IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Nathan M. RIVERA Private First Class (E-2) U.S. Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 202400304 USCA Dkt. No. 26-0093/MC

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

Arthur L. Gaston III
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Washington, DC 20374
(202) 685-7077
arthur.l.gaston2.mil@us.navy.mil
CAAF Bar No. 37756

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Issue Presented

Did the military judge abuse his discretion in denying the defense motion to suppress Appellant's statements to NCIS?

Statement of Statutory Jurisdiction

Because the sentence entered into judgment includes a dishonorable discharge, the lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A general court-martial composed of officer and enlisted members found Appellant guilty, contrary to his pleas, of sexual assault in violation of Article 120, UCMJ.[3] The military judge sentenced Appellant to forty-eight months' confinement, reduction to E-1, and a dishonorable discharge.[4] The military judge subsequently found Appellant guilty, pursuant to his pleas, of wrongful use of lysergic acid diethylamide in violation of Article 112a, UCMJ.[5] The convening authority approved the sentence.[6] The military judge then entered the findings and sentence

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[1] 10 U.S.C. § 866(b)(3).
[2] 10 U.S.C. § 867(a)(3).
[3] J.A. 278, 613.
[4] J.A. 614.
[5] J.A. 278, 616.
[6] J.A. 618.

into judgment.[7]

On November 13, 2025, the lower court affirmed the findings and sentence.[8] On January 9, 2026, Appellant timely filed a Petition for Review, which this Court granted on March 9, 2026.

Statement of Facts

A. During the rights advisement, the NCIS agent told Appellant that if he invoked his right to counsel "we basically won't have a conversation with you," "[w]e don't get to hear your side of this story," and "we'll just go with what we've got," and that having counsel present during the interrogation is "not something we do."

After receiving allegations of sexual assault against Appellant, Naval Criminal Investigative Service (NCIS) agents had him escorted to their office for what the Government concedes was a custodial interrogation.[9] When Appellant arrived at the NCIS office, the lead agent told Appellant he wanted to "chit chat," but first had to run through some "paperwork."[10]

As a precursor to advising Appellant of his *Miranda* rights, the NCIS agent advised that Appellant's commanding officer would be more understanding if he had a "full picture of what happened":

> We basically collect facts, and we provide a report and those facts to your commanding officer, okay? Your commanding officer is going to

[7] J.A. 619-621.
[8] *United States v. Rivera*, No. 202400304, slip op. at 12 (N-M. Ct. Crim. App. Nov. 13, 2025) (unpublished).
[9] J.A. 141-142, 241, 272, 455; *Rivera*, slip op. at 9.
[10] J.A. 85, 86.

> get the reports and all the facts, and he's going to read everything, and he's going to consult with his staff judge advocate, which is basically like a lawyer who advises the commanding officer of legal matters, okay? He's going to get with him and he's going to talk to, you know, some other people and basically make a decision of what he wants to do with an investigation, right, where there's an alleged crime. So, I've been doing this a long time. And I have found that commanding officers are not lenient, but they are more understanding when they've got a full picture of what happened versus just bits and pieces . . . .[11]

The agent then had Appellant start reading aloud and initialing a rights advisement form stating that he was suspected of sexual assault in violation of Article 120, UCMJ.[12] After Appellant read aloud three of the five rights listed on the form, the agent asked Appellant if he had any questions about any of his rights. Appellant responded that he was "a little iffy on 3," which discussed one of his counsel rights.[13]

The rights advisement form stated, pursuant to *Miranda v. Arizona*, that Appellant had two counsel rights: (a) "the right to consult with a lawyer prior to questioning," which "may be a civilian lawyer retained by [him] at no cost to the United States, a military lawyer appointed at no cost to [him], or both"; and (b) "the right to have [his] retained lawyer and/or appointed military lawyer present during this interview."[14] In response to Appellant's statement that he was "iffy" about the first of these two rights (and had not yet read aloud the other one), the NCIS agent

[11] J.A. 85, 90-91 (corrected to audio).
[12] J.A. 113.
[13] J.A. 85, 91.
[14] J.A. 113.

provided the following explanation about both of them:

> So, you have the right to consult a lawyer prior to any questioning where it can be a civilian lawyer retained by you at no cost to the United States, a military lawyer appointed to act as your counsel at no cost to you, or both. Okay. So what that means is before we talk, you've got the right to go consult with a lawyer or have them present during this questioning. However, it's not like the shows like -- like SVU or you know whatever it is where they're like call your lawyer and have them come. If you -- if you lawyer [sic], we -- we basically won't have a conversation with you. We don't get to hear your side of this story, okay? And we'll just go with what we've got. So, you've got that right. You can have them present. But we just -- that's not something we do. We -- it's not like the shows where we call somebody and the guy comes and we get in here with a little briefcase and slams it on the thing he says we're done here, you know what I mean?[15]

When Appellant responded, "Yeah," the agent stated, "[T]hat's not what happens. But that's -- that's one of your rights."[16]

After considering the agent's explanation, Appellant waived his rights.[17] During the ensuing interrogation, he made various admissions including the following: "I think I may have done something that I . . . shouldn't have done"; "I'm worried I may have beaten or raped her," which he clarified meant "unwanted sexual . . . advantages"; "I believe I penetrated her while I was, like, laying there with her"; "I believe I stuck my dick in her vagina [when she was asleep]"; and "I think I kind of pulled both of our[pants] down."[18]

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[15] J.A. 85, 91.
[16] J.A. 85, 91.
[17] J.A. 85, 91-92.
[18] J.A. 85, 103-106.

B. The Defense moved to suppress Appellant's statements on grounds that the NCIS agent had mischaracterized his right to the presence of counsel, resulting in a waiver that was not knowing and intelligent.

Prior to trial, the Defense filed a motion to suppress Appellant's statements to NCIS pursuant to Article 31(b), UCMJ, and Military Rules of Evidence 304 and 305, which incorporate the Fifth Amendment right to counsel in custodial interrogations.[19] In an affidavit filed in support of the motion, Appellant stated that the NCIS agent's explanation had led him to believe he "did not have a right to have a lawyer present during the interview because that right does not apply to NCIS or [him] as a Marine," and that "[b]ut for [the agent]'s explanation, [he] would have requested an attorney," just as he did at a subsequent interrogation.[20]

Citing the Supreme Court's decision in *Florida v. Powell*, the Defense argued that the way the agent had explained Appellant's *Miranda* rights "does not reasonably convey the right to have an attorney present 'not only at the outset of interrogation, but at all times.'"[21] Rather, the Defense argued, the explanation "presents [Appellant] with an 'either or' decision. Either consult with an attorney before questioning or have an attorney present for questioning but not both. It also indicates if [Appellant] chooses one right he will lose the other."[22] The Defense

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[19] J.A. 119.
[20] J.A. 117.
[21] J.A. 129 (quoting *Florida v. Powell*, 559 U.S. 50, 62 (2010)).
[22] J.A. 129.

argued that a warning "that suggests that *Miranda* rights can be lost if one right is chosen over the other frustrates the purpose of the *Miranda* protections."[23] The Defense argued the agent's mischaracterization of Appellant's counsel rights resulted in a waiver that was not knowing and intelligent.[24]

In response to the defense motion, the Government argued that specific language or wording is not necessary in rights advisements and that "[a]ll that is required is that the words the officer employs must reasonably convey to a suspect his rights."[25] The Government argued that the agent's "reference to common media representations of the right to counsel was in an effort to avoid any confusion about the logistical aspect or timeline expected to retain an attorney."[26]

Prior to the suppression hearing, the Government provided the defense motion to the NCIS agent to review and discussed its arguments with him.[27] The agent then testified at the hearing that his comment about the presence of a lawyer being "not something we do," while referring to the rights, was designed to convey that there

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[23] J.A. 129 (citing *Missouri v. Seibert*, 542 U.S. 600, 621-22 (2004) (noting *Miranda* would be frustrated if police were allowed to use rights advisement techniques that deprived a suspect of the "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them") (Kennedy, J., concurring) (quoting *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986))).
[24] J.A. 127-131, 230, 234.
[25] J.A. 144.
[26] J.A. 144-145.
[27] J.A. 169-170.

was "no on-call defense attorney" that NCIS could logistically arrange for.[28] The agent conceded on cross-examination, however, that he didn't explain that to Appellant and was not aware there was a duty defense attorney on call "24/7."[29]

C. The military judge denied the suppression motion, ruling the agent's explanation of the *Miranda* right to the presence of counsel was both factually true and legally permissible.

The military judge denied the defense motion in a written ruling.[30] He found as a "matter of common practice that if a suspect invokes their right to counsel then NCIS will simply terminate the interview."[31] He found the agent "did not tell [Appellant] he did not have the right to have an attorney present, he simply told him that if he invoked that right it would end the interview," which "as a practical matter" was "true."[32]

The military judge further found the agent's explanation of counsel rights in this manner "was made in an attempt to persuade [Appellant] to waive his rights."[33] However, he reasoned that "ploys to mislead a suspect or lull him into a false sense of security do not render a statement involuntary provided they do not rise to the

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[28] J.A. 203.
[29] J.A. 203-204.
[30] J.A. 261-277.
[31] J.A. 275.
[32] J.A. 275.
[33] J.A. 275.

level of compulsion or coercion."[34] He further reasoned that such "ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."[35] Based on this reasoning, he concluded that "if [the NCIS agent]'s explanation of the right to an attorney was a factor in [Appellant]'s decision to waive his rights, it was a product of his own balancing and competing considerations," and that "[n]othing the [a]gent did rose to the level of compulsion or coercion."[36]

D. At trial, the NCIS agent provided a different explanation of the *Miranda* right to the presence of counsel than the one he provided to Appellant during the rights advisement.

The NCIS agent testified at trial about both the interrogation and the rights advisement he had provided to Appellant.[37] When asked by the Government what would have happened if Appellant had requested to have a defense attorney present during the interrogation, the agent testified that "[w]e would have terminated the interview at that time. *And then, if he wanted to go and get a defense attorney and return and continue the interrogation, we would have done that, yes*."[38]

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[34] J.A. 275 (citing *United States v. Jones*, 34 M.J. 899, 902 (N.M.C.M.R. 1992) (citing *Illinois v. Perkins*, 496 U.S. 292 (1990))).
[35] J.A. 275.
[36] J.A. 275.
[37] J.A. 407-482.
[38] J.A. 470 (emphasis added).

When cross-examined by the Defense about this new aspect of his explanation about the right to the presence of counsel at the interrogation, the agent conceded, "No," that going to get a defense attorney and then returning and continuing the interrogation was not something he told Appellant he could do.[39]

E. The Government used Appellant's admissions to NCIS to obtain a conviction for sexual assault.

At trial, the Government emphasized Appellant's admissions to NCIS throughout its opening statement, played the interrogation video in open court during its case-in-chief, and argued the statements extensively in both its closing and rebuttal arguments.[40] The trial counsel argued in rebuttal that Appellant had "confesse[d] to what he had done to [the complaining witness]" and that "[t]here is consistent evidence for every single thing [Appellant] says. He raped her. He penetrated her while she was asleep. He stuck his dick in her vagina."[41]

The members acquitted Appellant of other sexual offenses alleged by the complaining witness, but convicted him of the sexual assault to which he had confessed during his NCIS interrogation.[42]

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[39] J.A. 476.
[40] J.A. 280, 281, 284-285, 287-289, 426-432, 568, 570, 574-577, 579, 581-582, 606-608, 610, 612.
[41] J.A. 608.
[42] J.A. 83, 613.

F. The lower court upheld the military judge's ruling despite noting his erroneous view of the law.

On appeal, the lower court held the military judge did not abuse his discretion in admitting Appellant's statements.[43] While acknowledging the agent's explanation "was certainly not the model of clarity," the court concluded Appellant "was not objectively misinformed about his right to counsel," since the agent's explanation of his right to the presence of counsel was "properly understood" to mean the "NCIS agents would not call a lawyer for Appellant."[44] The court further concluded the military judge did not clearly err in finding that the agent's comment that invoking the right to counsel "will simply terminate the interview" was true as "a matter of common practice," since that is what happens "[i]n most cases."[45]

The lower court noted that the military judge's "discussion about the permissibility of investigator's use of 'ploys to mislead a suspect' is inapplicable in the rights advisement context."[46] Nevertheless, the court concluded the military judge "used the proper framework" and did not rely upon an erroneous view of the law in determining Appellant's waiver was knowing, intelligent, and voluntary.[47] The court then concluded that "even if the military judge did hold an erroneous view

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[43] *Rivera*, slip op. at 9.
[44] *Id.* at 9, 11.
[45] *Id.* at 10.
[46] *Id.* at 11.
[47] *Id.*

of the law based on the idea that an investigator may lie to an accused during the rights advisement," it did not influence his ruling because he "affirmatively found that [the NCIS agent] did not lie to Appellant and Appellant understood his rights."[48] The court held it could "affirm the military judge even if he held an incorrect view of the law because Appellant properly understood his rights to counsel and validly waived them."[49]

Summary of Argument

Miranda squarely held that suspects in custodial interrogations must be "*clearly* informed" of two separate counsel rights: "the right [1] to consult with a lawyer *and* [2] to have the lawyer with [the]m during interrogation."[50] Despite this controlling precedent requiring that the two rights be advised in the conjunctive, the military judge ruled that law enforcement agents are permitted to advise suspects that invoking their right to counsel will simply terminate the interrogation, nullifying their right to have counsel present during the interrogation. This view is clearly erroneous on both the facts and the law. The waiver produced by the NCIS agent's improper rights advisement was neither knowing and intelligent nor voluntary, and the erroneous admission of this key government evidence prejudiced the case and

[48] *Id.* at 11-12.
[49] *Id*. at 12 (citation omitted).
[50] *Miranda v. Arizona*, 384 U.S. 436, 470-71 (1966) (emphasis added).

led to Appellant's sexual assault conviction. This Court should remedy the error by setting aside the affected guilty findings and the sentence.

Argument

The Fifth Amendment does not permit law enforcement to advise custodial suspects that invoking their right to counsel will simply terminate the interrogation, nullifying their right to have counsel present during the interrogation.

Standard of Review

The denial of a suppression motion is reviewed for an abuse of discretion.[51] "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law."[52]

Discussion

In *Miranda v. Arizona*, the Supreme Court held "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."[53] Of the two rights, the Court found "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[54]

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[51] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[52] *Freeman*, 65 M.J. at 453.
[53] *Miranda*, 384 U.S. at 470.
[54] *Id.* at 469.

Accordingly, the Court held the Fifth Amendment requires that before a custodial interrogation may proceed, the suspect must be "*clearly* informed that he has the right to consult with a lawyer *and* to have the lawyer with him during interrogation."[55] The Court then emphasized the latter of these two counsel rights—i.e., the right to the presence of counsel during the interrogation—in formulating the now-familiar advisement required for every custodial suspect:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has *the right to the presence of an attorney*, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[56]

And the Court held the "[o]pportunity to exercise these rights must be afforded to [the suspect] throughout the interrogation."[57]

In the years since this case was decided, the Supreme Court has continued to emphasize that "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel *present at any custodial interrogation*."[58] When determining whether particular rights advisements comply with its requirements, the Court "has never indicated that the rigidity of *Miranda* extends to the precise formulation of the

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[55] *Id.* at 471 (emphasis added).
[56] *Id.* at 479 (emphasis added).
[57] *Id.*
[58] *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981) (emphasis added).

warnings given a criminal defendant."[59] Thus, reviewing courts are not required to "examine [them] as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda.*'"[60] With respect to *Miranda* counsel rights specifically, the Court has focused on whether the advisement "reasonably conveyed [the suspect's] right *to have an attorney present*, not only at the outset of interrogation, but at all times."[61]

Such determinations about whether a waiver of *Miranda* rights is valid generally examine three issues. First, "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."[62] Second, the relinquishment of the right must have been knowing and intelligent, which means that the suspect had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[63] And third, "[i]n determining whether there has been a

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[59] *California v. Prysock,* 453 U.S. 355, 359 (1981) (per curiam) (internal quotation marks omitted).
[60] *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 453 U.S. at 361).
[61] *Powell*, 559 U.S. at 62 (emphasis added).
[62] *Moran*, 475 U.S. at 421.
[63] *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010)).

valid waiver, a court must focus on the perceptions of the accused," as opposed to the agent.[64]

Here, contrary to this precedent, the military judge erroneously concluded that law enforcement can convey to suspects that invoking their right to counsel will simply terminate the interrogation, such that having their counsel present at the interrogation is not something that actually occurs. The NCIS agent, after advising Appellant how important it was to give his commanding officer (CO) "a full picture of what happened," advised that if Appellant invoked his right to counsel, "we basically won't have a conversation with you," "[w]e don't get to hear your side of this story," and "we'll just go with what we've got," and that having counsel present at the interrogation is "not something we do."[65] Taken together, these statements reasonably conveyed that invoking his right to consult with counsel would effectively negate his right to have counsel present during the interrogation.

This misleading explanation prevented Appellant from having a full (or even correct) understanding of the nature of the *Miranda* counsel rights being abandoned. Finding a knowing, intelligent, and voluntary waiver of rights under such circumstances—which must be viewed from Appellant's perspective, not the agent's—is an abuse of discretion for three reasons.

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[64] *United States v. Erie*, 29 M.J. 1008, 1012 (A.C.M.R. 1990) (citing *Rhode Island v. Innis*, 446 U.S. 291 (1980)).
[65] J.A. 85, 91.

A. The military judge abused his discretion in finding the agent's explanation was factually true, as it plainly conveyed that Appellant could *not* have counsel present during the interrogation, which the agent's own testimony contradicted.

First, the military judge clearly erred in finding the NCIS agent's statement "that if a suspect invokes their right to counsel then NCIS will *simply* terminate the interview" is "true" as a "matter of common practice" and is therefore a permissible way to advise custodial suspects.[66] Based on the agent's own testimony, "simply" (which means "[m]erely; only"[67]) terminating the interview is not what NCIS would have done "if the accused [had] wanted the attorney present."[68] Rather, when asked by the Government what would have happened if Appellant had requested to have a defense attorney present during the interrogation, the agent testified at trial that "[w]e would have terminated the interview at that time. *And then, if he wanted to go and get a defense attorney and return and continue the interrogation, we would have done that, yes*."[69] And the agent conceded, "No," that is not what he had explained to Appellant when he was trying to get him to waive his rights.[70]

Nor is the military judge absolved of this clear factual error, as the lower court's opinion suggests, by viewing the agent's comments during the rights

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[66] J.A. 275 (emphasis added).
[67] *Simply*, *The American Heritage Dictionary of the English Language* (5th ed. 2018).
[68] J.A. 470.
[69] J.A. 470 (emphasis added).
[70] J.A. 476.

advisement as "properly understood" to mean solely that the "NCIS agents would not call a lawyer for Appellant."[71] In addition to erroneously adopting the agent's perspective instead of Appellant's, this view addresses only the agent's comment that having counsel present at the interrogation is "not something we do."[72] It does not address his immediately preceding comments that if Appellant invoked his right to counsel, "we basically won't have a conversation with you," "[w]e don't get to hear your side of this story," and "we'll just go with what we've got," all of which equally convey an irrevocable termination of the interrogation that nullifies the *Miranda* right "to have the lawyer with him during interrogation."[73]

When coupled with the agent's pre-advisement explanation that "commanding officers are . . . more understanding when they've got a full picture of what happened," those same comments reasonably conveyed that if Appellant asked for a lawyer, he would be alienated from his CO's disposition decision regarding the criminal allegations against him.[74] In other words, the agent implied even before the rights advisement began that Appellant's termination of the interrogation would have adverse consequences with his CO—an implication lost on both the military judge and the lower court.

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[71] *Rivera*, slip op. at 11.
[72] J.A. 85, 91.
[73] *Miranda*, 384 U.S. at 471.
[74] J.A. 85, 90.

Thus, the agent erroneously advised not only that Appellant could *not* have a lawyer present during the interrogation, but that opting to consult with a lawyer would cut him off from cooperating in the investigation even if he wanted to do so. Since both the law and the agent's own trial testimony plainly contradict this view, the military judge's conclusion that the agent's explanation was a factually true, permissible way to advise a suspect of his *Miranda* rights was an abuse of discretion.

B. The two *Miranda* counsel rights are conjunctive and must be clearly advised as such. The military judge abused his discretion in approving the agent's either/or approach.

Second, the military judge's clearly erroneous finding conflicts as a matter of law with *Miranda* itself, which on its face requires that the two counsel rights must be advised as *con*junctive, not *dis*junctive: "an individual held for interrogation must be *clearly* informed that he has the right [1] to consult with a lawyer *and* [2] to have the lawyer with him during interrogation."[75]

Advising a suspect that he has a certain right, but then conveying that right does not really apply if he exercises some other right, does not *clearly* inform him that he has that right. Rather, as the Defense argued in its suppression motion, it conveys just the opposite: "it presents [Appellant] with an 'either or' decision. Either consult with an attorney before questioning or have an attorney present for questioning but not both. It also indicates if [Appellant] chooses one right he will

[75] *Miranda*, 384 U.S. at 471 (emphasis added).

lose the other."[76] And as the Defense further argued, the problem with creating this false, disjunctive framework—for counsel rights that *Miranda* specifically makes *con*junctive—is that suggesting "*Miranda* rights can be lost if one right is chosen over another frustrates the purpose of the *Miranda* protections."[77]

Here, the NCIS agent improperly framed the *Miranda* rights in the disjunctive from the very start, telling Appellant he had "the right to go consult with a lawyer *or* have them present during this questioning."[78] The agent then reinforced this either/or understanding by saying, "if you lawyer [sic], we -- we basically won't have a conversation with you. We don't get to hear your side of this story, okay? And we'll just go with what we've got. So, you've got that right. You can have them present. But we just -- that's not something we do."[79]

In plain terms, what the agent was reasonably conveying was, as the military judge himself tacitly found, that Appellant could go consult with a lawyer*, but could not actually have a lawyer present during the interrogation because invoking his right to counsel would simply (and irrevocably) end the interrogation*.[80] And that explanation does not reasonably convey that the two counsel rights are conjunctive,

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[76] J.A. 129.
[77] J.A. 129 (citation omitted).
[78] J.A. 85, 91 (emphasis added).
[79] J.A. 85, 91.
[80] *See* J.A. 275 (finding the agent "did not tell [Appellant] he did not have the right to have an attorney present, he simply told him that if he invoked that right it would end the interview").

or that the suspect has the "right to have an attorney present, not only at the outset of interrogation, but at all times."[81]

Two United States Circuit Courts of Appeals have explained why advising the two counsel rights in the disjunctive does not comply with *Miranda*. In *United States v. Wysinger*, the Seventh Circuit held that diverting from the proper conjunctive wording can "put a suspect to a false choice between talking to a lawyer before questioning or having a lawyer present during questioning, when *Miranda* clearly requires that a suspect be advised that he has the right to an attorney both before *and* during questioning."[82] Thus, the court found the rights warning "inadequate and misleading" in *Wysinger* where the agents not only used tactics to confuse the suspect about the start of questioning and divert him from exercising his rights, but "erroneously suggested that Wysinger had to choose between having a lawyer present before questioning or during questioning."[83]

The Second Circuit reached a similar conclusion in *United States v. Anderson*.[84] There, the court found the suspect's statements were involuntary even after a prior rights waiver where the investigator made "false and/or misleading" statements conveying that the suspect had to "choose between having an attorney

[81] *Powell*, 559 U.S. at 62.
[82] *United States v. Wysinger*, 683 F.3d 784, 799 (7th Cir. 2012) (emphasis added).
[83] *Id.* at 803.
[84] *United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991).

present during questioning or cooperating with the government."[85] That misleading tactic is similar to the one the NCIS agent used here: conveying that Appellant had to choose between invoking his right to counsel (which would end the interrogation) or cooperating by giving his CO a "full picture of what happened" without a lawyer present (when *Miranda* specifically requires *clearly* advising that Appellant could make such statements *with a lawyer present*).[86]

The military judge's approval of the agent's disjunctive approach to counsel rights also conflicts with this Court's predecessor's holding in *United States v. Tempia*, which applied *Miranda* to the military environment.[87] There, the accused "was only warned by the agents that he could consult with counsel" and was advised that "no attorney would be appointed to represent him in any law enforcement investigation."[88] The Court of Military Appeals found this advisement "deficient" and the resulting statements inadmissible because *Miranda* "squarely points out 'the person must be warned that he has a right to . . . the *presence of an attorney* . . . ."[89]

The Supreme Court has followed a similar approach in other cases. In *Duckworth v. Eagan*, the Court emphasized that while "*Miranda* does not require that attorneys be producible on call," the suspect must "be informed . . . that he has

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[85] *Id.* at 100.
[86] J.A. 85, 90.
[87] *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).
[88] *Id.* at 257.
[89] *Id.* (emphasis added).

the right to an attorney *before and during questioning*, and that an attorney would be appointed for him if he could not afford one."[90] Thus, the Court in *Duckworth* found it permissible to advise the suspect: "You have this right to the advice *and presence* of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."[91]

Here, unlike the advisement in *Duckworth*, the NCIS agent's explanation of Appellant's right to the presence of counsel during the interrogation had nothing to do with whether or when Appellant would be provided an attorney at no cost to himself. Rather, the agent explained that even if Appellant did opt to consult an attorney (military or civilian), having that attorney present during the interrogation was "not something we do," and that invoking his counsel right would simply end the interrogation and mean "we basically won't have a conversation with you" and "don't get to hear your side of this story."[92]

Subsequently, in *Florida v. Powell*, the Supreme Court held it permissible to advise a suspect of (a) his "right to talk to a lawyer before answering any of [the agents'] questions" *and* (b) his "right to use any of [his] rights at any time [he]

[90] *Duckworth*, 492 U.S. at 204 (emphasis added).
[91] *Id.* at 198 (emphasis added).
[92] J.A. 85, 91.

want[ed] during th[e] interview."[93] The Court found the first statement communicated that the suspect "could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway."[94] The Court therefore held that "[i]n combination, the two warnings reasonably conveyed [the suspect's] right *to have an attorney present, not only at the outset of interrogation, but at all times*."[95]

Here, the NCIS agent's explanation to Appellant is equally deficient under *Powell*, as it conveyed only that Appellant could consult with a lawyer prior to questioning, not "that he could exercise that right while the interrogation was underway."[96] Consequently, the agent's advisement did *not* "reasonably convey[] [Appellant's] right *to have an attorney present*, not only at the outset of interrogation, but at all times."[97] Rather, it conveyed precisely what the Defense argued in its motion was deficient: that "if [Appellant] chooses one right [to consult with counsel] he will lose the other [to have the lawyer present during the interrogation]."[98] Thus, it did not "reasonably 'convey to [the suspect] . . . [both counsel] rights as required by *Miranda*.'"[99]

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[93] *Powell*, 559 U.S. at 62.
[94] *Id.*
[95] *Id.* (emphasis added).
[96] *Id*.
[97] *Id.* (emphasis added).
[98] J.A. 129.
[99] *Duckworth*, 492 U.S. at 203 (quoting *Prysock*, 453 U.S. at 359).

For this reason, the military judge abused his discretion in finding "that if a suspect invokes their right to counsel then NCIS will simply terminate the interview" is a legally permissible way to advise custodial suspects of their counsel rights under *Miranda*.[100] To the contrary, this view is in direct conflict with *Miranda* and its progeny, and is therefore an erroneous view of the law that influenced his decision.

C. The military judge clearly erred in concluding that law enforcement can use ploys to obtain a rights waiver.

Third, the military judge's ruling is also based on another clearly erroneous view of the law that the lower court opinion attempts to gloss over: that while the NCIS agent's misleading explanation "was made in an attempt *to persuade [Appellant] to waive his rights*," such tactics are a permissible way to obtain a rights waiver because investigative "ploys may play a part in the suspect's decision to confess."[101] In fact, the law holds just the opposite. While law enforcement agents are permitted to use ploys and trickery to elicit admissions *after* a valid rights waiver,[102] the Supreme Court squarely held in *Miranda* itself that "*any* evidence that

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[100] J.A. 275.
[101] J.A. 275 (emphasis added).
[102] *See, e.g.*, *Frazier v Cupp*, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."); *United States v. Sojfer*, 47 M.J. 425, 428-30 (C.A.A.F. 1998) (holding confession was voluntary despite misrepresentations and trickery employed by NCIS agents during interrogation).

the accused was . . . tricked, or cajoled *into a waiver* will, of course, show that the defendant did not voluntarily waive his privilege."[103]

This is because, as the Supreme Court has explained, "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or *deception*."[104] Accordingly, "the use of trickery, artifice, and subterfuge by investigators . . . in *obtaining* a waiver of rights or in dissuading invocation of rights is not permissible."[105] Indeed, even the case the military judge cited in reaching the opposite (and clearly erroneous) conclusion, *United States v. Jones*, involves an investigator's use of ploys or trickery to elicit incriminating statements *only after the suspect had already waived his rights*, not as a means of obtaining the rights waiver itself.[106]

Impermissibly using a ploy as a means of obtaining the rights waiver itself is exactly what occurred here. The NCIS agent misled Appellant into waiving his rights by creating a false dichotomy of either having a chance to tell his side of the story (without a lawyer), or invoking his right to counsel and having his CO make a disposition decision without hearing from him (since his invocation would mean "we

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[103] *Miranda*, 384 U.S. at 476 (emphasis added).
[104] *Moran*, 475 U.S. at 421 (emphasis added).
[105] *Erie*, 29 M.J. at 1012 (citing *Innis*, 446 U.S. at 291) (emphasis added).
[106] *See Jones*, 34 M.J. at 904-05 (discussing how, after obtaining the rights waiver, the investigator misled the appellant into believing his co-actor in the crime had "ratted" on him as a means of getting him to confess).

basically won't have a conversation with you" and "don't get to hear your side of this story" and "we'll just go with what we've got").

The lower court opinion defends the military judge's clear misinterpretation of the law as merely "inapplicable" and goes on to find it "clear that he used the proper framework and determined that Appellant's waiver was knowing, intelligent, and voluntary—and therefore not the result of Appellant being tricked into believing that the rights to counsel did not apply to him."[107] Then, in virtually the same breath (i.e., the next sentence), the opinion concludes that "even if the military judge did hold an erroneous view of the law," it "did not influence the military judge's decision" since he found the NCIS agent "did not lie" and Appellant "understood his rights."[108] This revisionist-historical approach to both the evidence and the ruling is clearly erroneous on both the facts and the law.

First, as discussed above, finding the agent did not lie to Appellant through at least a material omission is belied by the agent's own self-contradictory statements about how the right to the presence of the counsel would actually apply to Appellant's interrogation. The agent intentionally led Appellant to believe during the rights advisement that invoking the right to counsel would simply terminate the interview and mean "we basically won't have a conversation with you," "[w]e don't

[107] *Rivera*, slip op. at 11.
[108] *Id.* at 11-12.

get to hear your side of this story," and "we'll just go with what we've got," since having counsel present is "not something we do." But the agent's trial testimony supports that just the opposite was true: that if, upon invoking his right to counsel, "[Appellant] wanted to go and get a defense attorney and return and continue the interrogation, we would have done that, yes."[109] And the agent conceded that this additional, crucial information was *not* included in his explanation to Appellant.

Second, the further finding that Appellant actually "understood his rights" in this context is even clearer error, as it necessarily views the issue from the agent's perspective, when the law requires that "[i]n determining whether there has been a valid waiver, a court must focus on the perceptions of the *accused*."[110] Nothing about the agent's explanation during the rights advisement reasonably conveyed to Appellant that he had the "right to have an attorney *present*, not only at the outset of interrogation, but at all times."[111] Rather, it reasonably conveyed just the opposite: that invoking his right to a lawyer would simply (i.e., irrevocably) terminate the interview and mean that Appellant's CO would not receive a "full picture of what happened" because NCIS would just "go with what we've got" without getting Appellant's side of the story.

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[109] J.A. 470.
[110] *Erie*, 29 M.J. at 1012 (A.C.M.R. 1990) (citing *Innis*, 446 at 291) (emphasis added).
[111] *Powell*, 559 U.S. at 62 (emphasis added).

Third, the lower court's conclusion that the military judge's erroneous view of the law "did not influence" his ruling is belied by that very same ruling.[112] The military judge specifically concluded that "if [the NCIS agent]'s explanation of the right to an attorney was a factor in [Appellant]'s decision to waive his rights, it was a product of his own balancing and competing considerations."[113] But if the agent's misleading explanation was a factor in Appellant's waiver decision, then it was a factor that effectively *misled* the balancing and competing considerations by which Appellant reached that decision.

And that means Appellant's waiver was not knowing and intelligent, since he did not have a "*full* awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[114] Rather, the agent's misleading explanation gave Appellant, at best, an incomplete awareness (and, at worst, a completely incorrect one) of the nature of the right being abandoned—i.e., the *Miranda* right to the presence of counsel—as it conveyed that invoking the right to counsel would simply end the interrogation. But that is not the right that *Miranda* held is guaranteed by the Fifth Amendment: the right to the *presence of an attorney at the interrogation.* Indeed, when combined with his other comments, the agent's explanation reasonably conveyed exactly what Appellant told the military judge he

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[112] *Rivera*, slip op. at 11.
[113] J.A. 275.
[114] *Mott*, 72 M.J. at 330 (citing *Berghuis*, 560 U.S. at 370) (emphasis added).

took it to mean: that he "did not have a right to have a lawyer present during the interview because that right does not apply to NCIS . . . ."[115]

A knowing and intelligent waiver of the *Miranda* right to the presence of counsel does not (and did not) occur under such circumstances. The controlling precedent is clear that law enforcement cannot use such ploys to induce custodial suspects to waive their rights, and the military judge abused his discretion by reaching a decision that was influenced by his erroneous view of that law.

D. The erroneous admission of Appellant's confession was not harmless, as the Government relied on his admissions throughout its case to obtain a conviction for sexual assault.

Finally, the erroneous admission of Appellant's statements to NCIS was not harmless beyond a reasonable doubt.[116] As the Supreme Court explained in *Arizona v. Fulminante*,

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.[117]

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[115] J.A. 117.

[116] *See Mott*, 72 M.J. at 332 (citing *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009); *Freeman*, 65 M.J. at 453 (citing *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991)).

[117] *Fulminante*, 499 U.S. at 296.

For this reason, appellate courts are "require[d] . . . to exercise extreme caution before determining that the admission of the confession at trial was harmless."[118] And a confession is "not harmless beyond a reasonable doubt if 'there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction.'"[119]

Here, there is far more than a reasonable possibility that Appellant's confession contributed to his conviction, and the lower court's opinion does not suggest otherwise. To prove the sexual assault charge of which Appellant was convicted, the Government had to prove beyond a reasonable doubt that Appellant vaginally penetrated the complaining witness without her consent, for which Appellant's incriminating statements to NCIS were the key evidence. Among other things, he admitted to NCIS that he "may have beaten or raped" the complaining witness, which he clarified meant "unwanted sexual . . . advantages," and that he had "stuck [his] dick in her vagina [when she was asleep]" after he "kind of pulled both of [their pants] down."[120]

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[118] *Mott*, 72 M.J. at 332 (quoting *Fulminante*, 499 U.S. at 296).
[119] *Mott*, 72 M.J. at 332 (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007); *Chapman v. California*, 386 U.S. 18, 24 (1967)) (emphasis added). *See also Fulminante*, 499 U.S. at 296 ("it must be determined whether the [Government] has met its burden of demonstrating that the admission of the confession . . . did not contribute to [the] conviction.").
[120] J.A. 85, 104-106.

The Government capitalized on these graphic, incriminating statements throughout the trial, discussing them in opening statements, playing the interrogation video in open court, and arguing them extensively in its closing and rebuttal arguments.[121] While other evidence may have corroborated that a sexual act occurred, Appellant's statements to NCIS were very probative, damaging evidence on the crucial element that the charged act was *without consent*. Indeed, the confession was so vital to its case that the Government argued in rebuttal that the other evidence corroborated *Appellant's confession* (as opposed to the complaining witness's allegations): "There is consistent evidence for every single thing [Appellant] says. He raped her. He penetrated her while she was asleep. He stuck his dick in her vagina."[122]

Given the incriminating nature of these admissions, it is no surprise that the members convicted Appellant of the one sexual offense he admitted in his statements to NCIS—vaginal penetration without consent—but acquitted him of other sexual offenses alleged by the complaining witness.[123] Under these circumstances, there is far more than a reasonable possibility that Appellant's confession "might have contributed" to his conviction of sexual assault.

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[121] J.A. 280, 281, 284-285, 287-289, 426-432, 568, 570, 574-577, 579, 581-582, 606-608, 610, 612.
[122] J.A. 608.
[123] J.A. 83, 613.

Conclusion

WHEREFORE, Appellant respectfully requests that this Court reverse the lower court's decision and set aside the guilty findings for Appellant's conviction under Article 120, UCMJ (Charge II and Specification 3 thereunder) and the sentence.

Respectfully submitted,

Arthur L. Gaston III
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Washington, DC 20374
(202) 685-7077
arthur.l.gaston2.mil@us.navy.mil
CAAF Bar No. 37756

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court, and copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on April 29, 2026.

Arthur L. Gaston III
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Washington, DC 20374
(202) 685-7077
arthur.l.gaston2.mil@us.navy.mil
CAAF Bar No. 37756

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Arthur L. Gaston III
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Washington, DC 20374
(202) 685-7077
arthur.l.gaston2.mil@us.navy.mil
CAAF Bar No. 37756