IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY 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. 24-0093/MC

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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 Facts

The United States provides the following facts in addition to the Statement of Facts in its Brief.

A. The Military Judge and Trial Counsel argued over whether Appellee had the right to counsel during his interview with law enforcement.

Appellee filed a Motion to suppress his interview with law enforcement. (Appellate Ex. XXI.) Trial Counsel filed a Motion opposing and argued Appellee's rights were not violated and he waived his right to counsel. (Appellate Ex. XXIII.) During the motion hearing, Trial Counsel argued the parties correctly informed Appellee he would not be detailed military defense counsel until charges were preferred and he waived any right to counsel through signing the rights form. (R. 61–66, 69–70.) He argued that Appellee did not have a right to detailed defense counsel or any counsel during a voluntary interview; and that otherwise his waiver was voluntary, knowing, and intelligent. (R. 81–84, 86–88.)

Trial Counsel argued Appellee could "subject himself to an interview" pre-preferral only if "he's willing to do so without appointed military counsel." (R.

87.) The Judge then told Trial Counsel "You, yourself, are confused and you're an attorney. Or you, yourself, think that a Marine doesn't have a right to have an attorney present prior to preferral of charges." (R. 88.) Trial Counsel responded that Appellee "has the right to not make any statement at all until he has a lawyer present." (R. 88.) The Judge then stopped the proceedings. (R. 88.) When the hearing resumed, Trial Counsel stated Appellee "obviously rated counsel" but he "voluntarily, knowingly, and intelligently waived that right" because he wanted to make a statement to law enforcement. (R. 89.)

The Parties did not address whether law enforcement subjected Appellee to a custodial interrogation during his second interview.

Argument

THE JUDGE ABUSED HER DISCRETION WHEN SHE SUPPRESSED APPELLEE'S INTERVIEW. APPELLEE HAS NO RIGHT TO COUNSEL OUTSIDE OF A CUSTODIAL INTERROGATION. APPELLEE AND THE *MOTT* DICTA INCORRECTLY CLAIM ARTICLE 31B PROVIDES A RIGHT TO COUNSEL IN NONCUSTODIAL INTERVIEWS. NEITHER ARTICLE 31B NOR MIL. R. EVID. 305 PROVIDE THE CLAIMED RIGHT, AND ANY CASELAW THAT INDICATES OTHERWISE SHOULD BE CLARIFIED.

A. Servicemembers have no greater rights than those provided by the Constitution, by statute, or by the President's Rules. Neither Article 31(b), M.R.E. 305, nor *Delarosa* provide for a right to counsel outside of a custodial interrogation. Because there is no right to counsel in a noncustodial, pre-preferral interrogation, the *Mott* footnote is incorrect.

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).

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

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).

If a suspect "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).

2. A military suspect must be advised of his Article 31(b) rights regardless of whether he is subject to a custodial interrogation. Article 31(b) rights do not provide a right to counsel.

"Military officials and civilians acting on their behalf are required to provide rights warnings prior to interrogating a member of the armed forces if that servicemember is a suspect, irrespective of custody." *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009) (citing Article 31(b), UCMJ, 10 U.S.C. 831(b) (2000); Mil. R. Evid. 305(b)(1), 305(c)).

Article 31(b) does not contain any warning about the presence of counsel: "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).

3. Military Rule of Evidence 305 is plain: a right to counsel exists for a custodial interrogation. There is no equivalent right for a non-custodial, pre-preferral interrogation.

Military Rule of Evidence 305 clearly distinguishes between custodial interrogations and other interrogations, and the rights available at each. First, Military Rule of Evidence 305(b) defines "interrogation" and "custodial interrogation." Second, 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.*

The section of the Rule titled *Exercise of Rights* requires that "[i]f a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately." Mil. R. Evid. 305(c)(4). The right to invoke the presence of counsel is more limited: "[i]f a person who is subjected to interrogation under the circumstances described in subdivision (c)(2) [suspected of an offense and subjected to *custodial* interrogation] . . . of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present." *Id.* (emphasis added).

The Rule's section *Presence of Counsel* states that "[w]hen a person *entitled to counsel under this rule* requests counsel, a judge advocate . . . will be provided by the United States at no expense to the person . . . and must be present before the interrogation may proceed." Mil. R. Evid. 305(d) (emphasis added). The *Waiver*

of the Right to Counsel and *Waiver After Initially Invoking the Right to Counsel* sections likewise use, respectively, the phrases "right to counsel under this rule" and "subjected to custodial interrogation." Mil. R. Evid. 305 (e)(2), (3)(A).

Thus, nowhere does the Rule provide a right to counsel for non-custodial interrogations. It instead carefully distinguishes between the right to exercise the privilege against self-incrimination—available at any interrogation—and the right to the presence of counsel—applicable only for custodial (and post-preferral) interrogations.

4. This Court can decline to follow the dicta in the *Mott* footnote. Dicta is not binding, and the unsupported footnote contradicts *Vazquez* by providing servicemembers additional rights outside the Constitution, statute, and Manual.

a. Dicta in a judicial opinion entails expressions that do not directly concern a case's outcome. Dicta is not binding.

Courts "are not bound to follow [their] dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (disregarding statements in previous case that did not directly implicate the holding). "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is

presented for decision." *Id.* (quoting *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821)).

b. *Mott* concerned whether a judge erred in admitting a suspect's statements during a custodial interrogation when the suspect's waiver was questionable due to psychosis. In dicta, this Court claimed the right to counsel for military suspects extended beyond custodial interrogations.

In *United States v. Mott*, 72 M.J. 319 (C.A.A.F. 2013), the court held the judge erred by admittingthe appellant's statements to law enforcement without analyzing whether his rights waiver was knowing and intelligent in light of his severe mental illness. *Id.* at 321–22, 330–31. The statements in question occurred during a custodial interrogation. *Id.* at 322.

In a footnote, the court asserted that "in the military system the accused's right to counsel—and the requirement of knowing and voluntary waiver—are not limited to custodial interrogation." *Id.* at 330 n.10 (citing *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009) ("Military officials and civilians acting on their behalf are required to provide rights warnings prior to interrogating a member of the armed forces if that servicemember is a suspect, irrespective of custody. Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2000); Mil. R. Evid. 305(b)(1), 305(c).").

c. Neither *Delarosa*, Art. 31(b), nor the Rules *Mott* cites support its contention that military suspects have an additional right to counsel in a noncustodial interrogation.

This Court can decline to follow the *Mott* footnote for three reasons. First, there is no right to counsel in a noncustodial interrogation provided by the Constitution, statute, or Manual. Without any source of such a right, the *Mott* footnote creates a "military due process" right prohibited under *Vazquez*. 72 M.J. at 19; Article 31(b), UCMJ; Mil. R. Evid. 305(b–c).

Second, *Mott*'s cited authority—*Delarosa*—does not claim military suspects have a right to counsel outside custodial interrogation. 67 M.J. at 319–20. In *Delarosa*, the court upheld a judge's ruling denying a suppression motion for statements made during a custodial interrogation. 67 M.J. at 319. The court noted that for Article 31(b) rights, "Military officials and civilians acting on their behalf" must "provide rights warnings" prior to interrogation of military suspects regardless of a custody. *Id.* at 320. The court distinguished this from the provision of rights warnings to a person in custody, for which it cited the Fifth Amendment, *Miranda v. Arizona*, 384 U.S. 436, 445 (1966), and *United States v. Tempia*, 37 C.M.R. 249, 257 (C.M.A. 1967). *Delarosa*, 67 M.J. at 320. The *Delarosa* court dealt only with a custodial interrogation and never claimed the right to counsel extended to custodial interrogations or to non-custodial interrogations under Article 31(b).

Third, the *Mott* footnote conflicts with precedent holding that military suspects are only entitled to a right to counsel during a custodial interrogation. *Seay*, 60 M.J. at 77 (right to counsel only during custodial interrogation where suspect faces coercive police questioning); *Evans*, 75 M.J. at 305 (Art. 31(b) only concerns statutory privilege against compulsory self-incrimination; right to counsel only in custodial interrogation).

This Court should provide clarity for lower courts by clarifying the *Mott* dicta: the right to counsel does not extend beyond custodial interrogations. It has caused at least one lower court to err in their understanding of the breadth of the right to counsel for servicemembers. *United States v. Davis*, No. ARMY 20160069, 2018 CCA LEXIS 417, at *11-12 (A. Ct. Crim. App. Aug. 16, 2018) (following *Mott* footnote and claiming servicemembers have right to counsel in noncustodial interrogations despite noting contrary language in Mil. R. Evid. 305).

B. *Tempia* adopted *Miranda* for the military. The *Tempia* appellant's rights were violated because he was (1) not properly informed of his *Miranda* rights and (2) was subject to a custodial interrogation after he invoked his right to counsel and was not provided counsel.

A suspect's right to counsel only requires that the "the interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U.S. 436, 474 (1966); *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.")

1. *Tempia* involved an appellant who was: (1) denied legal advice when he requested counsel in a custodial interrogation; (2) improperly advised of his right to counsel under *Miranda*; and (3) improperly subjected to a custodial interrogation after invoking his right to counsel.

In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), this Court's predecessor applied *Miranda* to the military about ten months after the Supreme Court decided *Miranda*. *Id.* at 253–54. The appellant, accused of making lewd proposals to three young girls, was arrested and brought to military law enforcement for questioning. *Id.* at 252. He asked to consult with counsel, after which law enforcement terminated the interview and released the appellant. *Id.* Only two days later, the appellant was again ordered to the law enforcement office, where he "stated he had not yet received legal counsel." *Id.* Rather than again terminate the interview, law enforcement officers made an appointment for him with the Base Staff Judge Advocate. *Id.*

The Staff Judge Advocate, recognizing that he could not "accept an attorney-client relationship" while also serving in his usual capacity, simply advised the appellant that "he could not make a military lawyer available to him as his defense counsel" but that "he had the right to employ civilian counsel" who could represent him. *Id.* He further advised that the appellant would receive a

military lawyer when charges were preferred. *Id.* The appellant then returned as ordered to the law enforcement office, where he was once again re-advised of his rights. *Id.*. He then confessed. *Id.* at 253.

The *Tempia* court found the rights warning deficient, since law enforcement and the Staff Judge Advocate "specifically told the accused no attorney would be appointed to represent him" and that the availability of counsel was limited "to private attorneys employed by the accused at his own expense." *Id.* at 257. The court found, "This is exactly contrary to the information which, under *Miranda*, must be preliminarily communicated to the accused." *Id.* at 257. The advice was therefore deficient, and the confession suppressed. *Id.* at 258.

Tempia is distinguishable from this case for at least three reasons.

2. First, *Tempia* is distinguishable since it involved a custodial interrogation. Appellant has never claimed, and does not now claim, that his second self-scheduled interrogation was custodial.

The *Tempia* court concluded that the appellant had been in custody, noting that he "was clearly summoned for interrogation" and "would have undoubtedly subjected himself to being penalized for a failure to repair" if he had refused to go to the law enforcement office. *Id.* at 256. That conclusion applied to his initial arrest, and also to both his second meeting with law enforcement two days later and his return to the police station following his meeting with the Staff Judge Advocate. *Id.* The court held that it "ignores the realities of the situation to say

that one ordered to appear for interrogation has not been significantly deprived of his freedom of action." *Id.*

The opposite is true here. Following Appellant's first interrogation, more than four months passed without him being approached by law enforcement in any way. (Appellate Ex. XXII at 4.) Appellant then called NCIS to set up an interview before coming to the office on his own to make a statement. (*Id.*)

Appellant was not in custody at the time of his second interview. Any rule announced in *Tempia* as the requirements for rights advisement during a custodial interrogation are therefore inapplicable.

3. Second, unlike *Tempia*, law enforcement informed Appellee he could still request a government provided attorney at the interrogation consistent with *Miranda*. Any overadvisement by law enforcement here does not amount to a concession or create additional rights.

    a. Appellee was fully advised of his rights under *Miranda* as if he were in a custodial interrogation.

Here, unlike *Tempia*, law enforcement fully informed Appellee of his *Miranda* rights as if he were in a custodial interrogation. Law enforcement in *Tempia* failed to satisfy *Miranda* because they did not inform that appellant that he could invoke his right to counsel to have an attorney, provided at government expense, present before any custodial interrogation could occur. *Tempia*, 37 C.M.R. at 257; *Miranda*, 384 U.S. at 444–45, 474. Law enforcement informed this Appellee that he had "the right to have my retained civilian lawyer and/or

appointed military lawyer present during this interview," just as if he were entitled to counsel under *Miranda*. (Appellate Ex. XXIV at 18); 384 U.S. at 444–45, 474.

b. Law enforcement over-advising a suspect of rights is not a factor in determining whether an interrogation was custodial.

In determining whether an interrogation is custodial "the 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). Overadvisement of rights by law enforcement is not a factor this Court considers in whether an interrogation is custodial. *See United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017) (listing factors determining custodial interrogation).

Military commands could order suspects to speak with law enforcement and potentially create a custodial interrogation without law enforcement's knowledge. *See e.g. Tempia,* 37 C.M.R. at 256 (suspect facing penalty for "failure to repair" if he did not return to law enforcement). Therefore, it is reasonable for law enforcement to have a practice of over-advising suspects during any interrogation to avoid any potential violation of rights or unnecessary pre-trial suppression litigation. *See e.g. Berkemer v. McCarty*, 468 U.S. 420, 442, (1984) (recognizing the occasional difficulty police have in "deciding exactly when a suspect has been taken into custody").

Appellee's argument that over-advising amounts to "trickery," creates additional rights, or makes the interrogation custodial is unsupported. (Appellee Br. at 12–13.)

4. Third, unlike *Tempia*, Appellee was not misled about the difference between consultation with the staff judge advocate and advice from an independent defense attorney.

In *Tempia*, after the appellant told police he had not yet consulted with counsel, they made an appointment for him with a lawyer—the base staff judge advocate—who could not actually provide him with any advice. 37 C.M.R. at 252. After reporting back to law enforcement, and apparently believing he had already received all of the legal advice he could get, the appellant "stated he had consulted with [the staff judge advocate], and did not desire further counsel, as `they could not help him…He said, `They didn't do me no good.'" *Id.* (ellipses in original).

Here, Appellee was not laboring under the same misapprehension. He went to the Defense Services Office on two occasions to ask for assistance. (Appellate Ex. XXII at 4.) Though we do not know what Appellee was told during these visits, it is evident from his repeated attempts that he appreciated, unlike the *Tempia* appellant, what it meant to receive independent legal advice. Appellee was also told by his command, correctly, that such independent advice would be available to him at a later date, and for no charge. (Appellate Ex. XXII at 12–13.) Lastly, Appellee was informed by law enforcement—and knew from prior

experience—that if he wanted appointed counsel to be present for the interview, the interview would stop until he had a free military lawyer available. (Appellate Ex. XXIV at 18).

While one can readily understand why the appellant in *Tempia* was confused, Appellee does not merit the same consideration. He knew what a military defense lawyer did, knew he would receive one for free if charges were preferred, and knew he had the option to wait until that time before saying anything to law enforcement. He instead set up an interview on his own accord, and chose to speak. *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.")

5. Even if *Tempia* was applicable, its holding as to the insufficiency of the rights advisement was abrogated by the Supreme Court's holding in *Duckworth*.

Courts clarified *Miranda*'s application in the succeeding decades. When *Tempia* is examined in the light of subsequent Supreme Court decisions, it is evident that the court reached the right outcome, but for the wrong reason.[1]

[1] If *Tempia* were decided today, the conduct of the police would have almost certainly resulted in suppression of the confession. It was the police, not the appellant, who re-initiated contact with the appellant after his invocation, in violation of the rule in *Edwards v. Arizona*, 451 U.S. 477 (1981). While the *Edwards* rule would later be modified by *Maryland v. Shatzer*, 559 U.S. 98 (2010),

It is clear that the *Tempia* court—much like the Military Judge here—was laboring under the impression that *Miranda* guaranteed a free lawyer provided by the government for pre-preferral interrogations. Noting that the military already required defense counsel to be appointed prior to trial, it stated, "All that will now be required is that the date of appointment be moved back." *Id.* at 258. If the government could not comply with this requirement, "it need only abandon its reliance in criminal cases on the accused's statements as evidence." *Id.* at 258. In other words, *Tempia* saw the government as having a simple choice: either appoint counsel before interrogation for those who request it, or render any statements they make inadmissible.

We now know that this is not an accurate statement as to what *Miranda* requires. In *Duckworth v. Eagan*, 492 U.S. 195 (1989), the Supreme Court found a rights advisement sufficient to satisfy *Miranda* when a suspect was told, "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. The Seventh Circuit ruled that the confession was inadmissible because the advisement was "misleading and confusing" and linked "an indigent's right to counsel before interrogation with a future event." *Id.* at 200. As a result, the appellant "arguably believed that he

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the two-day gap in custody in *Tempia* would still be objectionable under the 14-day *Shatzer* standard.

could not secure a lawyer during interrogation"; a second warning "did not explicitly correct this misinformation." *Id.* The Supreme Court reversed, and held that *Miranda* "does not require that attorneys be producible on call" or that "each police station must have a `station house lawyer' present at all times to advise prisoners." *Id.* at 204. "If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel." *Id*. Since the rights advisement accurately described the procedure in Indiana, and did not imply that the right to counsel only attached after interrogation, it satisfied the *Miranda* requirement. *Id.* at 205.

The *Tempia* court would therefore have reached a different conclusion for *Miranda*'s application if it had been decided today rather than in 1967. In *Tempia*, the suspect had a right to counsel at a custodial interrogation, but was told that the government could not actually provide such an attorney until charges were preferred. *Duckworth* assures us that such advisements satisfy the *Miranda* prophylaxis. Just as the *Duckworth* advisement correctly conveyed the Indiana appointment procedures, the advice Appellee received accurately captures when military counsel must be appointed. (Appellate Ex. XXIV at 5–16 (service regulations providing discretion to defense counsel leadership to detail defense counsel pre-preferral)). To the extent that *Tempia* suggests otherwise, this Court should find it has been abrogated.

6. Since *Tempia*, the Supreme Court, Federal courts, Military courts, Congress, and the President have clarified that neither *Miranda* nor the Constitution requires production of counsel on demand, but only that the interrogation must cease if a suspect cannot have the benefit of counsel.

Post-*Miranda*, the Supreme Court clarified in *Edwards* that 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). This Court's predecessor followed suit in *Dock*. *United States v. Dock*, 40 M.J. 112, 115 (C.M.A. 1994) ("*Edwards* clearly applies to the military.").

The President promulgated Rules which required that when a suspect invoked his right to counsel during a custodial interrogation that "questioning must cease until counsel is present." Mil. R. Evid. 305(c)(4).

Neither has Congress made any statute nor has the President made any rule that affirmatively requires appointed military counsel if no custodial interrogation occurs. If law enforcement does not go forward with a custodial interrogation after a suspect invokes his right to counsel, then there is no statute or rule that requires appointed military counsel for a suspect to make a statement. *See* Art. 27, 38, UCMJ; 10 U.S.C. §§ 827, 838; Mil. R. Evid. 305.

C. Appellee fails to distinguish this case from *Duckworth*. He ignores the fact that law enforcement ceased the custodial interrogation after he invoked his right to counsel. Appellee has no greater rights to counsel than those in *Miranda* and Mil. R. Evid. 305, which require a custodial interrogation for the right to counsel to be implicated.

A person subject to custodial interrogation who requests a counsel will be provided a qualified judge advocate "by the United States at no expense" "and must be present before the interrogation may proceed." Mil. R. Evid. 305(d).

This Appellee, as in *Duckworth*, chose to make statements without counsel present and waived his rights. 492 U.S. at 200, 203–04. Through the rights advisement and their colloquy, the Agents informed Appellee that he could invoke his rights provided in the form and stop the interview, or waive his rights and continue the interview. Appellee chose to do the interview. *Barrett*, 479 U.S. at 529 ("*Miranda* gives the defendant a right to choose between speech and silence, and [the suspect] chose to speak.")

As in *Duckworth*, no authority gives suspects the right to force the government to conduct a custodial interrogation so they can have counsel present, as Appellee implicitly claims. (Appellee Ans. at 16.)

Further, Appellee provides no authority for how he has additional rights to counsel more than those provided in *Miranda* and Mil. R. Evid. 305. (Appellee Ans. at 16.) The right to counsel only exists for a custodial interrogation, which he does not allege occurred during his voluntary, self-scheduled interview with law

enforcement. *Miranda* and the Rules provide only that counsel will be provided before a *custodial interrogation* may proceed. Nothing in the service regulations Appellee cites require authorities to appoint or provide defense counsel to accompany a suspect to an interrogation. (Appellate Ex. XXIV at 5–16 (providing discretion to defense counsel leadership to detail defense counsel pre-preferral); Appellee Ans. at 9, 17).

D. The lower court's opinion attempts to create a new right for military suspects in noncustodial interrogations.

The lower court disagreed that "counsel would only be appointed upon preferral of charges" because an accused can "obtain detailed military counsel prior to preferral of charges" under Mil. R. Evid 305(d). *United States v. Flanner*, No. 202300134, 2023 CCA LEXIS 428, at *11 (N-M Ct. Crim. App. Oct. 10, 2023). The court does not clarify its understanding of Mil. R. Evid. 305 or *Miranda,* which do not require law enforcement to then go forward with the interrogation. Through this logic, the lower court creates—or at least appears to create—an affirmative right for military suspects to obtain detailed military counsel after invoking the right to counsel, regardless of whether a custodial interrogation occurs. *Id.* at *10–12.

Appellee misstates the impact of the lower court's opinion. (Appellee Ans. at 17.) In effect, it creates a new right to counsel during interrogations without authority.

E. At trial, Trial Counsel did not concede the issue of whether Appellee had a right to counsel during a noncustodial interview. Regardless, this Court is not bound by government concessions.

1. Trial Counsel repeatedly stated Appellee was not entitled to appointed military counsel. At one point, Trial Counsel appears to state that if Appellee was subject to a custodial interrogation, then Appellee had a right to counsel. The Judge did not address whether Appellee's interview was custodial. Their failure to address this determinative issue is not binding on this Court.

Appellee's argument that Trial Counsel conceded that Appellee rated "military counsel" before preferral mischaracterizes the Record. (Appellee Ans. at 11, 16.) Trial Counsel only stated that Appellee "rated counsel" during his interview and that he waived that right. (R. 89.) The Judge appeared to assume, without discussing it, that Appellee's interview was a custodial interrogation. (R. 80–89.) Trial Counsel's comments, given after a recess, must be taken in this context—that if Appellee was subjected to a custodial interrogation, then he had a right to counsel. Trial Counsel repeatedly argued throughout the hearing that Appellee had waived this same right. (R. 81–84, 86–88.)

2. Even if this Court finds Trial Counsel conceded that Appellee's interview was custodial, it is not bound by that concession.

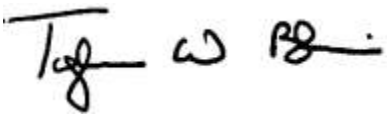
This Court is not "bound by government concessions." *United States v. Budka*, 74 M.J. 220 (C.A.A.F. 2015) (citations omitted) (rejecting government contention that factual predicate for offense had not been met, affirming conviction).

Any concession by Trial Counsel regarding his mistaken belief that Appellee's interview was custodial is irrelevant to determining the factual predicate of whether Appellee's interview amounted to a custodial interrogation. This issue was not fully litigated at the motions hearing, but this Court has ample evidence to show the interview was non-custodial. (Appellate Ex. XXII at 7:35–40; pg. 4; Appellate Ex. XXIV at 18 (Appellee requested an interview, appeared for questioning voluntarily, free to leave, terminate interview at any time)).

Appellee conducted a self-scheduled, voluntary, non-custodial interview with law enforcement: this is not a custodial interrogation. Therefore, his right to counsel was not implicated and this Court can reverse the Judge's Ruling on those grounds.

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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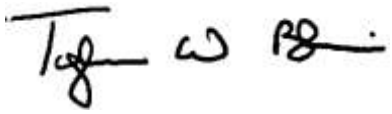

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United States v. Davis

United States Army Court of Criminal Appeals

August 16, 2018, Decided

ARMY 20160069

Reporter
2018 CCA LEXIS 417 *; 2018 WL 3996488

UNITED STATES, Appellee v. Private E2 NICHOLAS E. DAVIS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Reconsideration denied by, Reconsideration denied by, En banc *United States v. Davis, 2018 CCA LEXIS 618 (A.C.C.A., Oct. 17, 2018)*

Motion granted by *United States v. Davis, 78 M.J. 254, 2018 CAAF LEXIS 794 (C.A.A.F., Dec. 17, 2018)*

Motion granted by *United States v. Davis, 78 M.J. 298, 2019 CAAF LEXIS 8 (C.A.A.F., Jan. 3, 2019)*

Motion granted by *United States v. Davis, 78 M.J. 406, 2019 CAAF LEXIS 160 (C.A.A.F., Mar. 1, 2019)*

Review granted by *United States v. Davis, 79 M.J. 27, 2019 CAAF LEXIS 223, 2019 WL 2070680 (C.A.A.F., Apr. 2, 2019)*

Affirmed by *United States v. Davis, 79 M.J. 148, 2019 CAAF LEXIS 404 (C.A.A.F., June 18, 2019)*

Review granted by *United States v. Davis, 79 M.J. 213, 2019 CAAF LEXIS 568, 2019 WL 3562635 (C.A.A.F., July 31, 2019)*

Affirmed by *United States v. Davis, 79 M.J. 329, 2020 CAAF LEXIS 76, 2020 WL 745470 (C.A.A.F., Feb. 12, 2020)*

Prior History: [*1] Headquarters, U.S. Army Medical Department Center and School Wade Faulkner, Military Judge Lieutenant Colonel Toshene C. Fletcher, Staff Judge Advocate.

Counsel: For Appellant: Captain Bryan A. Osterhage, JA (argued); Lieutenant Colonel Tiffany M. Chapman, JA; Lieutenant Colonel Christopher D. Carrier, JA; Captain Bryan

A. Osterhage, JA (on brief); Lieutenant Colonel Christopher D. Carrier, JA; Captain Bryan A. Osterhage, JA (on reply brief); Major Todd W. Simpson, JA; Captain Bryan A. Osterhage (on supplemental brief).

For Appellee: Captain Jeremy Watford, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Cormac M. Smith, JA (on brief).

Judges: Before CAMPANELLA[1] SALUSSOLIA, and FLEMING Appellate Military Judges. Senior Judge CAMPANELLA and Judge SALUSSOLIA concur.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION

FLEMING, Judge:

In this appeal, we find the military judge properly denied the defense motion to suppress some of appellant's statements to Criminal Investigation Command (CID) agents and the search of his cell phone. We affirm appellant's conviction of making an indecent visual recording of another soldier's private area when that soldier possessed a reasonable expectation of privacy at the time of its recording. [*2] We find appellant's conviction of broadcasting an indecent recording is factually and legally insufficient.

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of false official statement, one specification of indecent recording, and one specification of broadcasting an indecent recording in violation of *Articles 107* and *120c*, Uniform Code of Military Justice, *10 U.S.C. §§ 907*, *920c (2012)* [UCMJ]. The military judge convicted appellant, pursuant to his pleas, of two specifications of violating a lawful general order in violation of *Article 92*, UCMJ. The convening authority approved the adjudged sentence of a bad conduct discharge and a reduction to the grade of E-1. Appellant was credited with fifteen days of confinement against the sentence to confinement.

This case is before us for review pursuant to *Article 66*, UCMJ. We address two assignments of error, with multiple subparts, one of which merits relief. Appellant personally raised seven matters pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, one of which is also an assigned error. The remaining *Grostefon* matters, after due consideration, do not warrant discussion or relief.

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[1] Senior Judge Campanella decided this case prior to her departure from the Court.

BACKGROUND

*Events Regarding Appellant's Crimes [*3]*

Appellant's offenses occurred the day after Thanksgiving when mostly underage soldiers consumed alcohol and engaged in sexual activity in a cheap off-post motel room. Appellant, Private (PV2) JE, and several other soldiers rented the motel room to surreptitiously consume alcohol. Appellant purchased alcohol for all the soldiers. After consuming various amounts of alcohol, most of the soldiers left the motel room except for appellant, PV2 JE, PV2 JH, and PV2 JS.

The location of these four remaining soldiers within the room and the room's location and layout is key to understanding this case. The room was located on the first floor with a window facing towards, and a door opening to, the motel's parking lot. Upon opening the door, there was a bedroom containing two beds and a separate bathroom beyond. Private JS, due to immense alcohol consumption, passed out on the bed closest to the window. Appellant, PV2 JE, and PV2 JH engaged in a variety of sexual activities with one another on the other bed closest to the bathroom. Private JE asserted the sexual activities were nonconsensual and appellant asserted the activities were consensual. While on the bed and without PV2 JE's knowledge or [*4] consent, appellant used his cell phone to record PV2 JE's buttocks as she was bent over and faced forward while engaging in sexual intercourse with him.

A few minutes after appellant made the recording, several soldiers from the group returned to the motel room and knocked on the door. When no one answered the locked door, one of the soldiers walked over to the window, looked in, and saw PV2 JE jump off the far bed and run into the bathroom. Appellant then opened the door to let the group into the room. Before leaving the room, appellant showed a fellow soldier the cell phone recording he made of PV2 JE's buttocks.

Appellant's CID Interview

A few days later, appellant was interviewed by CID agents for the alleged rape, among other offenses, of PV2 JE. Appellant made several incriminating statements. At the end of the interview, appellant consented to the seizure and search of his cell phone which contained his video recording of PV2 JE. Appellant deleted the video recording he made of PV2 JE, but the CID digital forensic examiner was able to extract the deleted video from appellant's cell phone.

At trial, defense counsel filed a motion to suppress appellant's statements to CID and challenged [*5] the validity of his consent to seize and search his cellphone because: (1) appellant invoked his right to counsel; and (2) his entire statement was involuntary. The military judge granted the motion, in part, and denied the motion, in part, as discussed in-depth below.

In order to review the military judge's ruling, we divide the CID interview into four key areas: (1) initial waiver; (2) invocation of rights; (3) re-initiation of communication; and (4) re-waiver of rights.

Initial Waiver

At the time of the interview, appellant was twenty-five years old, had a General Technical (GT) score of 124, and was receiving training to be a combat medic specialist. The military judge found "[appellant] maintained eye contact; could recollect facts, had no difficulty speaking, had no slurred speech, had no difficulty walking, and had no difficulty sitting. The [appellant] did not appear to be under the influence of any substance that would impair his ability to knowingly waive his rights."

Prior to any questioning by CID agents, appellant was advised orally and in writing of his *Article 31(b)*, UCMJ, and *Miranda* rights. *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. Appellant verbally affirmed he understood his rights and waived his rights. Appellant [*6] placed his initials by each right and signed Department of Army Form 3881-E (DA Form 3881), the rights' waiver procedure/waiver certificate, purportedly indicating he understood and waived his rights.

The CID agent verbally advised appellant he was suspected of "having knowledge," as opposed to "having committed," a rape. Appellant's DA Form 3881, however, stated appellant was suspected of committing the offense of rape. This initial discrepancy between the CID agent's oral advisement and the written form was later clarified by appellant during the interview and is discussed below.

After obtaining appellant's waiver of rights, a CID agent commenced questioning appellant. After a few minutes of questions, appellant asked the agent whether an attorney could be made available that night. The agent replied it would not be possible that night but it could be scheduled at a later time. Appellant did not ask to reschedule the interview but instead stated he wanted to get the interview done that night.

Invocation of Rights

Shortly after expressing his desire to continue the interview, appellant sought to clarify the discrepancy between whether he was suspected of "having knowledge" or "having [*7] committed" a rape. Appellant stated if an accusation existed that he committed a rape, the situation was "pretty serious." After noting the severity of the situation, appellant stated "I would like to have a lawyer present ... if I'm under investigation for [committing] rape." The military judge ruled this statement was an unambiguous invocation of appellant's right to counsel.

Re-Initiation of Communication

Immediately after appellant's request for counsel, he sua sponte continued talking to the CID agent, providing an approximate nine-minute monologue on his exculpatory version of the events regarding the alleged offenses. During this monologue, the agent did not ask appellant any questions or re-advise appellant of his rights. The agent testified he did not stop the interview because appellant continued to discuss the incident and "continued for an extensive period of time." The military judge denied the defense motion to suppress any statements during appellant's monologue, concluding they were voluntarily, spontaneously initiated by appellant, and not in response to any questions from the CID agent.

After appellant's lengthy monologue, the agent began re-questioning appellant without [*8] re-advising him of his rights. This re-questioning period continued for approximately fifty minutes. The military judge held appellant's statements within this fifty-minute window were not admissible because they were taken in violation of his right to counsel as a valid re-waiver of his rights had not occurred.

Re-Waiver of Rights

Approximately fifty minutes into the re-questioning period, appellant asked the agent about taking a polygraph examination. The agent told appellant that a polygraph examination could not occur that night, but it could be scheduled for later. Appellant then immediately stated "I would like to request a lawyer after this point." The agent then asked appellant if he was requesting a lawyer right at that moment. Appellant responded he was not requesting a lawyer at this time.

The military judge held appellant's statement was an affirmative re-waiver of his right to counsel and denied the defense motion to suppress any of appellant's statements after this re-waiver. While this re-waiver occurred almost an hour after appellant's spontaneous re-initiation of communication and fifty minutes after the agent began re-questioning appellant, the military judge reasoned [*9] appellant's immediate re-initiation of the

interview (the nine-minute monologue) authorized the agent to obtain a subsequent re-waiver of appellant' rights.

After this re-waiver, the interview continued with appellant stating "nothing I did is incriminating and I want my part of the story heard." Despite this assertion, appellant eventually made some incriminating statements in response to CID questioning, including an admission that he recorded PV2 JE's buttocks without her consent.

Appellant also consented to the seizure and search of his cell phone which he used to video PV2 JE. The military judge denied the defense motion to suppress the seizure and search of the cell phone on the grounds that appellant's consent occurred after his re-initiation and re-waiver of rights.

LAW AND DISCUSSION

Suppression of Statements

On appeal, appellant asserts the military judge abused his discretion by not suppressing all of appellant's statements to CID. Appellant essentially offers the same reasons supporting suppression as he did at trial. First, appellant unambiguously invoked his right to counsel and the CID agent failed to immediately terminate the interview. Second, appellant's statements were [*10] involuntary.

We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Baker, 70 M.J. 283, at 287 (C.A.A.F. 2011)*. An abuse of discretion occurs "when: (1) the findings of fact upon which [the military judge] predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)*; Military Rule of Evidence [Mil. R. Evid.] 304; 305. We review the military judge's conclusions of law *de novo*, including his conclusion as to the voluntariness of the statement. *United States v. Chatfield, 67 M.J. 432, 437 (C.A.A.F. 2009)*.

We find the military judge did not abuse his discretion by concluding appellant made an unambiguous invocation of his right to counsel after initially waiving his rights. An attorney was not made available to appellant after his invocation of his right to counsel. Under these facts, two issues must be considered to determine if the military judge abused his discretion by not suppressing all of appellant's statements: (1) whether appellant re-initiated communication with the CID agent; and (2) whether appellant subsequently re-waived his right to counsel.

Appellant's Statements Made After Re-Initiation

As to re-initiation, the [*11] Supreme Court in *Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*, created a bright-line rule barring police from interrogating an accused in custody once he clearly asserts his right to counsel, unless an attorney is provided, or "the accused himself initiates further communication, exchanges, or conversations with the police." Military Rule of Evidence 305(e)(3)(A) prohibits re-questioning an accused, who is subject to "custodial interrogation," after he invokes his right to counsel unless the accused re-initiates communication and provides a subsequent waiver.[2]

The military judge did not determine whether appellant was subject to "custodial interrogation," but the distinction between custodial and non-custodial interrogation in the military context appears irrelevant. Our superior court extends counsel rights and the *Edwards* re-initiation and re-waiver requirements to accused who are only subjected to mere non-custodial interrogation.

The Court of Criminal Appeals (CAAF) has stated "[c]onsistent with our precedents, we note that in the military system the accused's right to counsel - - and the requirement of knowing and voluntary waiver - - are not limited to custodial interrogations." *United States v. Mott, 72 M.J. 319, 330 n. 10 (C.A.A.F. 2013)* (citing *United States v. Delarosa, 67 M.J. 318, 320 (C.A.A.F. 2009))* ("Military officials and civilians acting on their behalf are required [*12] to provide rights warnings prior to interrogating a member of the armed forces if that servicemember is a suspect irrespective of custody."). Even with the explicit words in Mil. R. Evid. 305(e)(3)(A) requiring "custodial interrogation," and the absence of the military judge's finding of fact on this issue, we nevertheless apply CAAF's precedent and first review, under *Edwards*, whether "[appellant] himself initiate[d] further communication, exchanges, or conversations" with the agents. *Edwards, 451 U.S. at 484-85*.

We find the military judge did not err in finding appellant sua sponte re-initiated communication with a CID agent immediately after he invoked his right to counsel with no coaxing from the agent. Appellant engaged in a nine-minute monologue asserting his exculpatory version of events. The agent did not ask questions during this time period. The agent also testified he did not stop the interview because appellant continued to discuss the incident and "continued for an extensive period of time." Accordingly, we hold the military

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[2] "'Custodial interrogation' means questioning that takes place while the accused . . . 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." *See* Mil. R. Evid. 305(b)(3).

judge did not abuse his discretion by denying defense's motion to suppress appellant's statement made during his lengthy monologue.

Appellant's Statement Made after Re-Waiver

After determining appellant [*13] re-initiated communication, the question next turns to whether appellant subsequently provided a knowing, intelligent, and voluntarily re-waiver of his rights under a "totality of the circumstances." *Oregon v. Bradshaw, 462 U.S. 1039, 1045-46, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983)* (stating that once it has been determined that an accused re-initiated dialogue with law enforcement there is also a separate inquiry into the voluntariness of the re-waiver).

Appellant asserts his re-waiver was not knowing, intelligent, and voluntary because the agent failed to re-advise him of his rights, and therefore, any statement elicited by CID after his alleged re-waiver must be suppressed. Although a rights re-advisement is a very important factor to consider under a "totality of the circumstances," we decline to adopt a per se rule, as suggested by appellant, that a failure to re-advise an accused of his rights automatically equates to an unknowing, unintelligent, and involuntary re-waiver. *See United States v. LeMasters, 39 M.J. 490, 491 (C.M.A. 1994)* (holding an accused's acknowledgement that he could consult with counsel, without a re-advisement of rights, sufficed to establish a knowing waiver). We also decline to per se invalidate the legality of appellant's re-waiver because it occurred fifty minutes after appellant's re-initiation [*14] of communication and lengthy monologue when, we repeat, this is one of many factors which must be weighed in reviewing the totality of the circumstances. Any per se and pro forma rule would eviscerate a totality of the circumstances review.

After thoroughly reviewing the totality of appellant's circumstances, we hold the military judge did not abuse his discretion finding appellant knowingly, intelligently, and voluntarily re-waived his rights when appellant stated that he was not requesting a lawyer at this time. Appellant was twenty-five years old and possessed a GT score of 124. Nothing in the military judge's findings of fact, or our separate review, indicate any type of coercion during the re-waiver process or the entire interview.

After closely reviewing the entire video recording of appellant's interview, this court finds appellant was extremely articulate and clearly understood his rights. The overall theme of the entire interview was appellant's desire to immediately speak with CID because, as stated by appellant, "I want my part of the story heard." *See Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975)* (stating "the admissibility of statements obtained after the person in custody has decided to remain silent depends under [*15] *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'").

Appellant did not want to "cut off questioning" from CID agents but instead wanted to fully and immediately discuss the alleged offenses to clear his name.

Appellant re-initiated communication on his own volition and was not badgered by CID agents into re-waiving his rights. Appellant understood he had the right to counsel, he elected not to wait to consult with counsel, and he continuously exhibited a strong desire to talk to the CID agents. The military judge did not abuse his discretion by denying the motion to suppress appellant's statements that occurred after his re-initiation of communication and his affirmative re-waiver of counsel rights.[3]

Appellant's affirmative re-waiver, when combined with the other factors discussed above, served to establish a knowing, intelligent, and voluntary re-waiver of his rights. We find our holding consistent with the overall purpose of the *Edwards* rule which seeks to "prevent police from badgering a defendant into waiving his previously asserted" request for counsel. *See* Minnick v. Mississippi, 498 U.S. 146, 150, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).[4] Once appellant's re-initiation merged with a valid non-coerced re-waiver, the judicially created [*16] prophylactic reasons, derived from *Edwards*, to suppress appellant's statements no longer existed.

We pause now, however, to reinforce the general principle that CID agents should re-advise an accused of his rights before re-questioning an accused who: (1) invokes his right to counsel after initially waiving such right; and (2) re-initiates communication after that invocation. This opinion should not be read to embolden CID agents, or anyone else, to do otherwise. Our affirmance of the military judge's ruling in this case is limited to the very narrow set of presented facts.

Voluntariness of Appellant's Entire Statement

At trial, defense counsel asserted appellant's statements were involuntary because he was: (1) initially handcuffed enroute to the CID office; (2) prescribed certain medications; and (3) sleepy due to his medication usage and having been awake for the previous sixteen hours. An inquiry into voluntariness assesses "the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996). We review the military judge's

[3] Likewise, we find the military judge did not abuse his discretion in suppressing appellant's statements within the approximate fifty minute window occurring between the end of his monologue and his affirmative re-waiver of counsel.

[4] The *Edwards* rule "should be counterbalanced against the 'unmitigated good' on the part of law enforcement to secure 'uncoerced confessions.'" *See* United States v. Maza, 73 M.J. 507, 525 (N. M. Ct. Crim. App. 2014) (*citing* McNeil v. Wisconsin, 501 U.S. 171, 181, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991)).

conclusions of law *de novo*, including his conclusion as to the voluntariness [*17] of the statement. *United States v. Chatfield, 67 M.J. 432, 437 (C.A.A.F. 2009)*. We find appellant's statements were voluntary based on the totality of the circumstances.

Appellant was not handcuffed during any part of the interview. Appellant's freedom of movement was not constrained in any manner. Appellant even did calisthenics during one break in the interview.

As to appellant's prescription for trazodone and tramadol, the record does not establish he took either medication prior to or during his interview or that these medications had any bearing on his physical or cognitive functioning during his interview. Appellant was wide-awake and extremely articulate.

As to appellant being sleepy due to his alleged medication usage or having been awake for the previous sixteen hours, we adopt the military judge's detailed findings of fact. The military judge found "[appellant] maintained eye contact; could recollect facts, had no difficulty speaking, had no slurred speech, had no difficulty walking, and had no difficulty sitting. The [appellant] did not appear to be under the influence of any substance that would impair his ability to knowingly waive his rights."

We highlight the following additional facts supporting the voluntariness of appellant's [*18] statements. Again, at the time of the interview, appellant was twenty-five years old, had a GT score of 124, and was receiving training to be a combat medic specialist. Appellant felt sufficiently comfortable to sua sponte ask the CID agent if he could take off his Army Combat Uniform shirt because he was hot. Appellant's request was immediately granted. Appellant was so assertive he corrected the CID agent throughout the interview by adamantly denying he engaged in a "double penetration" of PV2 JE's body with another solider despite the agent's assertion to the contrary. The agents made no promises to or threats against appellant.

Suppression of Cell Phone

Appellant asserts the military judge abused his discretion by not suppressing the contents of appellant's cell phone because: (1) his consent to its seizure and search was involuntary; and (2) he consented to the search during an unlawful interrogation. We disagree.

Having already determined appellant's acts were voluntary during the entire interview, we further note that appellant failed to raise the issue of voluntariness at trial as it relates to his consent to seize and search his cell phone. Appellant's trial defense counsel also [*19] did not object to the contents of the cell phone being admitted into evidence.

Whether an appellant has waived an issue is a question of law we review *de novo*. *See* United States v. Rosenthal, 62 M.J. 261, 262 (C.A.A.F. 2005). Military Rules of Evidence 311(d)(1) and (2) require the trial defense counsel to make a motion to suppress evidence seized from the accused prior to submission of plea, or at a later time as permitted by the military judge for good cause. R.C.M. 905(e). Appellant's failure to raise the issue of voluntariness in his motion to the military judge and at trial constitutes waiver of his right to object to this Court regarding the admission of the contents of his cell phone. Accordingly, appellant's claim that his consent to search his cell phone was involuntary is waived, leaving no error to correct on appeal. *See* United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

As to appellant's second argument, even if we agreed with appellant that his consent occurred during an unlawful interrogation, which we do not, a request for a consent to seize and search does not impinge upon *Article 31(b)* or *Fifth Amendment* rights because such requests are not interrogations and the consent given is ordinarily not a statement. *See* United States v. Robinson, 77 M.J. 303 (C.A.A.F. 2018). "Requesting consent to search property in which a suspect has an interest is not prohibited by his prior request for counsel, because [*20] *Edwards* provides protection only as to interrogation." United States v. Burns, 33 M.J. 316, 320 (C.M.A. 1991).

Factual and Legal Sufficiency of the Cell Phone Offenses

Appellant argues his conviction for the offenses of making and broadcasting a visual recording is factually and legally insufficient because PV2 JE did not have a reasonable expectation of privacy when the recording was made and the manner in which appellant displayed the video to another soldier does not meet the definition of "broadcasting" in *Article 120c*, UCMJ.

We review claims of legal and factual insufficiency *de novo*, examining all of the evidence properly admitted at trial. *Art. 66(c)*, UCMJ; United States v. Beatty, 64 M.J. 456, 459 (C.A.A.F. 2007). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The test for factual sufficiency is whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

Within the context of this case, the government was required to prove beyond a reasonable doubt that appellant [*21] knew or reasonably should have known the recording was made

without PV2 JE's consent, under circumstances in which PV2 JE had a reasonable expectation of privacy, and that he knowingly broadcasted the recording to another. *Article 120c*, Uniform Code of Military Justice, *10 U.S.C. § 920c (2012)*.

Reasonable Expectation of Privacy

"Reasonable expectation of privacy," for the purposes of the charged offense, is defined as "[c]ircumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured." *10 U.S.C. § 920c(d)(3)*. "Private area" includes a person's buttocks. *10 U.S.C. § 920c(d)(2)*. "By enacting this provision of the UCMJ, Congress recognized an expectation of privacy in a person's body consistent with what has historically been recognized through widely accepted social norms." *United States v. Raines, 2014 CCA LEXIS 600, *12-13 (N.M. Ct. Crim. App. 2014)*.

Here, appellant recorded PV2 JE, who was bent over and facing forward, while he was directly behind her attempting to penetrate her vagina. Appellant asserts PV2 JE, who had neither knowledge of the cell phone's presence nor consented to the making of the recording, did not have a reasonable expectation of privacy because it was daylight, two other people [*22] were in the room, and the room was located on the first floor with a window looking out into the parking lot. Appellant further argues a passerby in the parking lot could have seen PV2 JE engaging in sexual activities with appellant, rendering the sexual act "open and notorious," and thus no reasonable expectation of privacy could exist.

In *Raines*, our sister service court explored the boundaries of a person's "reasonable expectation of privacy." *Raines, 2014 CCA LEXIS at *3*. In *Raines*, appellant video recorded his sexual encounters with four different women. *Id.* Although the sexual encounters were consensual, the women did not consent or know about the recording. *Id.* Raines argued the women should have noticed the camera and, that by agreeing to have sex with him, they implicitly agreed to the recording. *Id. at *13*. The Navy-Marine Corps Court of Criminal Appeals held such arguments were "[. . .] patently ridiculous; agreeing to have sex with another does not remove all reasonable expectations of privacy." *Id.; see also United States v. Vega, 2014 CCA LEXIS 929, *9-10 (N.M. Ct. Crim. App. 2014)*.

Likewise, PV2 JE did not consent to the surreptitious recording and did not lose her reasonable expectation of privacy when she engaged in sexual activity with two individuals in the presence of a third [*23] unaware person.[5] As to a possible passerby

[5] Private JE asserted the sexual intercourse with appellant was non-consensual. Appellant asserted the sexual intercourse was consensual. We need not determine, however, whether the sexual intercourse was consensual or nonconsensual because, even if we were to determine the sexual activity was consensual, PV2 JE did not lose her reasonable expectation as to being video recorded.

scenario, the door to the motel room was closed and locked and the scene of the sexual activity was across the room and away from the window. Private JE's buttocks were recorded by appellant, who was in direct physical contact with her from behind while trying to engage in sexual intercourse, from a very short distance. It was not the same image that could have been captured from a distance, across the motel room, and through a window.

The facts of this case fit squarely within the statute's definition of "reasonable expectation of privacy." *10 U.S.C. § 920c(d)(3)*. Private JE had a reasonable belief that her "private area," her buttocks, would not be captured because appellant never mentioned recording their sexual act. She did not consent to such recording and no cameras were visible to her while engaging in sex with appellant. *10 U.S.C. § 920c(d)(3)*. We conclude PV2 JE had a reasonable expectation of privacy that her buttocks would not be recorded by appellant, her sexual partner, while engaging in sexual intercourse behind a locked door in a motel room.

"Broadcasting" the Recording

The term "broadcast" is defined as "to electronically transmit a visual image with the intent that it be [*24] viewed by a person or persons." *10 U.S.C. § 920c(d)(4)*. The phrase "electronically transmit" is not further defined in the statute. Appellant asserts the mere act of playing the video recording of PV2 JE on his cell phone in front of one other physically present soldier does not constitute "broadcasting" under *10 U.S.C. § 920c(a)(3)*. We agree.

In deciding whether appellant's conduct constituted a "broadcast," we first must attempt to discern if a plain meaning of "electronically transmit" exists. *See King v. Burwell, 135 S. Ct. 2480, 2489, 192 L. Ed. 2d 483 (2015)*. If no plain meaning exists and the language is ambiguous, we next consider the ambiguous word in the context of the entire statute. *Id.* We also may review the legislative history and attempt to discern the intent of lawmakers in enacting the statute.

In the absence of explicit language showing a contrary congressional intent, we must give words in statutes their usual meaning. *See Barber v. Gonzales, 347 U.S. 637, 643, 74 S. Ct. 822, 98 L. Ed. 1009 (1954)*. In the absence of a statutory definition, we look to whether the language has a plain and unambiguous meaning. *United States v. Williams, 75 M.J. 663 (Army Ct. Crim. App. 2016)*. The plain language of a statute will control unless it is ambiguous or leads to an absurd result. *United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)*.

The pertinent definition of "electronic" is "utilizing devices constructed or working by the methods or principles of electronics." Webster's [*25] Third New International Dictionary

280 (1981). *See also* *Trump v. Hawaii, 138 S.Ct. 2392, 2410-11, 201 L. Ed. 2d 775 (June 26, 2018)* (approving the use of the Webster's Third International Dictionary to discern a statute's textual plain meaning). The most relevant definition of "transmit" is "to send out a signal either by radio waves or over a wire line." Webster's Third New International Dictionary 280 (1981). The combination of these two definitions appears to require an electronic device to send the transmission and an electronic device to receive the transmission.[6] In this case, there is only one electronic device - appellant's cell phone.

We also further considered the words, "electronically transmit" within the context of the entire statute. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)*. *Article 120c(a)(3)*, UCMJ prohibits two acts: "broadcasting" or "distributing."

"Distribute" is defined as "delivering to the actual or constructive possession of another, including transmission by electronic means." *10 U.S.C. § 920c(d)(5)*. The definition of distribution allows for a physical or an electronic transference whereas the [*26] definition of broadcast is limited to only an electronic transference. We find it persuasive that Congress intentionally included two modes of transference for a distribution and only delineated one mode of transference for a broadcast. Based on our analysis of "broadcast" within the context of the statute, we conclude there is no basis for finding that Congress intended the definition of "broadcast" to include the mere physical act of displaying a video to one other physically present soldier.

Although *10 U.S.C. section 920c* was not enacted until 2012, we note that Congress enacted a similar statute, *18 U.S.C. section 1801*, in 2004 which was given the short title, "Video Voyeurism Prevention Act of 2004." Notably, *18 U.S.C. section 1801* defines the term "broadcast" to mean "electronically transmit[ing] a visual image with the intent that it be viewed by a person or persons." *18 U.S.C. § 1801(b)(2)*. We now turn to the legislative intent of this similar statute for additional guidance to discern Congress' intent in enacting *10 U.S.C. section 920c*.

In the House Report for *18 U.S.C. section 1801*, Congress stated the background and need for this legislation was the "development of small, concealed cameras and cell phones, along with the instantaneous distribution capabilities of the Internet, have combined to create [*27] a threat to the privacy [...]." H.R. Rep. No, 108-504, at 3 (2004). Congress

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[6] Although "broadcast" is defined by the statute, we note that "broadcast" generally means "the act of sending out sound or images by radio or television transmission, especially for general transmission." Webster's Third New International Dictionary 280 (1981). This general meaning of broadcast appears to also require an electronic device to send the transmission and an electronic device to receive the transmission.

expressed a concern for a compounded violation of privacy when an image of an individual's private area is captured without his or her consent and then "[...] pictures or photographs find their way to the internet." *Id.* Congress' legislative intent in enacting *18 U.S.C. section 1801* appears to be aimed at combating the spread and showing of non-consensual photos of an individual's private area on the internet. The House Report does not mention a concern for a scenario, like in this case, where an indecent video is displayed, but never actually electronically or physically transferred to the possession of the other physically present person.

Appellant did not send the video to another person by any means. Appellant displayed the video recording on his cell phone to another soldier who was physically present. Under the facts of this case, we find appellant's act is not encompassed within the definition of "electronically transmit;" he did not "broadcast" the recording to the other soldier. As such, we take corrective action in our decretal paragraph below.[7]

CONCLUSION

On consideration of the entire record, the finding of guilty of [*28] Specification 2 of Charge IV, broadcasting an indecent recording in violation of *Article 120c(a)(3)*, UCMJ, is SET ASIDE and that Specification is DISMISSED. The remaining findings of guilty are AFFIRMED.

We reassess the sentence in accordance with the principles of *United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013)* and *United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986)*. We are confident the panel would have adjudged a sentence at least as severe as the approved sentence absent the error. While the conviction of Specification 2 of Charge IV increased appellant's maximum punishment that may be imposed by seven years of confinement, appellant was not sentenced to any confinement. Appellant was sentenced to a bad-conduct discharge and reduction to the grade of E-1. In light of the sentence received and the gravamen of the remaining offenses of which appellant was convicted, we AFFIRM the approved sentence. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered to be restored. *See* UCMJ *art. 58b(c)* and *75(a)*.

Senior Judge CAMPANELLA and Judge SALUSSOLIA concur.

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[7] We note the rule of lenity would require a reversal of the conviction if an otherwise ambiguous criminal statute still existed. *See Bifulco v. United States, 447 U.S. 381, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980)*; *Huddleston v. United States, 415 U.S. 814, 831-32, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974)* (holding the rule of lenity provides that a criminal statute should be read in favor of a defendant when the statute is sufficiently ambiguous and it cannot be said exactly what conduct is prohibited).

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United States Navy–Marine Corps Court of Criminal Appeals

Before
KISOR, KIRKBY, and DALY
Appellate Military Judges

UNITED STATES
Appellant

v.

Brandon K. FLANNER
Staff Sergeant (E-6), U.S. Marine Corps
Appellee

No. 202300134

Decided: 10 October 2023

Appeal by the United States Pursuant to Article 62, UCMJ

Military Judges:
Yong J. Lee (arraignment, motions)
Andrea C. Goode (motions)

Arraignment 28 February 2023 before a general court-martial convened at Marine Corps Base Camp Pendleton, California.

For Appellant:
Captain Tyler W. Blair, USMC

For Appellee:
Lieutenant Zoe R. Danielczyk, JAGC, USN

Judge KIRKBY delivered the opinion of the Court, in which Senior Judge KISOR and Judge DALY joined.

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

KIRKBY, Judge:

This case is before us on an interlocutory appeal pursuant to Article 62(a)(1)(B), Uniform Code of Military Justice [UCMJ].[1] Appellee is charged with 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.[2]

On 18 April 2023, trial defense counsel moved to suppress Appellee's second interview with agents of the Naval Criminal Investigative Service [NCIS] that occurred on 15 September 2021. Appellee concedes here that his waiver of right to counsel at this interview was voluntary.[3] However, Appellee argued this waiver was neither knowing nor intelligent.[4] In her ruling, the military judge suppressed the interview on the grounds that Appellee had an inaccurate belief that he could not get an attorney until charges were preferred and would not have acquiesced to an interview without having a lawyer present but for that inaccurate belief.[5]

On interlocutory appeal, the Government asserts that the military judge abused her discretion when she suppressed Appellee's non-custodial, pre-preferral, self-scheduled interview with law enforcement in which Appellee waived his right to counsel and later claimed he had a right to detailed military counsel. We disagree.

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[1] 10 U.S.C. § 862(a)(1)(B).

[2] 10 U.S.C. §§ 921, 924.

[3] App. Ex. XXI at 1.

[4] *Id.*

[5] R. at 89-90.

I. BACKGROUND

In February 2020, Appellee was one of two contracting officers located in Kuwait who managed all of the contracts for the United States Marine Corps [USMC] operating in that region. Between 14 February and 25 February 2020 Appellee submitted four purchase vouchers, two on 18 February 2020 and two on 23 February 2020. On 16 May 2020 it was discovered these four purchase vouchers, representing more than $30,000 in government funds, were allegedly fraudulent. Appellee's charges stem from this alleged theft of over $30,000 through the processing of fraudulent purchase voucher claims in Bahrain.[6]

On 19 May 2020, NCIS opened an investigation into the fraudulent vouchers. In May 2021, NCIS agents attempted to interrogate Appellee during their investigation into the suspected voucher fraud.[7] Prior to the interrogation, the NCIS agent, Special Agent (SA) Charlotte, advised appellee of his rights, including his right to counsel.[8] On the written rights advisement form, Appellee indicated he "would like to have a lawyer present during questioning," prompting the NCIS agent to end the interrogation.[9] After leaving that interrogation, Appellee visited the Defense Services Office [DSO] on Camp Pendleton.[10]

After several months passed without Appellant seeing any apparent progress on the investigation, Appellee, who was on legal hold past the end of his enlistment, sought an update from Master Gunnery Sergeant (MGgSgt) Charlie asking if he would receive military counsel at an NCIS interview.[11] The Master Gunnery Sergeant consulted the command Staff Judge Advocate and later informed Appellee that he "would only receive counsel if charges were preferred."[12] The Master Gunnery Sergeant's advice that Appellee would only receive counsel if charges were preferred gave Appellee the mistaken understanding that he "could not do an interview with military counsel present."[13]

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[6] The charge sheet dtd 21 November 2022.

[7] App. Ex. XXII at 2.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 4.

[11] *Id.*

[12] *Id.*

[13] *Id.*

Based on this belief and wanting to resolve his case since his family had already moved to Indiana, Appellee contacted the NCIS case agent requesting an interview.[14] At that time, the NCIS agent specifically noted that Appellee was given "incorrect info on lawyer by CMD [command]" and "explained preferral of charges=lawyer."[15]

Appellee went in for an interview with SA Charlotte[16] on 15 September 2021.[17] SA Charlotte started the interview by asking Appellee if he wanted to speak with her, since the last time he came in he had requested the presence of a lawyer.[18] Appellee told SA Charlotte that his enlisted leader explained his right to counsel to him and so he now understood he could not be appointed a lawyer until charges were preferred.[19] SA Charlotte then reviewed a rights advisement form with Appellee, and Appellee then signed.[20] According to the form, Appellee indicated that he understood he had the right to a "retained civilian lawyer and[/]or appointed lawyer present during [the] interview."[21] Appellee then participated in an interview with SA Charlotte.[22] The charges were preferred against Appellee on 18 November 2022.

Prior to trial, the defense moved to suppress Appellee's statements made during the September 2021 interview on the grounds that his rights waiver, while made voluntarily, was not knowing or intelligent.[23] After hearing evidence and argument, the military judge found that Appellee had been given "an inaccurate belief that he could not be appointed a lawyer until charges were preferred."[24] Furthermore, the judge found that Appellee "went forward with the interview without a lawyer present," even though "[h]is actions

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[14] R. at 49.

[15] App. Ex. XXXI at 17.

[16] All names used in this opinion, with the exception of the counsel and judges, are pseudonyms.

[17] App. Ex. XXII at 4.

[18] App. Ex. XXI at 3.

[19] *Id.*

[20] App. Ex. XXIV at 18.

[21] *Id.*

[22] App. Ex. XXII at 17.

[23] App. Ex. XXI.

[24] R. at 89.

showed that he truly desired to have an attorney," based on his inaccurate belief.[25] Therefore, the military judge concluded that "the interview, although voluntary, was not based on a knowing and intelligent understanding of the right that he abandoned when he acquiesced to proceed without having an attorney present" and granted the motion to suppress.[26]

II. DISCUSSION

"We review a military judge's ruling on a motion to suppress—like other decisions to admit or exclude evidence—for an abuse of discretion. In reviewing a military judge's ruling on a motion to suppress, we review fact-finding under the clearly-erroneous standard and conclusions of law under the *de novo* standard. Thus, on a mixed question of law and fact as in this case, a military judge abuses his [or her] discretion if his [or her] findings of fact are clearly erroneous or his conclusions of law are incorrect."[27] To be "clearly erroneous" a finding of fact "must be more than just maybe or probably wrong; it must strike us with the force of a five-week-old unrefrigerated dead fish."[28]

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[29] "In an Article 62, UCMJ, appeal, [the] Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial," which, in this case, is Appellee.[30] "It is an abuse of discretion if the military judge: (1) predicates his ruling on findings of fact that are not supported by the evidence;

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[25] *Id.*

[26] R. at 89-90.

[27] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "On matters of fact with respect to appeals under Article 62, UCMJ, this Court is 'bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous.'" *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).

[28] *United States v. Cooper*, 80 M.J. 664, 672 n.41 (N-M. Ct. Crim. App. 2020) (further citations omitted).

[29] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

[30] *Becker*, 81 M.J. at 488 (quoting *Pugh*, 77 M.J. at 3).

(2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) fails to consider important facts."[31]

In this case, the key issues before us are whether Appellee had a Fifth Amendment right to counsel during his second NCIS interview and whether the military judge applied the correct legal principles in making her ruling. The question presented to the military judge related to whether the Government proved, by a preponderance,[32] that Appellee's statement was voluntary.[33]

A. The Military Judge Did Not Abuse Her Discretion Considering the Totality of the Circumstances

The military judge made the following findings of fact:

> [1] The actions of various actors in this case, to include the DSO, left the accused with an inaccurate belief that he could not be appointed a lawyer until charges were preferred.
>
> [2] [T]he accused went forward with the interview without a lawyer, based on that misunderstanding.
>
> [3] His actions showed that he truly desired to have an attorney.
>
> [4] He first invoked his right to have an attorney present with him during his first interview.
>
> [5] He then made two separate attempts to get an attorney by visiting the Defense Services Office, where he was turned away.
>
> [6] He also asked his chain of command a number of questions about how he could get an attorney.[34]

The CAAF has clearly stated that "[m]ilitary officials and civilians acting on their behalf are required to provide rights warnings prior to interrogating

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[31] *Id*. at 489 (quoting *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)) (additional citation omitted).

[32] Mil. R. Evid. 304(f)(6-7).

[33] Mil. R. Evid. 305.

[34] R. at 89-90. Numbered here for ease of reference.

a member of the armed forces if that servicemember is a suspect, irrespective of custody."[35] It is also clear that the specific rules and Articles applicable to unique situations must be assessed and in this case the unique circumstances of Appellee's interactions with NCIS, the DSO and his chain of command must be considered in applying the law. Military Rule of Evidence 305(c) lays out specific situations that implicate a suspect's right to counsel either under the Fifth or Sixth Amendment to the Constitution. In this case, that Fifth Amendment right to counsel was implicated during the first interrogation; where it was honored by the SA Charlotte. The applicability of the Fifth Amendment during the second interview is less clear despite the NCIS Agent again providing the "right to counsel" warning.[36]

Appellee concedes that the second interview was voluntary, however he argues that his waiver was not knowing and intelligent. On the other hand, the Government argues that by voluntarily appearing for the second interview it was non-custodial and therefore Appellee had no right to counsel. We find the Government's reliance on *Edwards*[37] and *Mathiason*[38] unpersuasive under the unique circumstances of this case. If the second interview was the sum of the interactions influencing Appellee, then the question before this court is far different and *Edwards* is binding precedent. But, the intervening events are facts of consequence in this case. Appellee's initial request for counsel,[39] the two attempts to seek services from the DSO,[40] the inaccurate advice provided by his chain of command,[41] and the interactions between Appellee and NCIS prior to

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[35] *United States v. Delarosa*, 67 M.J. 318 citing Article 31(b), UCMJ, 10 U.S.C. 831(b) (2000); Mil. R. Evid. 305(b)(1), 305(c).

[36] Appellant conceded during the motion that "obviously the accused rated counsel..." R. at 89. The Government does not argue that Appellee's right to counsel did not attach in the first interrogation and therefore we do not evaluate the basis of that position.

[37] *Edwards v. Arizona*, 451 U.S. 477 (1981) (espousing the general proposition that even after requesting counsel a subject can initiate communication with authorities). The Government here suggests Appellee's initiation of the second interview proves there was no custodial interrogation.

[38] *Oregon v. Mathiason,* 429 U.S. 492 (1977). Here, the Supreme Court overturned the lower court's finding of a *Miranda* violation where the appellant went voluntarily to the police station, was told he was not under arrest and was allowed to leave.

[39] Finding of Fact (4).

[40] Finding of Fact (3).

[41] Finding of Fact (6).

and during the second interview are relevant for the military judge to consider for the issue at hand. Thus rendering her findings of fact supported by the evidence in the record and reasonable. We conclude, therefore, that the military judge's findings of fact were not clearly erroneous.

B. The Military Judge Did Not Abuse Her Discretion When She Found Appellee's Rights Waiver Was Not Given Knowingly and Intelligently

We next turn to the issue of whether Appellee's waiver of his right to counsel was sufficient.[42] "An involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial."[43] "Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment.[44] The Fifth Amendment states that "[n]o Person....shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[45] Supreme Court precedent, based on ensuring individual rights under the Fifth Amendment, contemplates a right of counsel to be present during custodial interrogations if the accused requests to have counsel there.[46] If a right to counsel exists, as conceded by the Government for the first interrogation in this case, then...a judge advocate or individual certified in accordance with Article 27(b) will be provided at no expense to the person and without regard to the person's indigency and must be present before the interrogation may proceed.[47] Furthermore, if a person "chooses to exercise the right to counsel, questioning must cease until counsel is present."[48]

It is axiomatic that the Fifth Amendment right to counsel can be waived, but it is no less obvious that any waiver of a right to counsel must be made

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[42] Assuming, without deciding, that Appellee had a Fifth Amendment right to counsel in the first interrogation, then under the narrow facts of this case, Appellee's invocation of his Fifth Amendment right to counsel in the initial interrogation reasonably carried over, through the intervening events, to the second interview.

[43] Mil. R. Evid. 304(a).

[44] Mil. R. Evid. 304(a)(l).

[45] U.S. Const. amend. V.

[46] *Miranda v. Arizona*, 384 U.S. 436 (1966). See also Mil. R. Evid. 305(c)(2), 305(c)(4), 305(d).

[47] Mil. R. Evid. 305(d).

[48] Mil. R. Evid. 305(c)(4).

freely, knowingly, and intelligently.[49] This is a two-part test. First, the Court must determine if the waiver was voluntary.[50] The Court must next determine whether the inquiry was knowing and intelligent.[51] The knowing and intelligent analysis requires an accused to have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[52] Furthermore, myriad cases discuss that any waiver must be intelligent and understood by the accused, which depends on the particular facts and circumstances of the case.[53]

The Government asserts on appeal that the military judge failed to consider that Appellee was advised of his rights and waived them, and that his belief that counsel would only be appointed upon preferral of charges was not a mistake.[54] We disagree. As the Chief Defense Counsel of the Marine Corps has recognized, while the Marine Corps Legal Support and Administration Manual "requires the detailing of defense counsel once charges are preferred,"[55] there are a wide variety of situations in which defense counsel may be detailed prior to the preferral of charges including, "servicemembers pending investigation….by any law enforcement agency, when the detailing authority reasonably believes that such an investigation may result in court martial, nonjudicial punishment, or adverse administrative action."[56] The Government's assertions regarding the ability for an accused to obtain detailed military counsel prior to

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[49] Mil. R. Evid. 305(e)(l).

[50] *United States v. Mott*, 72 M.J. 319 (C.A.A.F. 2013).

[51] *Id.*

[52] *Id*. at 330.

[53] See *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938); *Berghuis v. Thompkins*, 560 U.S. 370 (2010); *United States v. Mott*, 72 M.J. 319 (C.A.A.F. 2013). Additionally, the Supreme Court has held that while a talismanic recitation of Miranda warnings are not required, law enforcement cannot link the reference to appointed counsel to a future point in time after police interrogation. *See, e.g., California v. Prysock*, 453 U.S. 355, 360 (1981).

[54] The Government relies on the specific language of Mil. R. Evid. 305 suggesting that because the second interview was non-custodial, Appellee had no Fifth Amendment right to counsel.

[55] App. Ex. XXIV at 6.

[56] App. Ex. XXIV at 9.

preferral of charges is contrary to the language of Mil. R. Evid 305(d) and exactly the same premise that the military judge identified as Appellee's source of government-induced confusion.[57]

The military judge correctly recognized that while the waiver in this case was voluntary, that did not end the analysis. As discussed above, given the totality of the circumstances, she did not err in finding that the waiver analysis for the Fifth Amendment needed to be completed.

As to that second step, whether Appellee's waiver was made knowingly and intelligently, the military judge considered the situation Appellee was faced with when making his decision to sign the rights waiver, including his desire to move the investigation forward since he was past the end of his active duty service and had already moved his family. She also properly considered the steps Appellee took prior to agreeing to the interrogation, like visiting the DSO and talking to his chain of command in an effort to exercise his rights.[58] The military judge also considered the evidence presented about the advice Appellee was given regarding whether he could be detailed military counsel and Appellee's "inaccurate belief that he could not get an attorney until charges were preferred."[59] Given this evidence, we find that the military judge, quite reasonably, found that Appellee's waiver of his right to counsel was not made knowingly or intelligently because he did not have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[60] Therefore, the military judge's decision to suppress Appellee's statements to NCIS was well within the range of choices reasonably arising from the facts and the law.

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[57] Mil. R. Evid. 305(d) mandates that an attorney will be provided to an individual under these circumstances "and [the attorney] must be present before the interrogation may proceed." Any action undermining this rule, especially limitations on access to counsel, cannot be considered in compliance with the rule.

[58] R. at 89-90.

[59] R. at 89.

[60] *Mott*, 72 M.J. at 330 (further citations omitted).

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the military judge did not abuse her discretion.

The military judge's ruling is **AFFIRMED**. The case is returned to the Judge Advocate General for remand to the military judge for further proceedings consistent with this opinion.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court