 10 U.S.C. §§ 921 and 924 (2016), respectively.

The Military Judge issued a Ruling suppressing Appellee's interview. (R. 88–90.) The United States timely appealed. (Notice of Appeal, May 12, 2023.) The lower court found no error. *United States v. Flanner*, No. 202300134, 2023

CCA LEXIS 428 (N-M. Ct. Crim. App. Oct. 10, 2023). The United States moved for en banc and panel reconsideration, which the lower court denied. (Order, Dec. 12, 2023.) The Judge Advocate General filed a Certificate of Review, on behalf of the United States, at this Court. (Cert. Review, Crim. App. No. 202300134, February 12, 2024.)

Statement of Facts

A. The United States charged Appellee with larceny and fraud.

The United States charged Appellee with larceny, making a false claim, and using a forged signature when making a claim in violation of Articles 121 and 124, UCMJ, 10 U.S.C. §§ 921, 924 (2016). (Charge Sheet, Nov. 21, 2022.) The charges stemmed from an alleged theft of over $30,000 in government funds through fraudulent contracting claims in Bahrain. (Charge Sheet.)

B. Appellee moved to suppress a law enforcement interview he requested. The parties presented the recording of Appellee's interview and documentary evidence, but did not call witnesses.

Appellee moved to suppress his second interview with law enforcement, which took place in September 2021. (Appellate Ex. XXI at 1.) Appellee's Motion included his Article 31(b) rights advisement, his sworn Declaration, Appellee's witness interview notes, and his September interview recording. (Appellate Ex. XXII.) Appellee did not testify at the Article 39(a) hearing and presented no witnesses.

1. Law enforcement attempted to interview Appellee in May 2021. Appellee invoked his right to counsel and law enforcement ended the interview.

According to his Declaration and the rights advisement form, Appellee was interviewed by law enforcement on May 6, 2021.[1] (Appellate Ex. XXII at 2, 4.) He "requested to have a military attorney present" during that interview. (Appellate Ex. XXII at 2, 4.) Law enforcement then stopped the interview. (Appellate Ex. XXI at 1; Appellate Ex. XXII at 2, 4.)

2. Appellee went to the Defense Services Office twice after law enforcement interviewed him. The Defense Services Offices declined to detail him an attorney, and did not appoint counsel for Appellee until after the Charges were preferred months later.

Appellee went to the Defense Services Office "on or about" May 13, 2021, and again on June 14, 2021, to "seek legal services related to [his] interrogation." (Appellate Ex. XXII at 4.) Appellee informed his senior enlisted leader that the Defense Services Office said "there wasn't much they could do for him because he wasn't legally charged for something." (Appellate Ex. XXII at 9.) The Defense Services Office did not detail counsel to Appellee until after Charges were preferred in November 2021. (*Id.* at 4–5.)

[1] Appellee's Declaration states he was interviewed on March 6, 2021. (Appellate Ex. XXII at 4.) The typed and signed advisement of rights form lists the interview date as May 6, 2021. (Appellate Ex. XXII at 1.)

3. Appellee asked his leadership when he would receive appointed counsel. His leadership told him military counsel would only be appointed when charges were preferred.

a. Appellee went to his enlisted leader for an update on his case, and the enlisted leader asked the Staff Judge Advocate. The enlisted leader told Appellee he would only receive counsel after he was charged.

On September 6, 2021, Appellee "asked [his enlisted leader] for an update on [his] case." (Appellate Ex. XXII at 4.) "Specifically, [Appellee] asked him if [he] would receive appointed military counsel for an interview with NCIS." (*Id.*)

The senior enlisted leader did not testify, but Trial Defense Counsel provided his interview notes. (Appellate Ex. XXII at 7.) According to the notes, the senior enlisted leader advised Appellee "to go to talk to a defense attorney" and knew Appellee had spoken to defense counsel. (*Id.* at 9.)

The senior enlisted leader told Appellee on September 6, 2021, that "he spoke with the [Staff Judge Advocate]," who informed him that Appellee "would only receive counsel if charges were preferred." (*Id.* at 4, 9–10.)

b. The Staff Judge Advocate told the senior enlisted leader that military attorneys are detailed at preferral.

The Staff Judge Advocate did not testify, but Trial Defense Counsel provided notes from an interview. (Appellate Ex. XXII at 12.) According to the notes, the Staff Judge Advocate confirmed that he told the enlisted leader that

Appellee would be detailed military counsel "when charges are preferred." (*Id.* at 13.) He told the senior enlisted leader that Appellee could "go to the defense shop or hire a civilian." (*Id.*) The Staff Judge Advocate "made sure to tell" the senior enlisted leader not to inform Appellee of what they discussed because it was legal advice and the Staff Judge Advocate was not Appellee's attorney. (*Id.* at 13.) The conversation about Appellee's right to counsel was only for the enlisted leader's awareness as Appellee's chain of command representative. (*Id.*)

4. Pre-preferral, Appellee contacted law enforcement and scheduled an interview for September 2021.

After learning he "could only be appointed counsel if charges were preferred," Appellee "reached out to [law enforcement] on 8 September 2021 to schedule an interview." (Appellate Ex. XXII at 4.) Appellee's decision to contact law enforcement was made four months after his initial interview. (Appellate Ex. XXII at 1–2, 4.) Appellee claimed he "reached out to [law enforcement] because [he] believed that [he] could not do an interview with military counsel present." (*Id.*) He "only thought that [he] could do an interview with an attorney present if [he] hired a civilian attorney." (*Id.*) He "scheduled the interview to occur on 15 September 2021." (*Id.*)

5. Law enforcement advised Appellee of his rights, including the right to counsel. Before making a statement, Appellee waived his rights.

Appellee offered the recording of his second law enforcement interview. (Appellate Ex. XXII at 17.)

a. The Naval Criminal Investigative Service Agent confirmed that Appellee initiated contact with law enforcement after the first interview. She explained Appellee's right to civilian counsel, and that military attorneys are appointed after preferral. Appellee agreed that he understood these rights.

After asking Appellee if his personal data was still correct from the previous interview, the Agent said: "last time we spoke you mentioned that you wanted a lawyer at the interview [but] . . . then when we talked you said you wanted to come in. So I just wanted to make sure, are you good with speaking with us today?" (*Id.* at 3:20–3:35.)

Appellee responded "yes, yeah." (*Id.* at 3:35.) Appellee explained his "whole office said not to talk to anyone without a lawyer." (*Id.* at 3:45–50.) He said that, at first, the military defense attorney detailing policy did not make sense to him. (*Id.* at 4:35–40.) But "when [his enlisted leader] explained it to [him after talking with the Staff Judge Advocate] then it made way more sense." (*Id.*)

The Agent then asked "So you understand a military lawyer will only be appointed to you when charges are preferred." (*Id.* at 4:42–46.) And Appellee responded "Yes, yes." (*Id.*) The Agent explained "You do have access to a

civilian lawyer if you choose." (*Id.* at 4:46–49.) Appellee responded "Yeah, yeah. That's where it was all confusing." (*Id.* at 4:52–53.)

b. The Agent reviewed the rights advisement form with Appellee. Appellee read each part aloud, said he understood, and initialed each right that he waived. He waived the rights to counsel and to remain silent.

The Agent reviewed a rights advisement form with Appellee. (*Id.* at 4:53–8:05; Appellate Ex. XXIV at 18.) She said: "When you initial next to it that just means that you understand what it means." (Appellate Ex. XXII at 5:45–47.) Appellee initialed each of the rights on the form. (Appellate Ex. XXIV at 18.) Appellee understood he had "the right to remain silent and make no statement at all." (*Id.*) He understood "[a]ny statement" he made could "be used against [him] in a trial by court-martial or other judicial or administrative hearing." (*Id.*)

Appellee understood he had "the right to consult with a lawyer prior to any questioning" including a "civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both." (Appellate Ex. XXII at 7:10–13; Appellate Ex. XXIV at 18.) When the Agent asked if he understood that right, Appellee laughed and said "yeah, now." (Appellate Ex. XXII at 7:14.)

Appellee understood he had the right to a "retained civilian lawyer and, or appointed lawyer present during this interview." (*Id.* at 7:25–30; Appellate Ex.

XXIV at 18.) He understood he could "terminate th[e] interview at any time for any reason." (Appellate Ex. XXII at 7:35–40; Appellate Ex. XXIV at 18.)

The Agent asked Appellee: "With your rights in mind are you willing to speak with us today?" Appellee said "yes." (Appellate Ex. XXII at 7:48–50.) Appellee said he "[understood his] rights as related to [him] and as set forth above. With that understanding, [he had] decided that [he did] not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time." (Appellate Ex. XXII at 8:00–05; Appellate Ex. XXIV at 18.)

He made "this decision freely and voluntarily. No threats or promises [had] been made to [him]." (Appellate Ex. XXII at 8:00–05; Appellate Ex. XXIV at 18.) Appellee then conducted an interview with law enforcement. (Appellate Ex. XXII at 17.)

6. Appellee later claimed he made statements to law enforcement because of advice from his enlisted leader and the Agent that military attorneys would only be detailed after charges are preferred.

One year and seven months after the interview, Appellee claimed that he "spoke to [law enforcement] based on the advice that was given to [him] by" his enlisted leader. (Appellate Ex. XXII at 4.) "After speaking with [his enlisted leader] and receiving advice from [the Agent]" he believed that he "could not request to have a military attorney present at the interrogation." (*Id.*) Appellant never claimed the interview was custodial. (*Id.*)

C. The United States opposed the Motion to Suppress.

1. The United States offered the Legal Services and Administration Manual, which provides military counsel are detailed after charges are preferred.

The United States presented relevant portions of the Marine Corps' Legal Support and Administration Manual, which provides that the Chief Defense Counsel "is the detailing authority for all judge advocates assigned to the [Defense Services Office] and auxiliary defense counsel." (Appellate Ex. XXIV at 5.) The Chief Defense Counsel "may further delegate detailing authority for Marine defense counsel to subordinates" within the Defense Services Office. (*Id.*) The detailing authority shall detail a defense counsel within "Five days of being served notice of preferred charges" and as "otherwise required by law or regulation." (*Id.* at 6.)

2. The United States offered the Defense Services Organization's counsel detailing policy, which provides military counsel are detailed after charges are preferred.

The United States presented the Chief Defense Counsel's Policy Memorandum which provides "formation of attorney-client relationships" by "defense counsel with clients is permissible only when the attorney is authorized to do so by competent authority." (*Id.* at 8.) Without written permission from the Chief Defense Counsel, personnel not in confinement will receive detailed counsel no later than "Five days after being served notice of preferred charges." (*Id.* at 14.)

D. The Military Judge found Appellee's rights waiver voluntary, but not knowing and intelligent, because Appellee believed he could not be "appointed a lawyer until charges were preferred." She suppressed Appellee's interview.

The Military Judge issued an oral Ruling excluding Appellee's interview. (R. 89–90.) The Judge found "[t]he actions of various actors in this case, to include the [Defense Services Office], left the accused with an inaccurate belief that he could not be appointed a lawyer until charges were preferred." (R. 89.) This caused Appellee to go "forward with the interview without a lawyer, based on that misunderstanding." (R. 89.)

Appellee's "actions showed that he truly desired to have an attorney" because he "invoked his right to have an attorney present with him during the first interview." (R. 89.) The Judge found Appellee "made two separate attempts to get an attorney by visiting the Defense Services Office, where he was turned away." (R. 89–90.) "He also asked his chain of command a number of questions about how he could get an attorney." (R. 90.)

The Judge found "those results left him with the inaccurate belief, that he could not get an attorney until charges were preferred." (R. 90.) Appellee "acquiesced to an interview without having a lawyer present." (R. 90.) He did this because he "want[ed] to do the interview in order to get the investigation moving, as he was [beyond] his [end of active service date] and had already moved his family. . . ." (R. 90.) The Judge found Appellee's waiver of the right to counsel

"voluntary" but "not based on a knowing and intelligent understanding of the right that he abandoned when he acquiesced to proceed without having an attorney present." (R. 90.)

Based on those Findings, the Judge granted Appellee's Motion and suppressed the interview. (R. 90.) She did not make any findings about whether the interview was custodial. (R. 89–90.)

The Military Judge cited no authority in support of her Ruling. (R. 89–90.) She did not provide a written ruling.

E. On appeal, the lower court held that the Judge did not err in suppressing Appellant's statements.

The lower court held Appellant had an "inaccurate belief that he could not get an attorney until charges were preferred." *Flanner*, 2023 CCA LEXIS 428, at *12. The lower court did not address whether Appellee's interview was custodial. *Id.* at *8. The lower court relied on Appellee's "desire to move the investigation forward since he was past the end of his active duty service and had already moved his family" to determine he did not make a knowing and intelligent waiver of his rights in the interview. *Id.* at *12.

Argument

THE JUDGE ABUSED HER DISCRETION WHEN SHE SUPPRESSED APPELLEE'S INTERVIEW. THE JUDGE FAILED TO CONSIDER THAT APPELLEE'S SELF-SCHEDULED INTERVIEW WAS NONCUSTODIAL AND HE HAD NO RIGHT TO COUNSEL . SHE CLEARLY ERRED IN FINDING THAT (1) APPELLEE'S WAIVER OF HIS RIGHT TO COUNSEL WAS NOT KNOWING AND INTELLIGENT; (2) DEFENSE ATTORNEYS AND THE COMMAND GAVE APPELLEE INCORRECT LEGAL ADVICE; AND (3) APPELLEE WANTED AN ATTORNEY AT HIS SECOND INTERVIEW. THE JUDGE DESERVES LESS DEFERENCE BECAUSE SHE CITED NO LAW OR AUTHORITY IN HER RULING.

A. The standard of review is abuse of discretion.

Military courts review a military judge's decision on a motion to suppress evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted). "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." *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (citation omitted). This standard also applies to interlocutory appeals under Article 62. *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021). This Court "reviews a military judge's ruling directly in an Article 62 appeal." *United States v. Vargas*, 83 M.J. 150, 153 (C.A.A.F. 2023) (citation omitted).

B. The Judge cited no law or authority to support her Findings of Fact or Conclusions of Law. This Court should afford her Ruling little or no deference.

"[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020) (citations and internal quotations omitted). "On the contrary, if the military judge fails to place his findings and analysis on the record, less deference will be accorded." *Id.* (citations and internal quotations omitted).

In *United States v. Flesher*, 73 M.J. 303 (C.A.A.F. 2014), a judge's ruling received little deference when he failed to discuss relevant law and "did not apply the law to the facts to support his decision." *Id.* at 312. As a result the court was "left with a limited understanding of the military judge's decision-making process" and therefore gave "his decisions in this case less deference than we otherwise would." *Id.*

Here, like *Flesher*, the Judge fails to cite any law or authority to support her conclusions of law. (R. 89–90.) Likewise, she did not apply the law to the facts. And, despite finding that Appellee's waiver was not knowing and intelligent, she never performed the required analysis. *See infra* Section E.2; *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (waiver analysis should take into account appellee'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.")). Her Ruling deserves little to no deference.

Her failure to provide any authority to support her findings, in conjunction with her clearly erroneous Findings of Fact and erroneous Conclusions of Law, shows she abused her discretion in suppressing Appellee's interview. *See infra* Sections C–F.

C. The Judge abused her discretion by holding that agents violated Appellee's right to counsel. Appellee never claims he was in custody during his requested September interview, and he was not.

1. A suspect not subjected to a custodial interrogation does not have a Fifth Amendment right to counsel.

A suspect must be subject to a custodial interrogation to invoke the right to counsel. Mil. R. Evid. 305(c–d).

If an appellant "was not subjected to a custodial interrogation" then he cannot suffer a "violation of his Fifth Amendment rights." *United States v. Evans*, 75 M.J. 302, 305 (C.A.A.F. 2016). "[S]omeone not in custody has no constitutional right to counsel." *United States v. Malcolm*, 435 F. App'x 417, 420 (6th Cir. 2011) (citing *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (considering "right to have counsel present *during custodial interrogation*" (emphasis added)).

2. Courts look to a series of factors to determine if a suspect was subject to custodial interrogation.

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

"[T]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (internal quotation marks and citation omitted). Courts evaluate: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred; (3) the length of the questioning; (4) the number of law enforcement officers present at the scene; and (5) the degree of physical restraint placed upon the suspect." *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017) (citations omitted).

3. Appellee was not subjected to a custodial interrogation because he initiated contact with police and was free to leave at any time.

A non-custodial interview is not transformed into a custodial one simply because "the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

In *United States v. Chatfield*, 67 M.J. 432 (C.A.A.F. 2009), the military judge did not abuse his discretion when he admitted the appellant's statements and found he was not subject to a custodial interrogation. *Id.* at 438. The court relied on the fact that the accused "appeared for questioning voluntarily." *Id.* Even though the accused later claimed "he felt compelled to go to the station, he did not identify any express order from a superior establishing that obligation." *Id.* And the accused "was never physically restrained, either on board [ship]" or "on the way to the police station." *Id.*

In *Mathiason*, the Supreme Court overturned a lower court that suppressed an interview based on an alleged *Miranda* violation when the appellant was not in custody. 429 U.S. at 492, 496. That appellant was not subject to a custodial interrogation when he (1) "came voluntarily to the police station;" (2) "was immediately informed that he was not under arrest;" and (3) left "the police station without hindrance" at "the close of a half-hour interview." *Id.* at 495.

In *United States v. Leal*, 1 F.4th 545 (7th Cir. 2021), an interlocutory government appeal, the court reversed a trial judge's ruling suppressing the accused's statement. *Id.* at 547. There, the judge erred in holding the accused was "in custody" because he "voluntarily consented to the interview" requested by the agents and was told "he was not under arrest." *Id.* at 551–52.

Here, Appellee was not subject to a custodial interrogation. Even more so than *Chatfield*, Appellee "appeared for questioning voluntarily" after initiating contact with the agents and requesting an interview. *Chatfield*, 67 M.J. at 438; *Mathiason*, 429 U.S. at 495; (Appellate Ex. XXII at 4). Furthermore, like *Leal*, the Agent informed Appellee he could "terminate th[e] interview at any time for any reason," thus showing he was not under arrest. 1 F.4th 551–52; *see Mathiason*, 429 U.S. at 495; (Appellate Ex. XXII at 7:35–40; Appellate Ex. XXIV at 18.)

The interview lasted about two-and-a-half hours, but like *Chatfield* and *Mathiason*, agents did not place Appellee under any physical restraint. *Chatfield*, 67 M.J. at 438; *Mathiason*, 429 U.S. at 495; (Appellate Ex. XXII at 3:20).

Looking at the circumstances of Appellee's voluntary interview, no reasonable person would believe they were subject to "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125.

Appellee did not undergo a custodial interrogation and therefore his Fifth Amendment right to counsel was not implicated. *Evans*, 75 M.J. at 305; Mil. R. Evid. 305(c)(2). The Judge abused her discretion by not addressing the key issue of whether Appellee was subject to a custodial interrogation. Likewise, the Judge abused her discretion in holding that Appellee's right to counsel was implicated by a non-custodial interview.

D. Even if Appellee was subject to a custodial interrogation, the Judge erred by ruling that Appellee had a right to have an attorney present upon request so that he could make a statement at the time of his choosing. Her decision was influenced by an erroneous view of the law.

1. The Fifth Amendment privilege against self-incrimination includes the right to silence and the right to counsel during custodial interrogation.

The Fifth Amendment guarantees that no suspect "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The Supreme Court has interpreted the Fifth Amendment privilege against self-incrimination to encompass two distinct rights: the right to silence and the right to counsel" during custodial interrogation. *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004).

"'[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent,' and 'has the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 468, 471 (1966)).

2. Once a suspect has invoked his right to counsel, law enforcement may not interrogate him unless counsel is made available or the suspect initiates contact with law enforcement and waives his rights.

A suspect "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has

been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" and waives his rights. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981); *accord United States v. Dock*, 40 M.J. 112, 115 (C.M.A. 1994) ("*Edwards* clearly applies to the military.").

3. The Military enshrined these rights in Article 31(b), UCMJ and the Rules of Evidence. The statute and Rules require an interrogator to inform the suspect of his rights. If the suspect invokes his right to counsel, then he must be provided with counsel before any interrogation can proceed.

"No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." Art. 31(b), 10 U.S.C. § 831(b); Mil. R. Evid. 305(c)(1)(A–C) (no required warning of right to counsel during interrogation).

The "*Fifth Amendment Right to Counsel*" applies when "a person suspected of an offense and subjected to custodial interrogation requests counsel." Mil. R. Evid. 305(c)(2). Then, any statement made "is inadmissible against the accused unless counsel was present for the interrogation." *Id.* If a suspect being interrogated "chooses to exercise the right to counsel, questioning must cease until

counsel is present." Mil. R. Evid. 305(c)(4). If a suspect invokes his right to counsel then a judge advocate will be provided "before the interrogation may proceed." Mil. R. Evid. 305(d).

4. *Miranda* requires law enforcement inform a suspect of his rights before a custodial interrogation.

A suspect must be warned prior to custodial questioning "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *accord United States v. Tempia*, 37 C.M.R. 249, 255 (C.M.A. 1967) (*Miranda* applies to the military).

5. The Fifth Amendment right to counsel requires a custodial interrogation to cease if no attorney is available and the suspect requests one. It does not require that an attorney be "producible on call" so a suspect can make a statement at the time of his choosing. The Judge misapplied the law to the facts.

a. Servicemember rights are limited to those provided by the Constitution, the Code, and Manual. The Fifth Amendment and Mil. R. Evid. 305 confer rights to protect a suspect against self-incrimination.

Servicemembers have no rights beyond the "panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

"*Miranda* warnings are not themselves rights protected by the Constitution but are instead measures to insure that the suspect's right against compulsory self-incrimination is protected." *Moran v. Burbine*, 475 U.S. 412, 424–25 (1986) (quotations omitted).

In *Miranda*, the Court announced required prophylactic warnings for suspects before law enforcement could conduct a custodial interrogation. 384 U.S. at 478–79. The Court enshrined these procedural safeguards to protect the Fifth Amendment "privilege against self-incrimination." *Id.* Namely, the Fifth Amendment guarantees that no person "be compelled in any criminal case to be a witness against himself" when "confronted with the power of government" during a custodial interrogation. *Id.* at 479; U.S. Const. amend. V.

The *Miranda* court explained a suspect's right to counsel only required that the "the interrogation must cease until an attorney is present." *Id.* at 474; *see also McNeil v. Wisconsin*, 501 U.S. 171, 176–77 (1991) ("Once a suspect asserts the right to counsel, not only must the current interrogation cease, but he may not be approached for further interrogation until counsel has been made available to him."); *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) ("*Miranda* gives the defendant a right to choose between speech and silence, and [the suspect] chose to speak.")

b. The Supreme Court in *Duckworth* rejected the idea that the Fifth Amendment right to counsel provided suspects a right to an attorney producible on call. The right only requires an interrogation to cease.

In *Duckworth v. Eagan*, 492 U.S. 195 (1989), an appellant challenged the admissibility of his confession on grounds that police informed him no counsel were available if he invoked his right to counsel, and that he could stop answering questions "until you've talked to a lawyer." *Id.* at 198. The Court rejected the appellant's argument that his confession should be suppressed because he claimed he did not believe he could consult with counsel during the interrogation. *Id.* at 200, 203–04. The Court clarified the right to counsel "does not require that attorneys be producible on call" but only that "[i]f police cannot provide appointed counsel" they cannot "question a suspect unless he waives his right to counsel." *Id.* at 204. There, because the accused waived his previously invoked right to counsel, his rights were not violated. *Id.*

c. The Judge misapprehended the law by ruling that Appellee had a right to force the United States to produce an appointed attorney so that he could make a statement to law enforcement.

Here, as the Supreme Court explained in *Miranda* and *Duckworth*, the right to counsel does not extend beyond ceasing an interrogation until the suspect can speak with an attorney. The Fifth Amendment protects against coerced self-incrimination, not the right to an attorney on demand so that a suspect can make

statements to police whenever he likes. The Military Judge's Ruling suggests a positive right for suspects to demand appointed counsel during an interrogation when she says Appellee had "an inaccurate belief that he could not be appointed a lawyer until charges were preferred." (R. 89.) This misapprehends the Fifth Amendment's right against self-incrimination in which the right to counsel is based. Under the Judge's Ruling, now erroneously adopted by the lower court, suspects have the right to force the government to make attorneys "producible on call" so that suspects can make potentially incriminating statements to law enforcement. (R. 90); *Flanner*, 2023 CCA LEXIS 428, at *11–12.

Neither the Fifth Amendment nor Mil. R. Evid. 305 confers such a right, but only demands the interrogation must cease until counsel is made available. *McNeil*, 501 U.S. at 176–77; Mil. R. Evid. 305(c–d). Logically, it is only within law enforcement's power to conduct a custodial interrogation. If law enforcement chooses not to conduct a custodial interrogation after a suspect invokes his right to counsel, then the right is not implicated. *See Edwards*, 451 U.S. at 484 (establishing framework to protect suspects who invoke right to counsel against repeated approaches from police, never requiring government to produce counsel so that a suspect can have the opportunity to be interrogated.)

The Judge's Ruling contradicts Supreme Court precedent. *Duckworth*, 492 U.S. at 200, 203–04 . Nothing in Mil. R. Evid. 305 or the Code confers any rights

for military members beyond those enumerated in the Fifth Amendment and the Supreme Court's *Miranda* prophylaxis. *Vazquez*, 72 M.J. at 19. The Judge abused her discretion by finding that Appellee had a right to be appointed counsel so that he could make a statement at the time of his choosing.

E. Even if Appellee was subject to a custodial interrogation, the Judge also abused her discretion by holding that Appellee's waiver of his right to counsel was not knowing and intelligent. All parties correctly informed Appellee of his rights and that he was only entitled to appointed military counsel after preferral of charges.

"After receiving applicable warnings" of his rights, a suspect may waive his rights to counsel and to remain silent. Mil. R. Evid. 305(e)(1). "The waiver must be made freely, knowingly, and intelligently." *Id.* The suspect "must affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement." *Id.*

1. A suspect can waive his right to counsel after invoking it by initiating contact with law enforcement.

When an accused requests the assistance of counsel during a custodial interrogation, any later waiver of that right "is invalid unless the prosecution can demonstrate by a preponderance of the evidence" that the accused "initiated the communication leading to the waiver[.]" Mil. R. Evid. 305(e)(3)(A)(i) (*see Edwards*, 451 U.S. at 484–85 (suspects cannot be subjected to custodial interrogation after invoking rights "unless the accused himself initiates further communication, exchanges, or conversations with the police")).

The *Edwards* prohibition on further questioning, like other aspects of *Miranda*, is only justified by reference to its prophylactic purpose. *Barrett*, 479 U.S. at 528. The rule serves as "an auxiliary barrier against police coercion." *Id*.

2. Waiver of the right to counsel must be both (1) voluntary and (2) knowing and intelligent. Knowing and intelligent only requires the person understand the right in general. The government need only show waiver by a preponderance of the evidence.

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

"Voluntariness of consent and knowing waiver are two distinct and 'discrete inquiries.'" *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (quoting *Edwards*, 451 U.S. at 484). "The analysis should take into account 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.'" *Mott*, 72 M.J. at 330 (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

However, "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To make a knowing and intelligent waiver, the 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. *Mott*, 72 M.J. at 330 (quoting *United States v. Ruiz*, 536 U.S. 622, 629–630 (2002)). "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." *Id.*

The government must show waiver of rights by a preponderance of the evidence. *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010); R.C.M. 905(c)(1); Mil. R. Evid. 305(e)(2).

3. Accused service members have constitutional, statutory, and regulatory rights to appointed military counsel only upon preferral.

By statute, "defense counsel shall be detailed for each general and special court-martial." Article 27, 10 U.S.C. § 827(a)(1); *see also* Article 31, 10 U.S.C. § 831 (no mention of right to military counsel during incriminating questioning).

"In the military, this Sixth-Amendment right to counsel does not attach until preferral of charges." *United States v. Harvey*, 37 M.J. 140, 141 (C.A.A.F. 1993) (citation and quotations omitted); *accord United States v. Gouveia*, 467 U.S. 180,

187–88 (1984) ("It has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

4. Appellee made a voluntary, knowing, and intelligent waiver because he (1) initiated contact with law enforcement, (2) understood his right to counsel, and (3) explicitly waived his rights on video and in writing.

To determine "whether a valid waiver of the right to counsel" occurred, courts look to "whether the purported waiver was knowing and intelligent" under "the totality of the circumstances." *Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983). Courts look to whether "the accused, not the police, reopened the dialogue with the authorities." *Id.* (citing *Edwards*, 451 U.S., at 486, n. 9). Courts also consider "the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *North Carolina* v. *Butler*, 441 U.S. 369, 374–375 (1979).

a. Like *Bradshaw*, Appellee initiated contact with law enforcement and waived his right to counsel.

In *Bradshaw*, the suspect's waiver of counsel was knowing, intelligent, and voluntary. 462 U.S. at 1046–47. There, the suspect initially invoked his right to counsel during a custodial interrogation, but then initiated contact with police while they drove him to jail by asking, "Well, what is going to happen to me now?" *Id.* at 1042. The officer advised the accused that he "d[id] not have to talk

to [him]" because he "requested an attorney" and he did not "want [the accused] talking to [him] unless" he wanted to and it was of his "own free will." *Id.* at 1042.

The accused said he understood, they had a discussion regarding the case, and later the accused took a polygraph and made a confession. *Id.* A lower court found "that the police made no threats, promises or inducements to talk, that [the] defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of the police." *Id.* at 1046. The suspect's Fifth Amendment right to counsel was therefore not violated. *Id*. at 1046–47.

Here, as in *Bradshaw,* Appellee's actions showed a knowing and intelligent waiver for at least three reasons. First, Appellee demonstrated he understood his right to counsel when he invoked his right to counsel and terminated the May interrogation. (Appellate Ex. XXII at 2, 4.) Second, Appellee showed he understood his right to counsel through his comments to law enforcement. When the agent acknowledged that Appellee had initially "wanted a lawyer at the [first] interview" but now "wanted to come in," Appellee agreed he wanted to speak to them. (Appellate Ex. XXII at 3:20–3:35.) Appellee understood he had "access to a civilian lawyer if [he chose]" and an appointed "military lawyer" only if "charges are preferred." (*Id.* at 4:46–49.)

Third, Appellee demonstrated he understood his right to counsel when he reviewed, read aloud, initialed, and signed his rights advisement which correctly stated his right to counsel during an interrogation. (Appellate Ex. XXII at 4:53–8:05.) When the Agent discussed his right to counsel and asked if Appellee understood, Appellee initialed the section, laughed, and said "yeah, *now*." (Appellate Ex. XXII at 7:14) (emphasis in original). He also knew he could "terminate th[e] interview at any time for any reason." (Appellate Ex. XXII at 7:35–40; Appellate Ex. XXIV at 18.)

Like *Bradshaw*, "police made no threats, promises or inducements" to induce Appellee to talk, and he was "properly advised of his rights, and understood them" at the time of the waiver. 462 U.S. at 1046.

b. Like *Duckworth*, there was no misunderstanding of Appellee's right to counsel. Appellee only had a right to appointed military counsel when charges were preferred. The Fifth Amendment does not require an attorney be "producible on call" when a suspect invokes his rights , but only that the interrogation cease. Appellee correctly understood the limited scope of his right to counsel when he waived it.

In *Duckworth v. Eagan*, 492 U.S. 195 (1989), there was no *Miranda* violation when police advised a suspect that "*You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning*," but also informed him, "*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*." *Id.* at 198

(emphasis original). The warnings continued, "If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer." *Id.*

The Supreme Court rejected the appellant's argument that his confession was inadmissible because the rights advisement led him to believe "he could not secure a lawyer during interrogation[.]" *Id.* at 200, 203–04. The Court also rejected the lower court's holding that the rights advisement led the suspect to believe that if "the government does not file charges, the accused is not entitled to counsel at all" during questioning. *Id.* at 203.

The suspect's rights were not violated because the officers provided a *Miranda* "equivalent" that adequately informed the suspect of his rights. *Id.* at 202–203. The warnings "accurately described the procedure for the appointment of counsel" where "counsel is appointed at the defendant's initial appearance in court" "and formal charges must be filed at or before that hearing." *Id.* at 204. The Court explained the right to counsel "does not require that attorneys be producible on call" but only that "[i]f police cannot provide appointed counsel," then they cannot "question a suspect unless he waives his right to counsel." *Id.* There, because the accused waived his previously invoked right to counsel, his rights were not violated. *Id.*

Here, as the Supreme Court explained in *Duckworth*, Appellee is not entitled to an appointed attorney "producible on call" to satisfy his right to counsel under the Fifth Amendment—his only right is to make the interrogation stop. 492 U.S. at 203–04. In his May interrogation, Appellee terminated the questioning by invoking his right to counsel because he did not have retained or appointed counsel present. (Appellate Ex. XXII at 4.) In the May interrogation, in order to not violate Appellee's rights, the agents had to either (1) provide Appellee an attorney or (2) terminate the interview. Mil. R. Evid. 305(c–d). They terminated the interview and Appellee's rights were not violated.

But during his September interview, Appellee waived his right to counsel after being informed, as in *Duckworth*, that while he had the right to have counsel present at an interrogation, he would not actually receive appointed military counsel until charges were preferred. (Appellate Ex. XXII at 3:20–3:35, 4:35–4:46.) Instead of invoking his right to counsel and terminating the interview, he waived his right to counsel and conducted the interview. (Appellate Ex. XXII at 17; Appellate Ex. XXIV at 18.) Nothing stopped Appellee from terminating the interview again, invoking his right to counsel again, or waiting to conduct an interview until after charges were preferred.

As in *Duckworth*, Appellee's voluntary decision to conduct an interview with law enforcement does not create a right to an appointed attorney "producible

on call." 492 U.S. at 203–04. Likewise, the Agent's advice did not misinform Appellee that "he could not secure a lawyer during interrogation." (R. 89–90.) This was the premise upon which the Military Judge based her Ruling—the same premise rejected by the Supreme Court in *Duckworth.* (R. 89–90); *Duckworth*, 492 U.S. at 200, 203–04.

c. Law enforcement accurately informed Appellee of his right to counsel. Appellee's waiver was knowing and intelligent.

In *Maryland v. Shatzer*, 559 U.S. 98 (2010), the Court considered whether a suspect's rights are violated "when police tell an indigent suspect that he has the right to an attorney," he invokes his right to counsel, the interrogation ceases, and then police later reinterrogate him "without providing a lawyer." *Id.* at 114–15. The Court rejected the notion that scenario would cause the suspect "to feel that the police lied to him and that he really does not have any right to a lawyer." *Id.* at 114–15. The primary concern under *Miranda* and *Edwards* is whether the suspect "will be coerced into saying yes." *Id.* at 115. "An officer has in no sense lied to a suspect" when after informing him of his rights, the suspect invokes his rights, and "then, two weeks later, [law enforcement] reapproaches the suspect and asks, 'Are you now willing to speak without a lawyer present?'" *Id.*

Here, as in *Duckworth* and *Schatzer*, Appellee was correctly informed of his *Miranda* rights by law enforcement when they told him he would not receive

appointed counsel until charges were preferred. (Appellate Ex. XXII at 4:42–46.) The Agents also correctly informed him of his right to request counsel and terminate the interrogation consistent with Mil. R. Evid. 305(c–d). This scenario is nearly identical to *Duckworth* and similar to the one in *Schatzer*. Appellee was informed of the limited scope of his right to counsel: he could still request counsel and terminate the interview, but the government did not have to grant him the opportunity to conduct an interview with an appointed attorney present. *Duckworth*, 492 U.S. at 198, 203–04; *Shatzer*, 559 U.S. at 114–15.

d. Like *Moran* and *Spring*, Appellee's rights advisement, coupled with his discussion with the agents, showed he had no misunderstanding of his right to counsel.

"Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times 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 as a matter of law." *Moran v. Burbine*, 475 U.S. 412, 422–23 (1986).

In *Moran*, the Court upheld the validity of a suspect's waiver of his *Miranda* rights even though he was not told a lawyer was trying to contact him during his interrogation. 475 U.S. at 415, 434. The suspect made a voluntary waiver because there was no "suggestion the police resorted to physical or psychological pressure to elicit the statements." *Id.* at 421. Indeed, the suspect "initiated the conversation

that led" to his confession. *Id.* at 422. The suspect made a knowing and intelligent waiver because there was no question about the suspect's "comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them." *Id.*

In *Colorado v. Spring*, 479 U.S. 564 (1987), the appellant made a knowing and intelligent waiver of his rights because he "understood that he had the right to remain silent and that anything he said could be used as evidence against him." *Id.* at 574. The mere fact he received "*Miranda* warnings protect[ed] this privilege by ensuring that a suspect knows he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Id.; see also Moran*, 475 U.S. at 422 (for waiver, police are not required to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.") Moreover, the fact that an accused's ultimate decision appears illogical is irrelevant to any inquiry of waiver validity. *Connecticut v. Barrett*, 479 U.S. 523, 527 (1987).

Like the properly-informed suspects in *Moran* and *Spring,* Appellee was correctly informed of his rights under *Miranda* and Article 31(b) before he waived them without any coercion. The Agent cleared up any potential for misunderstanding on Appellee's part when she informed Appellee of his right to counsel and that he could "terminate th[e] interview at any time for any reason."

(Appellate Ex. XXII at 7:25–40; Appellate Ex. XXIV at 18.) Appellee explained that he had originally believed military defense counsel would be assigned to him before the government preferred charges, but then the defense services office and his leadership informed him otherwise. (Appellate Ex. XXII at 9; Appellate Ex. XXII at 17, 3:45–4:40.) "[W]here it was all confusing" was that he could hire a civilian lawyer at any time at his own expense, but a free military counsel would only be detailed after preferred charges. (*Id.* at 4:42–53.)

To further avoid confusion, the Agent again informed Appellee of his rights to counsel. (*Id.* at 7:10–13; Appellate Ex. XXIV at 18.) As in *Duckworth*, the Agent effectively informed Appellee of his right to counsel at any interrogation, by explaining his options as: (1) retain civilian counsel and conduct the interview, (2) invoke his right to remain silent or to counsel and terminate the interview without speaking to law enforcement, (3) wait until charges were preferred and receive a detailed military counsel to conduct the interview, or (4) conduct the interview without any counsel present.

And, like *Spring* and *Duckworth*, Appellee then chose to conduct the interview without counsel when he stated he "[understood his] rights" and decided he did "not desire to . . . consult with a retained or appointed lawyer, or have a lawyer present at this time." (Appellate Ex. XXII at 8:00–05; Appellate Ex. XXIV at 18.) He made "this decision freely and voluntarily." (*Id.*) Nothing in the

recorded interview suggests Appellee did not understand his right to counsel and right to remain silent at the time of his waiver. Just as in *Duckworth*, this Court can therefore reject Appellee's self-serving claim, made for the first time many months after the fact, that he allegedly did not understand those same rights. 492 U.S. at 200, 203–04. His rights were correctly explained to him at every step in the process. Whether his decision was ultimately logical has no bearing on whether he was correctly advised. *See Barrett*, 479 U.S. at 527.

5. The Judge and lower court erred by considering Appellee's personal motives and circumstances to talk with law enforcement when determining whether the waiver was valid.

a. A waiver of the right to counsel is voluntary if it is a free and deliberate choice free of official coercion.

A suspect's waiver of the right to counsel must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010). The Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion." *Id.* at 387 (quoting *Colorado v. Connelly*, 479 U.S. 157, 170 (1986)).

b. When a suspect is not in custody and able to return to his normal life there is little reason to believe a waiver was the product of coercion.

When "a suspect has been released from custody and returned to his normal life for some time before the later attempted interrogation, there is little reason to

think that his change of heart has been coerced." *Shatzer*, 559 U.S. at 107 (specifying fourteen days as minimum amount of time before police can permissibly reapproach to interrogate after a suspect has invoked). Fourteen days "provides plenty of time for the suspect to get reacclimated to his normal life, consult with friends and counsel, and shake off any residual coercive effects of prior custody." *Id.* at 110.

In *Schatzer*, it was permissible for police to reapproach a suspect for interrogation two years after he first invoked. *Id.* at 100–01, 117. The Court held that because the suspect had "returned to his normal life"—in this case prison—and had the opportunity to consult with friends, family, and an attorney; there was no evidence of coercion. *Id.* at 107–08. The fact that the suspect had been *Mirandized* without any police coercion satisfied the voluntary prong for waiver—as any "change of heart" was less attributable to "badgering" from police than "to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest." *Id.* at 108.

c. Appellee's personal desire to get the investigation moving does not make his waiver involuntary.

Here, much like *Schatzer*, four months passed between Appellee's first interview and his second. During that time he had ample opportunity to consult with others in the course of his normal life. Indeed, the evidence shows Appellee

did exactly that, since he commented at his second interview that his "whole office said not to talk to anyone without a lawyer." (Appellate Ex. XXII at 3:45–50.) Rather than being involuntary or coerced, Appellee's "change of heart" apparently stemmed from his personal desire "to get the investigation moving" because he had moved his family believing he would leave the military. (R. 89–90; Appellate Ex. XXII at 3–4.) This does not amount to the official coercion required to make waiver involuntary. Both the Judge and the lower court erred in their reliance on Appellee's personal circumstances to invalidate his written and recorded waiver. (R. 89–90); *Flanner*, 2023 CCA LEXIS 428, at *12.

In addition, Appellee is a middle-aged, staff non-commissioned officer with several years of service in the Marine Corps. (Charge Sheet at 1; Appellate Ex. XXII at 17.) There is no reason to believe that someone with these personal characteristics would lack the intelligence or maturity needed to knowingly, intelligently, and voluntarily waive his rights. Indeed, Appellee understood them well-enough to invoke during his May interrogation. (Appellate Ex. XXII at 1.) Likewise, the recorded interview shows no coercion by law enforcement during Appellee's requested, self-scheduled interview. The Military Judge's Ruling failed to identify any police overreach to justify exclusion of the statement. (Appellate Ex. XXII at 17); *see Barrett*, 479 U.S. at 528.

d. The Judge erred in considering personal motives to invalidate a voluntary, knowing, and intelligent waiver.

Neither Appellee, the Judge, nor the lower court contest that Appellee's waiver was voluntary. (Appellate Ex. XXI at 1; R. 89–90); *Flanner*, 2023 CCA LEXIS 428, at *12. Instead, they misconstrue Appellee's personal motives as rendering his waiver unknowing or unintelligent. Nothing supports the notion that personal motives cause a suspect to not understand his rights when he is properly informed. *See Mott*, 72 M.J. at 330; *Bradshaw*, 462 U.S. at 1046; Mil. R. Evid. 305(e)(1).

Therefore, the Military Judge abused her discretion by holding Appellee did not knowingly and intelligently waive his right to counsel.

F. The Military Judge abused her discretion by making clearly erroneous factual findings.

1. A finding is "clearly erroneous" when it is unsupported by the Record and relied upon in the judge's analysis.

"[O]n a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous . . . ." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "A finding of fact is clearly erroneous when there is no evidence to support the finding or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harrington*, 81 M.J. 184, 185 (C.A.A.F. 2021). A "clearly erroneous" finding-of-fact that plays

"no small role" in the exclusion of inculpatory statements will be reversed for an abuse of discretion. *United States v. Lewis*, 78 M.J. 447, 454 (C.A.A.F. 2019).

2. The Judge erred by finding that defense attorneys and the command gave Appellee incorrect legal advice on his right to counsel. This is unsupported by the Record and contrary to law.

a. An accused has a statutory right to detailed military counsel when he has been charged with an offense. He may also request counsel if he has been confined.

"[D]efense counsel shall be detailed for each general and special court-martial." Art. 27(a)(1); Art. 38(b)(1); *see also* Art. 31 (no mention of right to military counsel during interrogation).

b. Both attorneys and unit leaders correctly informed Appellee he had a right to detailed military counsel after charges were preferred.

In *United States v. Jacobs*, 63 F.4th 1055 (6th Cir. 2023), a government interlocutory appeal, the Sixth Circuit reversed a trial judge when he made clearly erroneous findings of fact. *Id.* at 1058. The judge clearly erred when he found the agent threatened to "ransack and destroy" the accused's home during a search, when the record only showed he said he would "dump everything in that house out" during his search. *Id.* at 1057, 1060. That error weighed against the judge's legal conclusion the detective employed "unlawful coercion" while interviewing the accused. *Id.* at 1061.

Here, like *Jacobs*, the Judge's Finding of Fact that Marine Corps defense attorneys and "his chain of command" "left [Appellee] with the inaccurate belief, that he could not get an attorney until charges were preferred" is clearly erroneous for three reasons. (R. 90.) First, despite Appellee's multiple visits, the defense office did not appoint him counsel prior to preferral of charges. (Appellate Ex. XXII at 4–5.) In all likelihood, trial defense attorneys informed Appellee he could only receive appointed military counsel once charges had been preferred—conforming their practice with the policy. (Appellate Ex. XXIV at 5–6, 8, 14.) This is consistent with Appellee's statutory rights to military counsel. Art. 27(a)(1); Art. 38(b)(1). There is no right to military counsel for a suspect's voluntary interview when he has not been charged at court-martial and is not confined.

Second, neither defense attorneys nor his enlisted leader told Appellee he could not retain civilian counsel. (Appellate Ex. XXII at 4, 9–10, 13.) Third, the Judge fails to articulate how that accurate advice misinformed Appellee as to his rights. Nothing in the Record supports the Judge's Finding and the Judge clearly erred. *Harrington*, 81 M.J. at 185.

3. The Judge clearly erred in finding Appellee's "actions showed that he truly desired to have an attorney" present during his interview when the Record shows he waived his right to have counsel present.

In *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2013), the judge abused his discretion when he failed to account for important evidence in an evidentiary ruling. *Id.* at 182. There, the appellant contested the admission of an unrelated, alleged sex assault under Mil. R. Evid. 413. *Id.* at 177–79. The Judge erred when he "altogether failed to mention or reconcile [the appellant's] important alibi evidence and gave little or no weight to the fact of the prior acquittal." *Id.* at 180. That judge made erroneous findings of fact which were contradicted by the alleged victim's statements and unsupported by the record regarding the time frame of the alleged assault, what the alleged victims saw, and the appellant's actions. *Id.* at 180–81. Because he made "unexplained and unreconciled leaps from the evidence presented to his findings of fact, the military judge clearly erred." *Id.* at 181.

Here, like *Solomon*, the Record does not support that Appellee wanted counsel at the second interview. Appellee knew at that point that he did not have an attorney and would not be appointed one unless charges were preferred. He nevertheless contacted law enforcement on his own initiative and scheduled an interview, in full awareness that an attorney would not be present. (Appellate Ex. XXII at 1–4.)

To support her finding, the Judge relied on the fact that Appellee visited the Defense Services Office and asked his enlisted leader about how to get an attorney. (R. 89.) Yet she failed to account for Appellee's actions at the second interview that *he requested*: namely, his unequivocal waiver of his right to counsel. (Appellate Ex. XXII at 4:53–8:05; Appellate Ex. XXIV at 18.) Appellee's decision to contact law enforcement, subject himself to an interview without counsel, and waive his right to counsel all show the opposite of the Judge's Finding: Appellee did not desire to have an attorney present. Since she made "unexplained and unreconciled leaps from the evidence presented to his findings of fact," the Judge clearly erred. *Solomon*, 72 M.J. at 181.

4. The Judge clearly erred in finding Appellee "acquiesced to an interview without having a lawyer present" when the Record shows Appellee initiated contact with law enforcement to ask for an interview and then waived his rights.

"Acquiesce" is defined as "to accept, comply, or submit tacitly or passively." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/acquiesce (last accessed Feb. 12, 2024).

Again, like *Solomon*, the judge made logical leaps unsupported by the Record. Appellee initiated contact with law enforcement after invoking his rights four months earlier. (Appellate Ex. XXII at 2, 4.) Nothing in the Record supports the idea that Appellee accepted, complied, or submitted to a law enforcement request for an interview. There is no evidence that agents requested another

interview. The only evidence in the Record, from Appellee's own Declaration, showed that he "reached out to [law enforcement] on 8 September 2021 to schedule an interview." (Appellate Ex. XXII at 4.)

This occurred four months after the May interrogation where Appellee had invoked his rights. (Appellate Ex. XXII at 4.) Appellee was under no pressure or obligation from law enforcement to conduct an interview; he did it of his own free will, as shown by his interview statements and rights waiver. (Appellate Ex. XXII at 7:25–8:05; Appellate Ex. XXIV at 18.)

This Finding is unsupported by the Record and the Military Judge clearly erred.

5. The Judge clearly erred in finding Appellee did not understand his right to counsel when agents informed Appellee of his rights at least twice before beginning the Appellee-requested interview.

Here, similar to the judge's contradicted, erroneous finding in *Jacobs*, it is an undisputed fact that Appellee "reached out to [law enforcement] to schedule an interview" and make a statement. (Appellate Ex. XXII at 4; Appellate Ex. XXII at 3:20–3:35.) He did this after he invoked his right to counsel and terminated his first interview. (Appellate Ex. XXII at 4.) From talking with defense attorneys and his leadership, he knew that if charges were ever preferred against him he would be detailed military counsel. (Appellate Ex. XXII at 4, 9–10, 13.)

The Record shows no intervening facts that demonstrate Appellee mistakenly believed he was required to submit to an interview with law enforcement before charges were preferred and he was detailed counsel. Indeed, his experience at his first interview shows Appellee understood he had the right to refuse an interview under those circumstances. (Appellate Ex. XXII at 4.)

Instead, Appellee's decision to contact law enforcement and conduct an interview was based on a self-interested belief that he could "get the investigation moving, as he was [past] his [end of active service date] and had already moved his family. . . ." (R. 90.)

The error underpinning the Judge's Ruling is the idea that Appellee had a right to demand an interview at all. Appellee could have waited until charges were preferred and he received counsel. Unlike the accused in *Jacobs*, who at least claimed he was coerced, nowhere in Appellee's interview or his Declaration does he say anyone pressured or forced him to conduct an interview with law enforcement. (Appellate Ex. XXII at 4–5; Appellate Ex. XXII.) Indeed, the agent noted that Appellee reached out to them. (Appellate Ex. XXII at 3:20–3:35.)

The Judge's Finding is clearly erroneous as it is unsupported by the Record.

As the Military Judge made multiple clearly erroneous Findings of Fact, she abused her discretion. *Harrington*, 81 M.J. at 185; *Solomon*, 72 M.J. at 182.

G. The lower court's adoption of the Military Judge's error made an incorrect interpretation of the Fifth Amendment and *Miranda* binding law for the Navy-Marine Corps. This error will create confusion for law enforcement and suspects alike and deserves correction.

The lower court's adoption of the erroneous Ruling in this case could negatively impact the practice of military justice in four ways.

1. First, it would likely result in the suppression of completely voluntary confessions.

"Voluntary confessions are not merely 'a proper element in law enforcement,' they are an 'unmitigated good,' 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Shatzer*, 559 U.S. at 108 (citations omitted). When a prophylactic rule is extended, it achieves "diminished benefits" while also increasing the costs: "the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain." *Id.* Here, the exclusion of Appellee's statements arises not from police badgering or pressure, but only by law enforcement's "failure" to provide a nuanced explanation of how the right to counsel interacts with service policies on appointment of defense attorneys. This is not the kind of coercion that *Miranda* and *Edwards* were concerned with. *Id.* at 111 ("Confessions obtained after a 2-week break in custody and a waiver of *Miranda* rights are most unlikely to be compelled, and hence are unreasonably excluded.")

2. Second, the lower court's opinion will almost certainly cause confusion for law enforcement, thus undercutting the main advantage offered by *Miranda* and *Edwards*.

The *Shatzer* Court made clear that "law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful." *Id.* The "merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Id.* (citing *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990)). The Ruling in this case undermines that certainty; if it is allowed to stand, a law enforcement agent could no longer be sure that providing standard Article 31(b) warnings and informing a suspect of the right to counsel would be sufficient to effect a valid waiver. As *Shatzer* stated, the likely result will be agents deciding not to even try to get confessions, even under circumstances where they would be provided voluntarily. *Id.* at 108.

3. Third, it will substantially increase the burden on military defense offices.

If defense attorneys are to be "producible on call" whenever a suspect decides to make a statement, then it will be necessary for those attorneys to form "virtually indestructible" attorney-client relationships far earlier in the process than is currently required. *See United States v. King*, 30 M.J. 59, 62 n.3 (C.M.A. 1990) (rejecting ineffective assistance of counsel claim when counsel refused to form attorney-client relationship; suspect sought legal advice after invoking). An attorney could be forced to begin representing someone who is never subsequently

charged, and thus be ineligible, particularly in potential conflict cases, to represent service members who actually need the assistance far more.

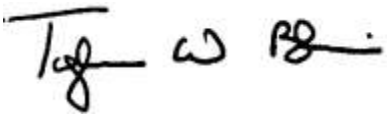
4. Finally, a holding that standard right-to-counsel advisements are not always sufficient would increase the burden on the trial judiciary.

Edwards established a "presumption of involuntariness" that provides an added benefit of "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Shatzer*, 559 U.S. at 106 (quoting *Minnick*, 498 U.S. at 151). If future determinations of voluntariness in the military rest not just on whether appropriate rights advisements were given, but also how well each suspect understood the attorney detailing policies for their respective service, then certainly the same expenditure of resources will inevitably result.

"The *Edwards* presumption of involuntariness is justified only in circumstances where the coercive pressures have increased so much that suspects' waivers of *Miranda* rights are likely to be involuntary most of the time." *Id.* at 115-116. Here, there were no such "coercive pressures" when Appellee, after a four-month interlude, decided on his own to schedule an interview and waive the right to counsel. Holding otherwise would have adverse impacts on military justice without excluding statements that are truly involuntary.

Conclusion

The United States respectfully requests that this Court vacate the lower court's decision, vacate the Military Judge's erroneous Ruling, find Appellee's interview admissible, and remand for further proceedings.



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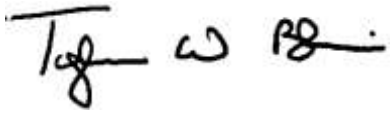

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