IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202300205
Danielle E. DEREMER, Private First Class (E-2) U.S. Marine Corps Appellant	)	USCA Dkt. No. 25-0158/MC

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

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Index of Brief

Page

[1] The Certification identifies Private First Class Deremer as Appellant and the United States thus identifies her as Appellant throughout this Brief.

Table of Authorities

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

FEDERAL COURTS OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946:

MANUAL FOR COURTS-MARTIAL

OTHER STATUTES

INSTRUCTIONS AND ORDERS

OTHER SOURCES

Under Rule 19(b)(3) of this Court's Rules of Practice and Procedure, the United States replies to Appellant's Answer. (Appellant's Answer, Aug. 19, 2025.)

Argument

I.

THE LOWER COURT ERRED WHEN IT FOUND APPELLANT WAS ENTITLED TO 10 U.S.C. § 1044E RIGHTS, INCLUDING THE PRESENCE AND REPRESENTATION OF HER VICTIMS LEGAL COUNSEL, WHEN SHE WAS INTERVIEWED AS A SUSPECT AND WAIVED HER RIGHT TO COUNSEL. CONGRESS' INTENT IS EVIDENT IN THE STATUTE; THE PLAIN LANGUAGE AND CONTEXT AUTHORIZE THE SERVICES TO PROVIDE LIMITED LEGAL SERVICES, INCLUDING REPRESENTATION AT PROCEEDINGS, TO AN ALLEGED VICTIM. A LAW ENFORCEMENT INTERVIEW, HOWEVER, IS NOT A PROCEEDING.

A. If there is no plain, unambiguous meaning in the language, the court looks to context within the statute and the statute's context as a whole.

"The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. Ermoian*, 752 F. 3d 1165, 1168–69 (9th Cir. 2013) (*citing Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "Whether the meaning of a statute is plain 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." *Id*. at 1169. When the meaning is resolved "by reference to

the statutory text such that 'the statutory language is unambiguous' and 'the statutory scheme is coherent and consistent,' [a court's] inquiry is complete." *Id*. (quoting *United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 240 (1989)).

Further, "a standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007). The maxim "may be 'doubly appropriate' where . . . .Congress employ[s] the same term in multiple places 'at the same time' in the 'same section' of the 'same public law." *Velaquez v. Bondi*, 145 S. Ct. 1232, 1242 (Apr. 22, 2025).

B. 10 U.S.C. § 1044e(f) provides for the availability of Special Victim Counsel but stops short of providing a right to their presence at law enforcement interviews, and does not require the Victim Counsel be notified before an interview.

10 U.S.C. § 1044e(f) (2018) states under the subheading "Availability of Special Victims' Counsel":

> [N]otice of the availability of a Special Victims' Counsel shall be provided to an individual . . . before any military criminal investigator or trial counsel interviews, or requests any statement from, the individual regarding the alleged sex-related offense.

The provision does not discuss a Victim Legal Counsel's *presence* at the law enforcement interview. This contrasts with the language in *Miranda v. Arizona,* 384 U.S. 436 (1966) and Mil. R. Evid. 305(d) which protect an accused's right to counsel's presence in custodial interrogations. *Miranda* states: "An individual held

for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer *with him* during interrogation under the system for protecting privilege we delineate today." 384 U.S. at 471 (emphasis added). Mil. R. Evid. 305(d) states that when a person "entitled to counsel under this rule" requests an attorney, military counsel must be provided at no expense to the person "*and must be present before the interrogation can proceed*." Mil. R. Evid. 305(d) (2019) (emphasis added).

Appellant also errs in interpreting 10 U.S.C. § 1044e to require Naval Criminal Investigative Service (NCIS) to contact her only through her Victims' Legal Counsel. (Appellant Answer at 41–42.) Congress could have provided this right. In fact, it specifically included a similar right in Article 6b, which requires counsel for an accused to "make any request to interview a victim through Special Victims' Counsel or other counsel for the victim." 10 U.S.C. § 806b. But there is no language in 10 U.S.C. § 1044e providing such a right.

In sum, Congress could have provided rights to victims to have Special Victims' Counsel present at any law enforcement interview and to require any request to interview a victim be made through Special Victims' Counsel. If it did provide those rights, it would do so in language that aligns with similar rights in the Manual for Courts-Martial and the Code. But it did neither.

C. Appellant claims her right to Victims' Legal Counsel representation at "proceedings" encompasses an NCIS interview. Although she relies on the broadest, non-legal definition of "proceeding," context and precedent dictate the "specialized meaning" is appropriate here.

1. In context, "proceeding" must mean something different than a military investigation.

10 U.S.C. § 1044e (b) authorizes eleven types of legal assistance, including:

> Representing the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.

The plain language of the statute, authorizing representation at "any proceedings in connection with the reporting, military investigation, and military prosecution" implies that a military investigation itself is not a proceeding. Rather, "proceedings" must be "connected to" a military investigation.

2. In *Valazquez v. Bondi*, the Court used the specialized meaning of "days"—non-calendar days—because courts presume a new provision should be understood to work in harmony with what has come before.

In *Velazquez v. Bondi*, 145 S. Ct. 1232 (Apr. 22, 2025), the Court examined the word "days" in an immigration statutory deadline. "Days" has a commonly understood meaning—calendar days—and in fact, that was the meaning the Board of Immigration Appeals and reviewing circuit court understood. *Id.* at 1238, 1241. The Court acknowledged that it "usually assume[s] statutory terms bear their ordinary meaning " "until and unless someone point to evidence suggesting otherwise." *Id.* at 1241 (internal citations and quotations omitted). But the Court

instead accepted the "specialized meaning" proposed by appellant; "in legal settings, the term 'days' is often understood to extend deadlines falling on a weekend or holiday to the next business day." *Id.* at 1241–42.

To reject the "ordinary meaning," the Court used interpretive tools. First, that when Congress adopts a new law against the backdrop of a "longstanding administrative construction," the Court "generally presumes the new provision should be understood to work in harmony with what has come before." *Id.* The "longstanding" regulatory scheme supported that "day" was not a weekend or legal holiday. *Id.* 1242–43. Likewise, the Court understood the non-calendar day meaning to best fit in other provisions of the same statute. *Id.*

3. The most appropriate definition of "proceeding" is the "business conducted by a court or other official body."

Black's Law Dictionary (8th ed. 2004) defines "proceeding" as:

> (1) The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. (2) Any procedural means for seeking redress from a tribunal or agency. (3) An act or step that is part of a larger action. (4) The business conducted by a court or other official body; a hearing.

The Merriam-Webster Dictionary (3rd ed. 1988) defines "proceeding" as:

> (1) An advancing or going on with what one has been doing (2) the carrying on of an action or course of action (3) a particular action or course of action (4) a record of the business transacted by a learned society or other organized group (5) a) legal action b) the taking of legal action.

Finally, the *American Heritage Dictionary* (2d ed.1982), defines "proceeding" as:

> (1) A course of action; procedure (2) a continuing of an action (3) *proceedings* A sequence of events occurring at a particular place or occasion. (4) *proceedings* A record of business carried on by a society or other organization; minutes. (5) *Law*. *a. proceedings.* Legal action: litigation. *b.* The instituting or conducting of litigation.

Here, the "longstanding administrative construction" of the Military Rules of Evidence and the Rules of Court-Martial both support the specialized meaning of "proceeding" as "the business conducted by a court or other official body; a hearing." *Proceeding*, *Black's Law Dictionary* (8th ed. 2004). In the Manual in use at the time 10 U.S.C. § 1044e was passed, the word "proceedings" was used hundreds of times across both groups of Rules, yet Appellant has not cited one that supports her preferred definition. (*See* Appellant Answer); *Manual for Courts-Martial*, *United* States (2012 ed.) (MCM).

4. <u>"Proceedings" is defined only once in the Rules for Courts-Martial. Neither it nor the definition of "lawyer" supports Appellant's broad reading, as both Rules indicate "proceedings" are not pre-litigation investigations and interrogations</u>.

Despite its ubiquity, "proceedings" is defined only once in the Rules for Courts-Martial. In R.C.M. 902, "for the purposes of this rule," "'proceedings' includes pretrial, trial, post-trial, appellate review, or other stages of litigation." Despite the broad inclusion of all stages of litigation, the use of the word in that Rule implies only hearings: "a military judge shall disqualify himself or herself in

any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902. Because judges are not involved in law enforcement interrogations, the Rule and its definition support that an interrogation is not a proceeding.

Another definition—this one of "lawyer" —supports the same. Mil. R. Evid. 502 (2012) states that a "lawyer" is a person "authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding." That the definition specifies representation at a "proceeding" *or* "in any military investigation" strongly implies that a "proceeding" does not cover a military investigation.

5. Appellant's preferred, overly-broad definition of "proceeding" conflicts with the use of "proceedings" in the Uniform Code of Military Justice and this Court's precedent.

In *United States v. Badders*, 82 M.J. 299 (C.A.A.F. 2022), the court looked at the word "proceedings" as used in Article 62. *Id.* at 303 (citing 10 U.S.C. § 862 (government may appeal "order or ruling or ruling of the military judge which terminates the proceedings with respect to a charge or specification")). The court used the definition of proceedings that "connotes 'the regular and orderly progression of' cases.'" *Id.* (citing *Black's Law Dictionary* 1457 (11th ed. 2019); *Merriam-Webster's Unabridged Online Dictionary*, https://unabridged.merriam-

webster.com/unabridged/proceeding (last visited May 25, 2022) (defining "proceedings" as "the course of procedure in a judicial action or in a suit in litigation.")).

Finding the definition "unilluminating" to the issue, the court looked to the broader statutory context. *Id.* at 303 (*citing Abramski v. United States*, 573 U.S. 169, 188 n. 10 (2014)). The court determined that Article 62's use of "proceeding" refers to terminating a particular court-martial in regard to a charge or specification—that the charge could be brought before another court-martial did not bar Article 62 jurisdiction. *Id.* at 303.

In doing so, the court rejected the appellant's contention that "proceedings" in Article 62 was broader because there were "other instances in the UCMJ where the word 'proceedings' is used but it is not in reference to a court-martial." *Id*. at 304. The appellant cited seven: Articles 1(14), 2(d)(1), 6b(a), 15(g), 30a, 66(f)(3), 131(f)(2) (10 U.S.C. §§ 801(14), 802(d)(1), 806b(a), 815(g), 830a, 866(f)(3), 931(f)(2) (2018)). *Id.* But in most instances, as the United States argued, the Uniform Code uses "proceedings" to refer to a particular court-martial. *Id.* at 304 (citing *United States v. Dossey*, 66 M.J. 619, 623–24 (N-M. Ct. Crim. App. 2008) ("A review of the Code reveals that, almost without exception, the Code uses 'proceedings' to refer to happenings before a particular court-martial.")).

Regardless of whether proceedings encompasses only one court-martial, possible later courts-martial proceedings, or adjudicatory hearings before "other official bodies" that are not courts-martial at all, none of the statutes indicate a definition of proceeding that would encompass a law enforcement interview, as appellant claims. (Appellant Answer at 16–20, Aug. 19, 2025). Where "proceedings" does not refer to a court-martial, it often refers to non-judicial punishment, other disciplinary proceedings, and other formal hearings before or after a court-martial—such as preliminary hearings under Article 32 or clemency and "public" parole board adjudications. *See e.g.* Article 2(d), Article 6b(a), Article 15(g), Article 66(f), Article 131b. (10 U.S.C. §§ 802(d)(1), 806b(a), 815(g), 866(f)(3), 931(f)(2) (2018)).

Article 131b, "Obstructing Justice," for instance, uses the word "proceeding" and explicitly includes both criminal and disciplinary types. 10 U.S.C. § 931b (applying when person has reason to believe "there were or would be criminal or disciplinary *proceedings* pending"). The explanation accompanying the Article further details that "criminal proceedings include general court-martial, special courts-martial, and all other criminal proceedings." Manual for Courts-Martial (MCM), United States pt. IV, para. 83.c.; Disciplinary proceedings, in turn, "include summary courts-martial as well as nonjudicial punishment proceedings." *Id*.

The explanation reflects that a proceeding does not encompass a law enforcement investigation. Rather, obstruction of justice is committed only when the perpetrator contemplates that there will be some "proceeding," *i.e.* business conducted before an official body, at the conclusion of a law enforcement investigation. Likewise, the interpretation of "proceeding" in 10 U.S.C. § 1044e does not encompass a law enforcement investigation.

6. The Ninth Circuit settled on the narrower, specialized "legal" definition and held "proceeding" does not encompass a law enforcement investigation.

In *United States v. Ermoian*, 752 F. 3d 1165 (9th Cir. 2013), the appellant challenged whether an investigation, by the Federal Bureau of Investigation, qualified as "any official proceeding" under the statute criminalizing obstruction of justice. *Id.* at 1168–69. Per the statute, an official "proceeding" covered, in part, "a proceeding before a Federal Government agency which is authorized by law." *Id.* at 1169. The court noted that "'proceeding' may be used either in a general sense to mean 'the carrying on of an action or series of actions; action, course of action; conduct, behavior' or more specifically, as a legal term to mean 'a legal action or process, and act done by authority of a court or law, a step taken by either party in a legal case.'" *Id*. at 1169. The court acknowledged that the former "is broad enough to include a criminal investigation, as it encompasses a wide range of activities." *Id*.

The other, however, "would exclude criminal investigations in the field, as it associates that term with formal appearances before a tribunal." *Id.* at 1170. The court concluded that the dictionary definitions, therefore, could "not conclusively resolve whether an FBI investigation qualifies as an official proceeding." *Id*.

To determine whether the statute used the more general or the more technical meaning, the court looked to the surrounding words and phrases. *Id*. It found that there were several clues that the legal, rather than the lay, understanding of "proceeding" was implicated. *Id*. First, use of the word "official" indicated "a sense of formality normally associated with legal proceedings, but not necessarily with a mere 'action or series of actions.'" *Id.* Surrounding words—"judge," "court," "federal grand jury," and "Congress"—all indicated a legal usage of the term, as did that proceeding was described as "authorized by law." *Id*. Finally, the "overall tenor of the definitions support[ed] the notion that a mere criminal investigation does not qualify as one." *Id.* The court also considered *Black's Law Dictionary*'s definition commentary, which explained, "'proceeding' is a word much used to express *the business done in courts*" and "is an act done *by the authority or direction of the court*, express or implied." *Id.* (*citing Black's Law Dictionary* 1241 (8th ed. 2004)) (emphasis in original).

Further, the same term as used in other parts of the statute made it more "apparent that a criminal investigation was not incorporated in the definition," as

they all "strongly implie[d] that some formal hearing before a tribunal [was] contemplated." *Id.* at 1172. And lastly, because the statutory scheme already provided an "explicit mechanism" to criminalize obstruction of a criminal investigation, "it would be odd to interpret 'official proceeding' to incorporate investigations. *Id.*

Here, "any proceedings" is used in subsections (5), (6), and (8) of 10 U.S.C. § 1044e. The first, 1044e(5), authorizes "legal consultation regarding the military justice system including (but not limited to) . . . (B) *any proceedings* of the military justice process in which the victim may observe." (emphasis added.) 1044e (8) authorizes "legal consultation and assistance . . . (B) in *any proceedings* of the military justice process in which a victim can participate as a witness or other party." (emphasis added.)

1044e(6), at issue here, authorizes "representing the victim at *any proceedings* in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." (emphasis added.) As in *Ermoian*, the other two subsections make the meaning of the phrase clear. These subsections indicate "some formal tribunal" as a victim would only be able to "observe" or "participate as a witness or other party" in criminal or disciplinary hearings—but not law enforcement's investigative steps.

Thus, while Victims' Legal Counsel could have accompanied her to the interview, 10 U.S.C. § 1044e provided no right to Victims' Legal Counsel representation at the interview. 10 U.S.C. § 1044e(6).

II, III.

THE LOWER COURT ERRED IN FINDING THE INTERVIEW VIOLATED APPELLANT'S DUE PROCESS RIGHTS, FINDING THE STATEMENT INVOLUNTARY, AND EXCLUDING IT. APPELLANT WAIVED HER RIGHT TO THE PRESENCE OF "AN ATTORNEY" AND FAILS TO SHOW THAT THIS WAIVER DID NOT INCLUDE HER VICTIM LEGAL COUNSEL.

A. A rules violation governing the conduct of an investigation does not necessarily warrant evidence suppression.

1. Neither *Yellin, Caceres*, nor *Guzman* support Appellant's position because *Yellin* involved a violation of a Congressional procedural rule, and in *Caceres* and *Guzman*, the evidence was not suppressed even though it was obtained in violation of agency rules.

In *Yellin v. United States*, 374 U.S. 109 (1963), the Court overturned the defendant's conviction for contempt of Congress when the House Committee on Un-American Activities had violated its own rules when it insisted on the witness's testimony in a public hearing without considering the potential harm to the witness's reputation. *Id*. at 114–23. The Court did not rely on the Due Process clause of the Constitution.

In *United States v. Caceres*, 440 U.S. 741 (1979), the Court addressed whether statements should be suppressed because they were taken in violation of Internal Revenue Service agency regulations, which required Department of Justice authorization before even "consensual electronic surveillance" between taxpayers and IRS agents could take place. *Id.* at 752–53. The Court found the agency was not required by the state or Constitution to adopt any particular procedures, the agency's error in interpreting its regulation did not violate the Constitution, and the Due Process Clause was not implicated because the respondent could not show he relied on the regulation or that its breach affected his conduct. *Id*. at 749, 752–53.

The respondent argued for exclusion anyway, but the Court rejected its use: it worried that "a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures." *Id*. at 755. The Court found the respondent's statements were properly admitted. *Id*.

In *United States v. Guzman,* 52 M.J. 318 (C.A.A.F. 2000), NCIS obtained evidence in violation of the Department of Defense directive about wiretap authorizations. The court found appellant was not harmed by the violation and there was nothing to indicate that the regulation's authorization provision was "directly tied to the protection of individual rights." *Id.* at 321.

Thus, neither *Yellin*, *Caceres,* nor *Guzman* support Appellant. *Yellin* dealt with a specific procedural rule that was to benefit the appellant before the hearing at which he testified. And in *Caceres* and *Guzman*, despite that the agencies violated their own rules in obtaining evidence, the Court did not suppress the evidence.

2. This Court should look to *Condon*, which clarifies that absent Appellant invoking a rule of evidence or statute amounting to a private right of action, relevant evidence is admissible.

In *United States v. Condon*, 170 F.3d 67 (7th Cir. 1999), the appellant argued that criminal statute 18 U.S.C. § 201 required the exclusion of testimony from witnesses who were promised immunity or lower sentences in exchange for their cooperation. *Id.* at 688. The statute reads, in part, "whoever . . . promises anything of value to any person, for or because of testimony under oath or affirmation. . . shall be fined under this title or imprisoned. . . ." *Id*. The court determined that because the section was a criminal statute, it was not a private right of action or a rule of evidence and additional consequences—beyond those in the statute—would not be appropriate. *Id.* at 689.

The court also rejected the appellant's reliance on local professional rules preventing attorneys from providing compensation contingent on the content of a witness' testimony. *Id*. at 690. The court looked to Fed. R. Evid. 402, making "all relevant evidence . . .admissible, except as otherwise provided by the Constitution

of the United States, by Act of Congress, by these rules, or by other rules proscribed by the Supreme Court pursuant to statutory authority." *Id*. The Court found the Federal Rule at least "implies that local rules may not require exclusion." *Id*.

3. Congress did not create privately enforceable rights in 10 U.S.C. § 1044e, nor are there enforceable rights in the Instructions cited by the lower court.

Here, although the statute is not criminal as in *Condon*, there is no indication the statute meant to provide a private right of action that would transfer to a criminal proceeding. The statute preceding it authorizes legal assistance and specifies the areas where that legal assistance may be provided. 10 U.S.C. § 1044. 1044e itself authorizes a special type of legal assistance but does not indicate that it provides a private right of action in case of a violation. Another statute adjacent to it, as Appellant points out, deals exclusively with policies with respect to special trial counsel. (Appellant Answer at 20); 10 U.S.C. § 1044(f) (2024).

Moreover, under the same public law creating 10 U.S.C. § 1044e, Congress passed Article 6b, which explicitly provides rights to victims. 10 U.S.C. § 806b; National Defense Authorization Act for Fiscal Year 2014 Pub. L. 113-66, §§ 1701, 1716 (Dec. 26, 2013). Contrary to Appellant's assertion, Article 6b is relevant to the analysis: when Congress wants to provide rights, it explicitly identifies them as "rights." (Appellant Answer at 20–21); 10 U.S.C. § 806b.

Nor are the Instructions cited by the lower court "directly tied to the protection of individual rights." *See Guzman,* 52 M.J. at 321. Similar to the Department of Defense directive about wiretap authorizations in *Guzman*, DoDI 5505.18 is directed internally at "OSD and DoD Component heads" and details who has responsibility for certain actions in the investigation and reporting of sexual assaults and what procedures military criminal investigators will use. Dep't of Def. Instr. 5505.18, *Investigation of Adult Sexual Assault in the Department of Defense* (Mar. 22, 2017) [DoDI 5505.18].

Likewise, the Marine Corps Legal Services Administration Manual "prescribes the organization, roles, and responsibilities of the Marine Corps Victims' Legal Counsel Organization, as provided for in law, regulations, and rules of professional conduct." Marine Corps Order 5800.16, *Legal Support and Administration* Manual, Volume 4, para 0101 (Aug. 26, 2021). Again like *Guzman*, nothing in this section of the Manual is "directly tied to the protection of individual rights."

4. Further, Appellant waived any claimed reliance on instructions when she did not raise those alleged protections provided to her at trial.

"Suppression arguments not raised at trial are waived." *United States v. Harborth*, 2025 CAAF LEXIS 436, *10 (C.A.A.F. June 5, 2025) (citing Mil. R. Evid. (d)(2)(A) (2019 ed.) "Preserving an argument requires a 'particularized

objection.'" *Id.* (internal quotation and citation removed). In *Harborth*, this Court found an appellant waived his challenge to the duration of a seizure when, at trial, he only claimed it lacked probable cause. *Id.* at *11. In that case, this Court found the "presumption against waiver of constitutional issues was overcome" because appellant failed to meet the "particularized objection" requirement of Mil. R. Evid. 311(d)(2)(A) (2019 ed.). *Id.*

Here, Appellant waived any reliance on instructions when she did not raise the alleged protections provided to her in DoDI 5505.18 and the LSAM in her Suppression Motion at trial. (J.A. 50–75.) She also did not raise it before the lower court—likely understanding she waived at trial. (J.A. 743–837.) Because Mil. R. Evid. 304(f)(1) contains the same language as Mil. R. Evid. 311(d)(2)(A)—the rule in *Harborth*—Appellant had to raise her claim with particularity to preserve it for appellate review. And because she did not, as in *Harborth*, the lower court erred in not recognizing that issue was waived. *Deremer*, 85 M.J. at 551–52; *see Harborth*, 2025 CAAF LEXIS 436 at *13.

5. Mil. R. Evid. 402 requires the admission of relevant evidence.

Mil. R. Evid. 402—like its Federal counterpart—requires the admission of relevant evidence unless the Constitution as applied to the Armed Forces, a federal statute applicable to trial by court-martial, these rules, or the Manual provide otherwise. 10 U.S.C. 1044e does not call for suppression as a remedy and thus Mil. R. Evid. 402 requires Appellant's statement be admitted. Further, the lower court and now Appellant err by implying the violation of "local rules," such as the Legal Support and Administrative Manual and DoDI, which themselves do not call for exclusion, trump Mil. R. Evid. 402's general default that relevant evidence is admissible.

6. Appellant's reliance on a more than forty-year old Air Force case should be rejected. In that case, an official form informed the appellant that he had a right, and he invoked it.

Appellant cites *United States v. Thompson,* 12 M.J. 993 (A.F.C.M.R. 1982), a Service Court case in which the appellant, after invoking his right to counsel in a custodial interrogation, was provided a form requesting he give permission for a search of his barracks room. *Id.* at 996. The form, along with an Air Force regulation, told him that he had a right to consult with counsel before giving consent to the search of his room. *Id.* He invoked that right, but the search was conducted before he consulted with counsel. *Id.* The court found the impact of

providing the form to appellant was to provide him a new right; since he invoked it and his invocation was ignored, the evidence was suppressed. *Id.* at 997.

As support, the *Thompson* court cited *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). *Thompson,* 12 M.J. at 997. *Accardi*, in turn, was a case in which the Attorney General had published a regulation in which he delegated to the Board of Immigration Appeals his discretionary authority to suspend deportations; he then ignored the regulation and interfered with the Board's decision in a deportation case. 347 U.S. 260.

But *Accardi* predated *Caceres,* which clarified that when an agency fails to follow a regulation, the appellant must show that he reasonably relied on an agency regulation promulgated for his benefit and "suffered substantially because of their violation by the agency". *Caceres*, 440 U.S. 741, 753. In *Caceres*, that the regulation provided for privacy protection was not enough. *Id.* at 755. And the Court implied that the analysis for a criminal case, in which an appellant asks for exclusion as a remedy, is different and more searching than for cases brought under the Administrative Procedures Act. *Id.* at 754.

Appellant's case is distinguishable from *Thompson* for the same reasons it is distinguishable from *Caceres*: she cannot show the regulations she relies on were promulgated for her benefit and she cannot show she relied on them. (*See supra.* A.3.) Even if she could show they were promulgated to benefit her as a Victim,

she cannot show they were meant to benefit her in a criminal proceeding. Regardless, unlike the *Thompson* appellant, Appellant here waived her right to counsel. *See infra* para. B.

B. Even if 10 U.S.C. § 1044e otherwise required the presence of Appellant's Victims' Legal Counsel, Appellant waived the presence of counsel, including her Victims' Legal Counsel.

Like in *Caceres*, even if there was a violation of any regulation here, it was harmless. Appellant could not show that any breach affected her conduct because the NCIS Agent prophylactically over-advised her and notified that she had the right to "[her] retained lawyer" and/or "appointed military lawyer present during this interview." (J.A. 590, 704); *see United States v. Flanner*, 85 M.J. 163, 169–175 (C.A.A.F. 2024) (no right to presence of counsel in non-custodial interview; counsel requirement is from *Miranda*, not Article 31b). The Rights Advisement Form and the Agent's recital of it was broad enough to encompass Appellant's Victim Legal Counsel. Appellant waived this broadly-worded right. (J.A. 590.) Neither the Agent nor Appellant had to distinguish between Victims' Legal Counsel and a hypothetical defense counsel to waive the presence of both.

C. Appellant's contention that the statutory "right" is analogous to the Sixth Amendment should fail.

Appellant ask this Court to equate the statutory provision of Special Victims' Counsel with the Sixth Amendment. (Appellant Answer at 25.) Even if this Court made that leap, the Sixth Amendment does not support Appellant's view

that representation by an attorney prevents Government Agents from contacting Appellant outside the presence of that attorney.

Instead, Sixth Amendment protections parallel Fifth Amendment protection in that nothing in the Sixth Amendment prevents police from approaching a represented accused, properly warning him, and taking his statement in the event he waives the presence of counsel. *Montejo v. Louisiana*, 556 U.S. 778, 788 (2009) (rejecting rule that request for counsel at arraignment be treated as invocation of Sixth Amendment right to counsel "at every critical stage of the prosecution" (citing *Michigan v. Jackson*, 475 U.S. 625 (1986)); *see also United States v. Swafford*, S32435, 2017 CCA LEXIS 747, *11 (A.F. Ct. Crim. App. Dec. 4, 2017) (noting Mil. R. Evid. 305(c)(3) protections—titled "Sixth Amendment Right to Counsel"—sweep broader than Sixth Amendment). "The defendant may waive the right whether or not he is already represented by counsel; the decision to waive itself need not be counseled." *Montejo,* 556 U.S. at 788 (*citing Michigan v. Harvey*, 494 U.S. 344, 352–53 (1990)).

Further, the Sixth Amendment is offense-specific. *See Texas v. Cobb,* 532 U.S. 162, 167–68 (2001) (rejecting claim Sixth Amendment extends to questioning about all offenses "factually related" to charged offense); *United States v. Turner*, 859 Fed. Appx. 542, 544 (11th Cir. 2021) (when federal law enforcement questioned appellant, right to counsel attached only to state charges).

Here, Appellant had no Sixth-Amendment-like right to have her Victims' Legal Counsel at her interrogation, and nothing in the Sixth Amendment prevented law enforcement from obtaining her waiver outside the presence of Counsel.

D. Appellant fails to show any law enforcement misconduct. Regardless, an agent's investigation and actions outside the interview are not the concern of the Fifth and Sixth Amendments and Mil. R. Evid. 304.

Appellant conflates the exclusionary rules of the Fourth Amendment and Mil. R. Evid. 311 with those of the Fifth and Sixth Amendment and Mil. R. Evid. 304. (Appellant Answer at 45–46.) Unlike the Fourth Amendment, which requires probable cause for searches, the conduct of investigation—whether sloppy or detailed and thorough—is irrelevant to the protections of the Fifth and Sixth Amendment. *See Davis v. United States*, 512 U.S. 452, 457 (1994) ("The right to counsel in *Miranda* was one of a series of recommended procedural safeguards . . . that were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.") (internal citation omitted).

Regardless, the investigation here was thorough as the Agent interviewed seven other recruits, reinterviewed one of them, and interrogated the recruit Appellant alleged had assaulted her. (J.A. 318–25.) Appellant fails to identify how the investigation process was "sloppy" or "apathetic," rather than disagreeing

with the processes' outcome and how Appellant's Victims' Legal Counsel was treated. (Appellant Answer at 45–46.)

Further, Appellant, like Judge Gross in the lower court, presumes law enforcement misconduct when the investigating agent closed the case in which Appellant was labeled a victim and opened another in which she was a suspect. *United States v. Deremer*, 85 M.J. 546, 555, 558 (N-M. Ct. Crim. App. Feb. 7, 2025) (Gross, J. concurring) (accusing agents of using "deception and artifice to separate Appellant from her duly assigned Victims' Legal Counsel" and "consciously and deliberately" violating Appellant's rights despite not considering how law enforcement should handle false allegations). The absence from the Record of the actual written policy guiding that action does not mean no such policy existed and does not merit doubting the Agent's testimony about the policy. (J.A. 327.)

Rather, whether such policy exists is irrelevant to the determinative legal issues for the suppression of statements—which involve only the objective assessment of whether an accused invoked their rights, and the subjective and objective factors that bear on any knowing, intelligent, voluntary waiver, and the voluntariness of the confession. *See Davis*, 512 at 459; *Illinois v. Patterson*, 487 U.S. 285, 299–300 (1988) ("So long as the accused is made aware of the dangers and disadvantages of self-representation during post-indictment questioning, by

use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is "knowing and intelligent."); *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).

IV.

THE LOWER COURT DID NOT ERR WHEN IT AFFIRMED APPELLANT'S MALINGERING CONVICTION.

A. The lower court did not err by affirming the malingering Charge based on the "compelling and overwhelming" evidence. Further, Appellant's theory of conversion disorder is weak.

The lower court found evidence of Appellant's malingering "compelling and overwhelming." *Deremer*, 85 M.J. at 555. Appellant had received extensive medical treatment over the course of months, and multiple providers testified about her "unusual presentations" that were not consistent with her medical history and self-described symptoms. (J.A. 91–171, 217–45.) Witnesses also testified to Appellant's interest in medical benefits and her discharge characterization. (J.A. 106, 121–28, 307.)

All the recruit Witnesses and Appellant's Drill Instructor testified to seeing Appellant use her body in ways wholly inconsistent with her claimed injuries, and testified to her shifting descriptions of her injuries. (J.A. 172– 205, 246–312.) Finally, medical Witnesses testified about what conversion disorder was and why Appellant's conduct was not consistent with conversion disorder. (J.A. 131–55,

233–45.) Thus, the lower court's assessment that the evidence of malingering was overwhelming was correct.

Conclusion

The United States respectfully requests that this Court vacate the lower court's decision and affirm the Findings and Sentence as adjudged.

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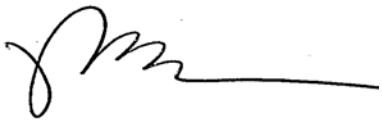

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on September 12, 2025.

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