IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellant

v.

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

Appellee

ANSWER ON BEHALF OF APPELLEE

Ct. Crim. App. Dkt. No. 202300134

USCA Dkt. No. 24-0093/MC

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

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Issue Presented

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

Statement of Statutory Jurisdiction

The Navy and Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction over this matter under Article 62(a)(1)(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(b) (2018). This Court has jurisdiction over the certified issue under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2)(2018).

Statement of the Case

Upon the referral to general court-martial of charges alleging larceny, false claim, and forgery in violation of Articles 121 and 124, UCMJ (2019), the Military Judge issued a ruling suppressing Appellee's statements to the Naval Criminal Investigative Service (NCIS).[1] The Government timely appealed.[2] The lower court found no error, affirmed the Military Judge's ruling,[3] and denied the Government's

[1] R. at 88-90.
[2] Notice of Appeal, May 12, 2023.
[3] *United States v. Flanner*, No. 2023000134, slip op. (N-M. Ct. Crim. App. Oct. 10, 2023).

motion for reconsideration.[4] The Navy Judge Advocate General then timely certified the instant issue, on behalf of the Government, to this Court.

Statement of Facts

A. Appellee invoked his right to counsel at the first NCIS interrogation.

In May 2021, an NCIS agent attempted to interrogate Appellee during an investigation into suspected voucher fraud.[5] Prior to the interrogation, the agent advised him orally and in writing of his rights, including his right to counsel.[6] On the rights advisement form, Appellee invoked his right to counsel, writing: "I would like to have a lawyer present during questioning."[7] As a result, the NCIS agent ended the interrogation and Appellee visited the Defense Service Office (DSO) on base to speak with an attorney.[8]

B. Appellee was incorrectly informed by his command about his right to receive military counsel.

After several months passed without any apparent progress on the investigation, Appellee, who was on legal hold past the end of his enlistment and whose family had already transferred back to his home of record, sought an update from his Master Gunnery Sergeant (E-9).[9] Specifically, he asked if he would receive

[4] Order, Dec. 12, 2023.
[5] App. Ex. XXII at 2.
[6] *Id.*
[7] App. Ex. XXII at 2.
[8] *Id.* at 4.
[9] App. Ex. XXII at 4; R. at 49.

military counsel at an NCIS interview.[10] The Master Gunnery Sergeant consulted the command Staff Judge Advocate (SJA) and later advised Appellee that he "would only receive counsel if charges were preferred."[11]

This advice was inaccurate. While the Marine Corps' Legal Support and Administration Manuel states that the detailing of defense counsel is *required* within "five days of being served notice of preferred charges" (among various other circumstances), it does not *prohibit* providing counsel to criminal suspects prior to the preferral of charges, such as during the investigative phase of a case.[12] In fact, the detailing policy of the Chief Defense Counsel of the Marine Corps specifically contemplates and allows for the detailing of defense counsel in a variety of pre-preferral situations, including the one Appellee was in: "servicemembers pending investigation . . . by any law enforcement agency, when the detailing authority reasonably believes that such an investigation may result in court-martial, non-judicial punishment, or adverse administrative action."[13] Moreover, Military Rule of Evidence (M.R.E.) 305(d) specifically says "[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

[10] App. Ex. XXII at 4.
[11] *Id*.
[12] App. Ex. XXIV at 6.
[13] *Id.*

may proceed."[14] Thus, it was incorrect for Appellee to be told he could *only* have counsel present once charges were preferred.

The Master Gunnery Sergeant's incorrect advice gave Appellee the mistaken understanding that he "could not do an [NCIS] interview with military counsel present."[15] When Appellee later contacted NCIS regarding an interview, the agent specifically noted that Appellee said he "was given *incorrect* info on lawyer by CMD [command]" and "explained preferral of charges=lawyer."[16]

C. The NCIS agent reinforced Appellee's incorrect understanding of his right to receive military counsel.

In September 2021, Appellee again met with NCIS.[17] When the agent asked Appellee if he wanted to speak with them, considering he had previously invoked his right to counsel, Appellee said he had originally believed a military lawyer could be appointed to advise him, but the SJA had cleared up his confusion.[18] Appellee said he had been told he did not rate counsel until charges were preferred.[19]

The NCIS agent did nothing to correct this belief, even though previously noting that his understanding was "incorrect."[20] Instead, the agent reinforced

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[14] Mil. Rul. Evid. 305(d). This section appears to be triggered by either a custodial interrogation or preferral of charges.
[15] App. Ex. XXII at 4.
[16] App. Ex. XXII at 15 (emphasis added).
[17] App. Ex. XXXI at 19 (Audio/video recording of NCIS Interview on Sep. 15, 21.)
[18] *Id.* at time stamp 3:21-3:53.
[19] *Id.*
[20] App. Ex. XXII at 15.

Appellee's incorrect belief, asking: "so you understand that a military lawyer will *only* be appointed to you if charges are preferred?"[21] Appellee responded in the affirmative, and then waived his rights and answered the agent's questions based on his incorrect belief that he "could not request to have a military attorney present at the interrogation."[22]

D. The Military Judge granted the Defense's motion to suppress Appellee's statements to NCIS as a product of a rights waiver that was not knowing and intelligent.

Prior to trial, the Defense moved to suppress Appellee's statements to NCIS on the grounds that his rights waiver was not knowing or intelligent.[23] During the hearing on the motion, the Government conceded that notwithstanding the advice Appellee had received, "obviously [Appellee] rated counsel" during the (non-custodial, pre-preferral, self-scheduled) second interrogation by NCIS, but that he had "voluntarily, knowing, and intelligently waived that right."[24]

After considering the evidence and argument of counsel, the Military Judge granted the defense motion.[25] She found Appellee had been given "an inaccurate belief that he could not be appointed a lawyer until charges were preferred."[26] She

[21] *Id.* at time stamp 4:50-4:55.
[22] App. Ex. XXII at 4.
[23] App. Ex. XXI.
[24] R. at 89.
[25] R. at 90.
[26] R. at 89.

found that based on that inaccurate belief he "went forward with the interview without a lawyer present" even though "[h]is actions showed that he truly desired to have an attorney."[27] She therefore 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."[28]

Argument

THE MILITARY JUDGE CORRECTLY SUPPRESSED APPELLEE'S STATEMENTS AS THE PRODUCT OF A RIGHTS WAIVER THAT WAS NOT KNOWING OR INTELLIGENT.

Standard of Review

In an Article 62 appeal, this 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 here is Appellee.[29] A ruling on a motion to suppress is reviewed for an abuse of discretion.[30] In reviewing a Military Judge's ruling on a motion to suppress, findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed *de novo.*[31] Thus, an abuse of discretion occurs where the Military Judge's "findings of fact are clearly

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[27] *Id.*
[28] *Id.*
[29] *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021) (citations omitted).
[30] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[31] *Id.*

erroneous, the court's decision is influenced by an erroneous view of the law, or the Military Judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[32] To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[33]

Discussion

A. The Military Judge's ruling applies correct legal principles to findings of fact that are supported by the record, meriting deference by this Court.

1. The Military Judge applied correct legal principles.

This Court has long recognized there is no requirement for a Military Judge's ruling to include "record dissertations."[34] The Military Judge must only provide a clear signal that she is applying the right law.[35] Where a Military Judge puts her "application of the law to the facts" on the record, "deference is surely warranted."[36]

Here, the Military Judge's ruling includes a clear signal she was applying the right law. She correctly identified that in order for an accused to waive his rights, the waiver must not only be voluntary, but must also be knowing and intelligent. In so doing, she clearly signaled she was applying this Court's precedent in *United*

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[32] *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).
[33] *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000).
[34] *United States v. Flesher*, 73 M.J. 303, 311–12 (C.A.A.F. 2014) (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).
[35] *Flesher*, 73 M.J. at 311.
[36] *Id.*

States v. Mott, which requires a distinct analysis of whether a waiver was "knowing and intelligent" separate and apart from whether the waiver was voluntary.[37] Moreover, both parties cited to *Mott* in their filings on the motion to suppress, further confirming the Military Judge was aware of and relied on *Mott* in her ruling.[38]

2. The Military Judge's findings of fact are supported by the record and not clearly erroneous.

The Military Judge's findings of fact are reviewed by this Court under the clearly erroneous standard. To be clearly erroneous, they "must be more than just maybe or probably wrong; [they] must . . . strike [the Court] as wrong with the force of a five-week-old, unrefrigerated dead fish."[39]

Here, the Military Judge's findings of fact smell like a bed of roses. They not only are not clearly erroneous, but are in fact correct and supported by the evidence, particularly when viewed in the light most favorable to Appellee who prevailed below. The Military Judge found the actions of Appellee's command, the DSO, and NCIS had given him "an inaccurate belief that he could not be appointed a lawyer until charges were preferred."[40] She further found that based on his inaccurate belief,

[37] *United States v. Mott*, 72 M.J. 319, 332 (C.A.A.F. 2013).
[38] App. Ex XXI at 7; App Ex XXIII at 5.
[39] *United States v. French*, 38 M.J. 420, 425 (C.A.A.F. 1993) (quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.,* 866 F.2d 228, 233 (7th Cir. 1988).
[40] R. at 89.

Appellee "went forward with the interview without a lawyer present" even though "[h]is actions showed that he truly desired to have an attorney."[41]

These findings are well supported by the evidence. After Appellee invoked his right to counsel during the first interrogation, the NCIS agent terminated the interview and Appellee went to the DSO.[42] Appellee subsequently asked his chain of command about getting a lawyer and was told he would only receive military counsel if charges were preferred.[43] He then had this same information reinforced by the NCIS agent, who had already noted that it was "incorrect."[44]

The Military Judge correctly found that what Appellee had been led to believe about his inability to receive military counsel prior to preferral was "inaccurate."[45] Indeed, the Chief Defense Counsel of the Marine Corps's detailing policy specifically states that military counsel may be detailed to "servicemembers pending investigation . . . by any law enforcement agency, when the detailing authority reasonably believes that such an investigation may result in court-martial. . . ." Since this was exactly the situation Appellee was in, the Military Judge was correct to find that he had been given an inaccurate view of his right to receive a military lawyer under the circumstances.

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[41] *Id.*
[42] App. Ex. XXII at 2, 4.
[43] App Ex. XXII at 4; 13, 9-10.
[44] App. Ex. XXII at 15.
[45] R. at 89.

Accordingly, the Military Judge applied the facts to the law and correctly concluded that Appellee's waiver, though voluntary, was not knowing and intelligent because it was premised on an inaccurate understanding of his rights, to include obtaining military counsel prior to the preferral of charges. This reasonable conclusion was well within the limits of her discretion, meriting deference by this Court.

B. The Military Judge did not abuse her discretion in looking at the totality of the circumstances and finding Appellee did not knowingly and intelligently waive his rights.

An accused's waiver of rights in an interrogation must be made voluntarily, knowingly, and intelligently.[46] To be knowing and intelligent, an accused has to have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[47] In determining whether a rights waiver is valid, this Court looks to the totality of the circumstances.[48] And the circumstances must be viewed as not just a "cold and sterile list of isolated facts," but rather a "holistic assessment of human interaction."[49]

Here, just as the Military Judge found, the totality of the circumstances reveal repeated manifestations of Appellee's desire for an attorney. He expressly informed

[46] *Mott*, 72 M.J. at 330 (citations omitted).
[47] *Id.*
[48] *United States v. Lonetree*, 35 M.J. 396, 400 (C.M.A. 1992).
[49] *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002).

NCIS in writing he wanted an attorney present during his first interview.[50] After being told it was "on him" to find a lawyer, he made two trips to the DSO, where he was turned away.[51] He then asked his chain of command, who consulted an SJA, and then advised him that he could not get a lawyer until charges were preferred.[52] The NCIS then reinforced this bad advice during the rights advisement, despite previously noting that it was "incorrect."[53] The totality of the circumstance are such that Appellee wanted a lawyer, yet was repeatedly led to believe that he did not rate one prior to the preferral of charges.[54]

But as the Military Judge correctly found, this belief was "inaccurate."[55] In fact, contrary to its current position, the Government itself *conceded* at the motion hearing that "obviously [Appellee] rated counsel" at the non-custodial, pre-preferral, self-scheduled, second interrogation by NCIS.[56] Given that Appellee received incorrect information about his ability to receive a military attorney prior to preferral, contrary to the Government's own view that he "rated one," the Military Judge was correct to conclude that he did not knowingly and intelligently waive his

[50] App. Ex. XXII at 2.
[51] App. Ex. XXII at 2.
[52] App. Ex. XXII at 4.
[53] App. Ex. XXII at 15.
[54] App. Ex. XXII at 4.
[55] R. at 88-90.
[56] R. at 89.

rights during the second interrogation. There is no way Appellee could knowingly and intelligently relinquish his rights while being misled by every possible authority.

While false information, or even trickery, can be used to obtain a confession, false or misleading information *cannot* be used to obtain a waiver of rights.[57] In *United States v. Tempia*, for example, the accused was advised of his rights under Article 31(b), including his right to consult with counsel. He decided to invoke his right to consult with counsel, so the interview ended.[58] The accused then met with the base SJA, who repeated his rights under Article 31(b) but declined to form an attorney-client relationship with him and told him "no military lawyer would be appointed to represent him during the . . . investigation by the law enforcement agents on this base."[59] The base SJA told him he could retain civilian counsel, but would not be appointed military counsel.[60] This Court's predecessor held the accused's rights advisement was deficient and the accused's right to counsel was

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[57] *United States v. Campbell*, 76 M.J. 644, 654 (A.F. Ct. Crim. App. 2017) (citing F*razier v. Cupp*, 394 U.S. 731, 739 (1969) (use of false statement to illicit confession did not render confession involuntary)) *Cf. United States v. Whitehead*, 26 M.J. 613, 619 (A.C.M.R. 1988)(finding it improper for an investigator to provide misleading and incorrect information to suspect after equivocal request for counsel).
[58] *United States v. Tempia*, 37 C.M.R. 249 (U.S. C.M.A. 1967).
[59] *Id.* at 252.
[60] *Id* at 252.

"frustrated by the Staff Judge Advocate's well-meant but legally improper statements."[61]

Here, similar misinformation provided by the SJA to Appellee's chain of command, who then provided it to Appellee, undercut his understanding of his ability to obtain military counsel prior to preferral. Without understanding his rights, he could not knowingly and intelligently waive them. Then the NCIS agent, knowing Appellee had received "incorrect" advice, not only did nothing to correct his misunderstanding, but further reinforced it.[62] Much like the appellant in *Tempia*, Appellee's understanding of his right to counsel was "frustrated by the Staff Judge Advocate's well-meaning but legally improper statements."[63]

While *Tempia* was analyzed under *Miranda's* Fifth Amendment right to counsel, this Court's precedent in *United States v. Mott* explains that in the military, a custodial interrogation is not required to trigger the requirement for a knowing and intelligent waiver of rights, including the right to counsel.[64] This explains why NCIS advised Appellee, before both interrogations, of his right to counsel. Accordingly, it is of no import that Appellee's interrogation was not custodial. Here, just like the accused in *Tempia*, the incorrect information about how and when military counsel

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[61] *Id.* at 258.
[62] *United States v. Tempia*, 37 C.M.R. 249 (U.S. C.M.A. 1967).
[63] *Id.*
[64] *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013).

are detailed rendered his rights waiver neither knowing nor intelligent. The Military Judge did not abuse her discretion in concluding the same.

1. The Government misapprehends the Military Judge's ruling, the lower court's decision, and Appellee's argument.

Contrary to the Government's argument, neither Appellee, the Military Judge, nor the lower court claims a right to "force the United States to produce an appointed attorney" so that an accused can "make statements to police whenever he likes."[65] The issue here is whether Appellee understood his rights, and then *knowingly* and *intelligently* waived them. The Military Judge was correct to conclude he did not, since he had been led to believe that he did not rate an attorney prior to preferral, whereas even the Government conceded it was "obvious[]" that he did.[66]

Contrary to the Government's argument, the lower court's ruling does not create a "counsel on demand" requirement—it merely recognizes the existing requirement for an accused to be properly informed of when and under what circumstance he may have counsel present, so that he can make the informed decision on how to proceed. Anything less makes a rights "advisement" a meaningless ritual. Had Appellee correctly understood his ability to get a military lawyer, he would have been able to knowingly and intelligently waive his rights. But that was not the case here.

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[65] App. Br. at 22.
[66] R. at 89.

The Government is unpersuasive in suggesting the lower court's ruling is too demanding in expecting law enforcement to provide a "nuanced explanation of how the right to counsel interacts with" the detailing of military attorneys. It is hardly expecting too much to ensure law enforcement officers are not purposefully contributing to an accused's "incorrect" understanding of his ability to have a military counsel present during an interrogation when securing a waiver of his constitutional and statutory rights. If a "rights advisement" is to mean anything, the person giving the advisement must certainly understand the rights being explained.

2. This case is distinguishable from *Duckworth v. Eagan.*

The Government's reliance on *Duckworth v. Eagon* is misplaced.[67] In *Duckworth*, police informed appellant he had the right to a lawyer during questioning, but then followed up with, "[w]e 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."[68] The Supreme Court held the rights advisement was sufficient because it "touched all the bases required by *Miranda*." In considering the conditional language, the Supreme Court found it did not undermine the validity of the rights advisement, in part because it accurately reflected the process for receiving counsel under state law.[69]

[67] *Duckworth v. Eagan*, 492 U.S. 195 (1989).
[68] *Duckworth*, 492 U.S. at 198.
[69] *Id.* at 205.

This case is distinguishable from *Duckworth*. First, the rights at issue here under Article 31(b) and M.R.E. 305 are broader than the rights under *Miranda.* Second, unlike in *Duckworth,* Appellee did not merely receive an isolated statement conditioning an attorney on a future event.[70] Instead, he asked for an attorney, was told he needed to find one on his own, made numerous attempts to do so (where he was sent away or told he did not rate one), and then law enforcement reinforced what was known to be an "incorrect" understanding that he could not get a military attorney until preferral of charges. This series of events was far more significant in rendering his waiver unknowing than the statement at issue in *Duckworth*. Moreover, like in *Tempia*, the information given to Appellant in this case was simply wrong. Thus, unlike the accurate information that was provided in *Duckworth*, here the information provided to Appellee (that he did not rate or was unable to obtain military counsel until preferral) was *in*accurate. Even the Government conceded that Appellee "obviously . . . rated counsel,"[71] whereas he had been repeatedly told just the opposite.

[70] *But see California v. Prysock*, 453 U.S. 355, 360 (stating that rights advisements that link the appointment of counsel to a "future point in time after police interrogation" does not fully advise an accused of his rights before an interrogation).
[71] R. at 89.

3. The lower court's ruling creates no new rights. It simply affirms that waivers must be knowing and intelligent. This Court should affirm.

Contrary to the Government's argument, the lower court's ruling creates no new rights for an accused; it merely affirms the requirement that rights waivers be knowing and intelligent.[72] The Government's argument is born out of their continued misunderstanding of Appellee's rights, in much the same way both his command and NCIS misunderstood them. The Military Judge's and the lower court's rulings do not create positive rights for an accused to be detailed defense counsel prior to an interrogation. They merely require (as the law already does) that an accused not be given misleading and incorrect information before deciding whether to waive his rights.

Here, the Marine Corps' Legal Support and Administration Manuel specifically contemplates situations where defense counsel are detailed, prior to the preferral of charges, for suspects like Appellee who are under investigation. It was incorrect for Appellee to be told otherwise. And while the detailing of military counsel to represent Appellee would certainly be *required* upon preferral of charges, such counsel can also be detailed prior to preferral under a number of circumstances. Accordingly, the Military Judge did not abuse her discretion when she found his

[72] App. Br. at 23.

mistaken understanding in this regard produced a rights waiver that was neither knowing nor intelligent.

C. In *United States v. Mott*, this Court explained a military accused has a right to counsel, regardless of whether the interrogation is custodial. The Military Judge did not abuse her discretion relying on this Court's decision.

Finally, Congress has provided rights advisement requirements for military members that are broader than what is required under the Constitution and *Miranda.*[73] These statutory rights predate *Miranda* and came into existence in the aftermath of World War II in recognition that the unique features of military service "required specific statutory protections for members of the armed forces."[74] When it comes to such rights, "the Constitution prescribes [a] floor . . . [not] a ceiling."[75] The rights under Article 31(b) apply to anyone "suspected of an offense" whereas *Miranda* rights, which set the Constitutional floor, only apply when the interrogation is custodial.[76]

In United States v. Mott, this Court specifically explained that in the military system, the statutory right to counsel, and by extension the requirement for a knowing and intelligent waiver of the right to counsel, is "not limited to custodial

[73] *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000); *see generally Miranda v. Arizona*, 384 U.S. 436 (1966).
[74] *Id.*
[75] *United States v. Evans*, 75 M.J. 302 (C.A.A.F. 2016).
[76] *Id.* at 445.

interrogation."[77] As recently as 2018, the Army Court of Criminal Appeals (ACCA) acknowledged this precedent in *United States v. Davis* by saying "[e]ven with the explicit words of Mil. R. Evid. 305(e)(3)(A) requiring "custodial interrogation" . . . we nevertheless apply CAAF's precedent."[78] Relying on this Court's position in *Mott,* the ACCA analyzed whether the appellant's right to counsel was violated, giving no consideration to whether the interrogation was custodial.[79] The Army Court's decision was affirmed by this Court (on a different issue) without any comment, correction, or word of caution about the ACCA's adherence to this Court's position in *Mott* that the right to counsel in the military also applies to non-custodial interrogations.[80]

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[77] *United States v. Mott*, 72 M.J. 319, 330 n.10 (C.A.A.F. 2013) ("Consistent with our precedents, we note that in the military system the accused's right to counsel – and the requirement of a knowing and voluntary waiver – are not limited to custodial interrogation.")(citing *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009)).

[78] *Id.*

[79] *Id.*

[80] *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020). This position appears to be shared by law enforcement, as the standard NCIS rights advisement form (NCIS 5580/19 Rev. 6-2021), which was provided during both interrogations in this case, advises on the right to have appointed military counsel present during the interview, irrespective of whether the interrogation is custodial. App. Ex. XXXIII at 18; App. Ex. XXII at 2. In *United States v. Robinson*, an appellant invoked his right to counsel after being read his rights before an interview with law enforcement. This Court analyzed whether his right to counsel was violated after law enforcement asked him for his cell phone passcode and did not consider whether he was in custody at the time he invoked his right to counsel. *United States v. Robinson*, 77 M.J. 303, 304 (C.A.A.F. 2018). *But see United States v. Mitchell*, 76 M.J. 413, 418. (C.A.A.F. 2017)(analyzing whether an interrogation

Thus, it was certainly no abuse of discretion for the Military Judge to rely on this Court's decision in *Mott*—which was decided in 2013 and has not received any subsequent negative treatment—to conclude like the ACCA that a rights waiver under Article 31(b) must be knowing and intelligent, regardless of whether the interrogation is custodial.

Conclusion

WHEREFORE, this Honorable Court should affirm the lower court's decision.

Respectfully submitted.

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List of Appendices

A. *United States v. Flanner* No. 202100085, slip op. (N-M. Ct. Crim. App. October 10, 2023).

Certificate of Compliance

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was custodial to determine whether the *Fifth amendment* right to counsel was violated).

1. This Answer complies with the type-volume limitation of Rule 21(b) because it contains less than 9,000 words.
2. This Answer complies with the type-style requirements of Rule 37 because it has been prepared with monospaced typeface using Microsoft Word with 14 point, Times New Roman font.

Certificate of Filing and Service

I certify that on March 13, 2024, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Appellate Government Counsel.

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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.
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> [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.
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> [4] He first invoked his right to have an attorney present with him during his first interview.
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> [5] He then made two separate attempts to get an attorney by visiting the Defense Services Office, where he was turned away.
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> [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