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	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202400304 USCA Dkt. No. _____/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 his discretion in denying the defense motion to suppress Appellant's statements to NCIS?

Statement of Statutory Jurisdiction

As 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 also found him guilty, pursuant to his pleas, of wrongful use of lysergic acid diethylamide in violation of Article 112a, UCMJ.[4] The military judge sentenced him to forty-eight months' confinement, reduction to E-1, and a dishonorable discharge.[5] The convening authority approved the sentence.[6] The military judge then entered the findings and sentence into judgment.[7]

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[1] 10 U.S.C. § 866(b)(3).
[2] 10 U.S.C. § 867(a)(3).
[3] R. at 406, 1465.
[4] R. at 406, 419, 1507.
[5] R. at 1501-02.
[6] Convening Authority Action.
[7] Entry of Judgment.

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

Statement of Facts

A. During his *Miranda* 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 sexual assault allegations against Appellant, the Naval Criminal Investigative Service (NCIS) had him brought in for what the Government concedes was a custodial interrogation.[9] As a precursor to the rights advisement, the lead NCIS agent told Appellant that when determining what to do with criminal allegations, commanding officers "are more understanding when they've got full picture of what happened."[10]

The agent then had Appellant start reading through the rights advisement form and asked if he had questions about any of the rights listed, to which Appellant responded he was "iffy" about his counsel rights.[11] The form stated, pursuant to *Miranda v. Arizona*, that Appellant had two separate rights to counsel: (a) "the right to consult with a [civilian and/or military] lawyer prior to questioning" and (b) "the

[8] *United States v. Rivera*, No. 202400304, slip op. at 12 (N-M. Ct. Crim. App. Nov. 13, 2025).
[9] R. at 352, 1058, 1140; Appellate Ex. LX at 15; *Rivera*, slip op. at 9.
[10] Appellate Ex. XII at 2; Appellate Ex. LXIV at 5-6.
[11] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6.

right to have [his] retained lawyer and/or appointed military lawyer present during this interview."[12]

In response to Appellant's statement that he was "iffy" about his counsel rights, SA Foxtrot provided the following explanation:

> 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 say we're done here, you know what I mean?"[13]

The NCIS agent later testified that his comment about the presence of a lawyer being "not something we do" was designed to convey that there was "no on-call defense attorney" that NCIS could logistically arrange for; however, he conceded that was not what he explained to Appellant and that he was not aware there was a duty defense attorney on call 24/7.[14] The agent also testified that if Appellant had requested to have a defense attorney present during the interrogation, "[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*

[12] Appellate Ex. XLIX at 3.
[13] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6.
[14] R. at 314-15.

that, yes."[15] He conceded this, too, was not what he had told Appellant during the rights advisement.[16]

As it was, the explanation of counsel rights that the agent provided during the rights advisement led Appellant 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."[17] As Appellant later told the military judge, "[b]ut for [the agent]'s explanation, [he] would have requested an attorney," as he did at a subsequent interrogation.[18] After considering the agent's explanation, Appellant waived his rights and made incriminating statements that were later used against him at trial.[19]

B. The military judge denied the motion to suppress Appellant's statements to NCIS, viewing the agent's explanation of counsel rights as both factually true and legally permissible under *Miranda*.

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.[20] The Defense argued Appellant did not knowingly and intelligently

[15] R. at 1073 (emphasis added).
[16] R. at 1079.
[17] Appellate Ex. XLIX at 6.
[18] *Id.*
[19] Appellate Ex. XII at 2; Appellate Ex. LI at 6-7, 19-22.
[20] Appellate Ex. XLVIII.

waive his rights because the NCIS agent's explanation had mischaracterized his right to counsel.[21] Specifically, the Defense argued:

> This explanation does not reasonably convey the right to have an attorney present not only at the outset of interrogation, but at all times; instead 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 lose the other.[22]

The military judge denied the motion in a written ruling.[23] He found it to be true as a "matter of common practice that if a suspect invokes their right to counsel then NCIS will simply terminate the interview."[24] He also found the NCIS agent's explanation of the counsel right in this manner "was made in an attempt to persuade [Appellant] to waive his rights," but that such "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 level of compulsion or coercion."[25] He concluded 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."[26] He found that "if [the NCIS agent]'s explanation of the right to an

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[21] *Id.* at 9-13; R. at 341, 345.
[22] Appellate Ex. XLVIII at 11 (internal quotation marks and citations omitted).
[23] Appellate Ex. LX.
[24] *Id.* at 15.
[25] *Id.* (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))).
[26] *Id.*

attorney was a factor in [Appellant]'s decision to waive his rights, it was a product of his own balancing and competing considerations."[27]

C. The Government relied on Appellant's statements 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.[28] The members acquitted Appellant of other offenses alleged by the complaining witness, but convicted him of the offense he had made incriminating statements about during his interrogation by NCIS.[29]

D. The lower court upheld the military judge's ruling.

The lower court held the military judge did not abuse his discretion in admitting Appellant's statements.[30] 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, despite finding his "discussion about the permissibility of investigator's use of 'ploys to mislead a suspect' is inapplicable in the rights advisement context."[31]

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[27] *Id.*
[28] R. at 864, 865, 868-69, 871-73, 1031-35, 1409, 1411, 1415-18, 1420, 1422-23; 1447-49, 1451, 1453.
[29] R. at 1465.
[30] *Rivera*, slip op. at 10.
[31] *Id.*

Alternatively, the lower court reasoned that "even if the military judge did hold an erroneous view of the law based on the idea that an investigator may lie to an accused during the rights advisement," it did not influence the military judge's decision because he "affirmatively found that [the NCIS agent] did not lie to Appellant and Appellant understood his rights."[32] The court concluded Appellant "was not objectively misinformed about his right to counsel," since the agent's explanation of the *Miranda* right to the presence of counsel was "properly understood" to mean the "NCIS agents would not call a lawyer for Appellant."[33] 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."[34]

Summary of Argument

This Court should grant review because the lower court's opinion conflicts with Supreme Court, United States Circuit Court, and this Court's precedent and in doing so decides an important question of law that has not been, but should be, settled by the Court.[35] The opinion affirms the military judge's conclusion that law enforcement are permitted to advise suspects at custodial interrogations that if they

[32] *Id.* at 12.
[33] *Id.* at 11.
[34] *Rivera*, slip op. at 12 (citation omitted).
[35] CAAF Rule 21(b)(5)(A), (B)(i), (ii), (v).

invoke their 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."[36]

The military judge's approval (and lower court's ratification) of this "explanation" of *Miranda* counsel rights is inconsistent with the Supreme Court's actual conclusion in that case: that "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*."[37] The ruling therefore conflicts with the Supreme Court's controlling holding in *Miranda* that prior to any custodial interrogation a suspect must be "*clearly* informed that he has the right to consult with a lawyer *and to have the lawyer with him during interrogation*."[38] It also conflicts with the case precedent of both this Court and multiple United States Circuit Courts of Appeals that the two *Miranda* counsel rights are *con*junctive, not *dis*junctive as the agent's explanation reasonably caused Appellant to believe.

[36] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6 (emphasis added).
[37] *Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (emphasis added).
[38] *Id.* at 470-71 (1966) (emphasis added).

Reasons for Granting Review

This Court should settle whether law enforcement can advise custodial suspects that invoking their right to counsel will simply terminate the interrogation, nullifying their *Miranda* right to have counsel present at the interrogation.

"[T]he right to have *counsel present at the interrogation* is indispensable to the protection of the Fifth Amendment privilege[.]"[39] Accordingly, the Supreme Court has 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."[40]

Contrary to this controlling holding, the lower court and the military judge have ratified a new approach that permits law enforcement agents to effectively eliminate the latter of those two rights. Now, agents can convey to custodial suspects that the *Miranda* right to have counsel present during the interrogation is essentially nonexistent because invoking the *Miranda* right to consult with counsel will simply terminate the interrogation. But in order for a waiver of rights to be knowing and intelligent, a suspect must have "*full* awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[41] And "[i]n

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[39] *Id.* at 469 (emphasis added).
[40] *Id.* at 471 (emphasis added).
[41] *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010)).

determining whether there has been a valid waiver, a court must focus on the perceptions of the *accused*," not the agent.[42]

Here, after being told how important it was for his CO to get his side of the story, Appellant was advised that if he invoked his right to consult with 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."[43] Taken together, these statements reasonably convey that invoking the right to consult with counsel will effectively negate the right to have counsel present at the interrogation, such that Appellant did not have a *full* (or even correct) understanding of the nature of the *Miranda* counsel rights being abandoned.

Finding a voluntary, knowing, and intelligent waiver of *Miranda* rights under such circumstances, which must be analyzed from Appellant's perspective, is an abuse of discretion. "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."[44] Here, the military judge abused his discretion in multiple ways, which this Court should review.

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[42] *United States v. Erie*, 29 M.J. 1008, 1012 (A.C.M.R. 1990) (citing *Rhode Island v. Innis*, 446 U.S. 291 (1980)) (emphasis added).
[43] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6 (emphasis added).
[44] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

A. The agent's explanation to Appellant was not factually true, and plainly communicated that he would not be able to exercise his right to have counsel present at the interrogation.

First, the military judge clearly erred in finding that 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.[45] Based on the agent's own testimony, "simply" (which means "[m]erely; only"[46]) terminating the interview is not what NCIS would have done "if the accused [had] wanted the attorney present."[47] Rather, the agent testified that if "[Appellant] wanted to go and get a defense attorney and return and continue the interrogation, we would have done that, yes."[48] And the agent conceded that "[n]o," that is not what he had advised Appellant when he was trying to get him to waive his rights.[49]

Nor does the lower court absolve the military judge of this clear error by concluding the agent's comments could be "properly understood" to mean only that the "NCIS agents would not call a lawyer for Appellant."[50] In addition to erroneously adopting the agent's perspective instead of Appellant's, this conclusion addresses

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[45] Appellate Ex. LX at 15 (emphasis added).
[46] *Simply*, *The American Heritage Dictionary of the English Language* (5th ed. 2018).
[47] R. at 1073.
[48] R. at 1073.
[49] R. at 1079.
[50] *Rivera*, slip op. at 11.

only the agent's comment that having counsel present at the interrogation is "not something we do."[51] It does not address the agent's immediately preceding comments that if Appellant invoked his right to consult with 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," which all equally convey an irrevocable termination of the interrogation obviating the *Miranda* right to the presence of counsel.

B. The *Miranda* counsel rights are conjunctive, and the lower court's ratification of the agent's disjunctive advisement conflicts with United States Circuit Court precedent and *United States v. Tempia*.

The military judge's clearly erroneous finding also conflicts as a matter of law with *Miranda* itself, where the Supreme Court specifically held "the right . . . *to have the lawyer with him during interrogation*" is a right a criminal suspect in a custodial interrogation not only has, but must be "*clearly informed* that he has."[52] 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 on the motion to suppress, 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

[51] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6 (emphasis added).
[52] *Miranda*, 384 U.S. at 471 (emphasis added).

indicates if [Appellant] chooses one right he will lose the other."[53] 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."[54]

Here, the NCIS agent indisputably framed the *Miranda* rights in the *dis*junctive, telling Appellant from the very start of his explanation of counsel rights that he had "the right to go consult with a lawyer *or* have them present during this questioning."[55] The agent then compounded the issue 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.[56]

In plain terms, he was saying: *you can go consult with a lawyer, but you cannot actually have a lawyer present because invoking the right to counsel will simply (and irrevocably) end the interrogation*. This is not a conjunctive right-to-counsel advisement.

Miranda on its face requires that these two different counsel rights be advised as *con*junctive, not *dis*junctive: "an individual held for interrogation must be *clearly*

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[53] Appellate Ex. XLVIII at 11 (internal quotation marks and citations omitted).
[54] *Id.*
[55] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6 (emphasis added).
[56] Appellate Ex. XII at 2; Appellate Ex. LXIV at 6 (emphasis added).

informed that he has the right [1] to consult with a lawyer *and* [2] to have the lawyer with him during interrogation."[57] At least two United States Circuit Courts of Appeals have explained why this is so, and the lower court's opinion decides a question of law in conflict with both these Circuit Courts, warranting this Court's review.[58]

In *United States v. Wysinger*, the Seventh Circuit explained that diverting from this 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."[59] The court found the rights warning "inadequate and misleading" in that case where the agents used tactics to confuse the suspect about the start of questioning and divert him from exercising his rights and "*erroneously suggested that Wysinger had to choose between having a lawyer present before questioning or during questioning*."[60]

The Second Circuit reached a similar conclusion in *United States v. Anderson*.[61] The court found the suspect's statements were involuntary even after a prior rights waiver where the investigator made "false and/or misleading" statements

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[57] *Miranda*, 384 U.S. at 471 (emphasis added).
[58] CAAF Rule 21(b)(5)(B)(v).
[59] *United States v. Wysinger*, 683 F.3d 784, 799 (7th Cir. 2012) (emphasis added).
[60] *Id.* at 803 (emphasis added).
[61] *United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991).

conveying that the suspect had "to choose between having an attorney present during questioning or cooperating with the government."[62] That is precisely what the NCIS agent's explanatory remarks did here, conveyed that Appellant had to choose between invoking his right to counsel (which would end the interrogation) and giving his CO a "full picture of what happened" by making statements without a lawyer present (when *Miranda* specifically requires him to be *clearly* advised that he could make such statements *with a lawyer present*).[63]

The military judge's (and lower court's) tacit approval of the NCIS agent's impermissible, disjunctive approach to *Miranda* counsel rights also conflicts with this Court's predecessor's application of *Miranda* to the military environment in *United States v. Tempia*,[64] further warranting this Court's review.[65] In *Tempia*, the accused "was only warned by the agents that he could consult with counsel" and was told "no attorney would be appointed to represent him in any law enforcement investigation."[66] The court found this advice "deficient" and concluded the resulting statements were inadmissible under *Miranda*, which "squarely points out 'the person must be warned that he has a right to . . . the *presence of an attorney* . . . ."[67]

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[62] *Id.* at 100.
[63] Appellate Ex. XII at 2; Appellate Ex. LXIV at 5-6.
[64] *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).
[65] CAAF Rule 21(b)(5)(B)(i).
[66] *Tempia*, 37 C.M.R. at 257.
[67] *Id.* (emphasis added).

C. The military judge clearly erred in ruling that law enforcement can use ploys to obtain a waiver of rights, and the lower court's attempt to sidestep this error will cause disastrous results in the field.

The military judge's ruling is also based on another erroneous view of the law: that while the NCIS agent's misleading explanation "was made in an attempt *to persuade [Appellant] to waive his rights*," that is a permissible tactic since investigative "ploys may play a part in the suspect's decision to confess."[68] To the contrary, the opposite is true. While law enforcement agents are allowed to use ploys and trickery to elicit admissions from a suspect *after* a valid rights waiver,[69] the Supreme Court specifically held in *Miranda* that "*any* evidence that the accused was . . . tricked, or cajoled *into a waiver* will, of course, show that the defendant did not voluntarily waive his privilege."[70] This is because "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*."[71] Accordingly, "the use of

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[68] *Id.* (emphasis added).

[69] *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).

[70] *Miranda*, 384 U.S. at 476 (emphasis added).

[71] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

trickery, artifice, and subterfuge by investigators . . . in *obtaining* a waiver of rights or in dissuading invocation of rights is not permissible."[72]

Indeed, 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.[73]

And using a ploy as a means of obtaining the 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 it would mean "we 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 obvious misinterpretation of the law as merely "inapplicable" and finds 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

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[72] *Erie*, 29 M.J. at 1012 (citing *Innis*, 446 U.S. at 291) (emphasis added).
[73] *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).

into believing that the rights to counsel did not apply to him."[74] Alternatively, a few sentences later the lower court 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 agent "did not lie" and that Appellant "understood his rights."[75]

This Court should review the lower court's revisionist-historical approach to both the evidence and the military judge's ruling, which will cause chaos in the field and serve to eviscerate *Miranda*. As described above, the agent's own testimony supports that he misled Appellant into believing one thing during the rights advisement (that invoking the right to counsel would mean "[w]e don't get to hear your side of this story") when actually the very opposite was true (that if "[Appellant] wanted to go and get a defense attorney and return and continue the interrogation, we would have done that, yes").[76] Now, agents can use such deception to trick suspects into waiving rights, testify at trial that what they told the suspect is not what actually would have happened, and the court of criminal appeals can wave away these clear *Miranda* problems by saying, essentially, "it did not matter in the first place." That is not a proper application of the abuse of discretion standard or the underlying case law.

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[74] *Rivera*, slip op. at 11.
[75] *Id.* at 11-12
[76] R. at 1073.

D. The error was prejudicial because Appellant's admissions to NCIS were central to the Government's case.

Finally, this constitutional error was not harmless beyond a reasonable doubt.[77] As this Court has explained, appellate courts are "require[d] . . . to exercise extreme caution before determining that the admission of the confession at trial was harmless."[78] That is because "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[79]

Here, that was certainly the case, and the lower court's opinion does not suggest otherwise. Not only was Appellant's unlawfully obtained confession the focus of the Government's case from beginning to end, but he was acquitted of every offense alleged by the complaining witness except the one he admitted to NCIS. Thus, there is far more than "a reasonable possibility that the evidence complained of *might* have contributed to the conviction.'"[80]

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[77] *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)).
[78] *Mott*, 72 M.J. at 332 (quoting *Fulminante*, 499 U.S. at 296).
[79] *United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002).
[80] *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 ("[I]t must be determined whether the [Government] has met its burden of demonstrating that the admission of the confession . . . did not contribute to [the] conviction.").

Conclusion

Accordingly, this Court should grant the Petition for Review.

Respectfully submitted,

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Certificate of Compliance

This Supplement complies with the type-volume limitations of Rule 21(b) because it does not exceed 9,000 words and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Appendix

A. *United States v. Rivera*, No. 202400304, slip op. (N-M. Ct. Crim. App. Nov. 13, 2025).

United States Navy–Marine Corps Court of Criminal Appeals

Before
DALY, GROSS, and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

Nathan M. RIVERA
Private First Class (E-2),
U.S. Marine Corps
Appellant

No. 202400304

Decided: 13 November 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Adam J. Workman

Sentence adjudged 3 February 2024 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of members with enlisted representation, with sentencing by military judge alone. Sentence in the Entry of Judgment: confinement for 48 months, reduction to pay grade E-1, and a dishonorable discharge.[1]

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[1] Appellant was credited with 7 days of confinement credit. The military judge also awarded 240 days of credit for restriction tantamount to confinement. *See United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

For Appellant:
Captain Arthur L. Gaston III, JAGC, USN

For Appellee:
Lieutenant Commander Philip J. Corrigan, JAGC, USN (argued)
Lieutenant Erin H. Bourneuf, JAGC, USN (on brief)
Lieutenant Lan T. Nguyen, JAGC, USN (on brief)

Senior Judge GROSS delivered the opinion of the Court in which Chief Judge DALY and Judge de GROOT joined.

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

GROSS, Senior Judge:

Appellant seeks reversal of his convictions for one specification of violation of Article 112a, Uniform Code of Military Justice (UCMJ) and one specification of violation of Article 120, UCMJ,[2] on the basis that the military judge improperly denied his motion to suppress statements given to law enforcement. Central to this appeal is Appellant's claim that agents of the Naval Criminal Investigative Service (NCIS) misled him when advising him of his rights under the Fifth Amendment and Article 31(b), UCMJ.[3] Because we hold that the military judge did not abuse his discretion in finding that Appellant's waiver of his rights to remain silent and to counsel was knowing, intelligent, and voluntary, we affirm the findings and the sentence.

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[2] 10 U.S.C. §§ 912a, 920.

[3] Although Appellant's brief seeks reversal of all of the findings and sentence, counsel for Appellant conceded at oral argument that Appellant's guilty plea to the Article 112a charge and specification waived his claim for error with respect to that charge and specification. We agree, and summarily affirm those findings.

I. BACKGROUND

Appellant attended a party at the home of Sergeant (Sgt) Lima on 14 October 2022 in base housing located on Marine Corps Base Camp Lejeune.[4] Appellant was friends with Sgt Lima's roommate at the time, Corporal Bravo. Corporal Bravo was friends with another partygoer, Navy Hospital Corpsman Third Class (HM3) Charlie.[5]

Most of the partygoers engaged in heavy drinking. Corporal Bravo testified that he had more than 5 drinks, and HM3 Charlie testified that she had about 16 shots of hard liquor. Appellant was also drinking alcohol and had taken two "tabs" of LSD at around 2100 prior to attending the party. During the party, Cpl Bravo became sick due to intoxication and threw up. Petty Officer Charlie helped Cpl Bravo to bed, gave him some food and water, and left him a trash bag to vomit into. She then returned to the living room and eventually was there only with Sgt Lima and Appellant.

The three sat on the couch in the living room and watched a movie together. During the movie, Appellant tried to get closer to HM3 Charlie, and she became uncomfortable with his attempts. She then left the living room and went to lie down in the room with Cpl Bravo. She chose to lie on the floor next to Cpl Bravo's bed.

Petty Officer Charlie woke to a "stabbing" sensation in her anus and realized that she was being penetrated by Appellant's penis. She resisted by trying to push him off and wriggling. She testified that Appellant's penis eventually slipped out of her anus, and he then penetrated her vulva with his penis without her consent. As Appellant was penetrating her vagina, HM3 Charlie began screaming for Cpl Bravo, but Cpl Bravo did not wake up or respond. When the assault ended, HM3 Charlie finally was able to shake Cpl Bravo awake. She then left the house and went to the naval hospital where she underwent a Sexual Assault Forensic Examination (SAFE). The nurse examiner noted findings consistent with sexual activity and took swabs of HM3 Charlie's genitalia that were sent to the U.S. Army Criminal Investigation Laboratory (USACIL) and indicated the presence of Appellant's DNA and semen in HM3 Charlie's vagina.

The same day HM3 Charlie reported the sexual assault to the naval hospital, NCIS special agents (SAs) were notified of the allegations against Appellant. Appellant was woken up by his superior and driven to the NCIS field office where SA Foxtrot interrogated Appellant. Prior to the interrogation, SA

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[4] All names contained within this opinion other than those of Appellant, counsel, and military judges, are pseudonyms.

[5] By the time of trial, Cpl Bravo and HM3 Charlie were married.

Foxtrot told Appellant that he thought Appellant had a "a pretty good idea of why" he was talking with NCIS SAs. Special Agent Foxtrot also said that he felt that it was important to give Appellant the opportunity to tell the agents what had happened. He further told Appellant that it would be up to Appellant's commanding officer to decide what to do with the investigation, and then said, "I have found that commanding officers are not lenient, but they are more understanding when they've got the full picture of what happened."[6] He continued, saying,

> I want to stress to you . . . [it] is super important that we get your side of the story, okay? I want to have a conversation with you about last night, but before we do that, I'm going to read you your rights to let you know that you don't have to talk to me. You can get a lawyer.[7]

Special Agent Foxtrot then continued telling Appellant that he felt it was really important to hear from Appellant, but reminded him several times that it was "only if you want to talk to us." Special Agent Foxtrot then proceeded to provide Appellant with a form that listed his rights under Article 31(b), UCMJ. The form stated, in relevant part, that Appellant had been advised by SA Foxtrot that he was suspected of sexual assault in violation of Article 120, UCMJ, and that: (1) Appellant had the right to remain silent; (2) any statement Appellant made could be used against him in a trial by court-martial; (3) Appellant had the right to consult a lawyer prior to questioning – this lawyer could be a civilian lawyer retained by Appellant or a military lawyer appointed at no cost to Appellant; (4) Appellant could have a lawyer present during the interview; and (5) Appellant could terminate the interview at any time.[8]

Special Agent Foxtrot asked Appellant, "Do you understand all of these? All these rights one through five?" to which Appellant responded, "I'm a little iffy on three."[9] Special Agent Foxtrot responded,

> Three? Okay, so you have the right to consult a lawyer prior to any questioning where it could be a 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

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[6] App. Ex. LI at 5.

[7] App. Ex. LI at 6.

[8] App. Ex. XLIX at 3.

[9] App. Ex. LI at 6.

> like the shows 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 slam it on the thing and he says 'we're done here,' you know what I mean?[10]

Appellant responded simply, "Yeah" and SA Foxtrot continued, "That's not, that's not what happens. But that's—that's one of your rights. Do you understand what that means?" Appellant nodded and then ultimately agreed to waive his rights and speak with law enforcement.[11] During the course of his interview with SA Foxtrot, Appellant initially disclaimed having a detailed memory of the night, but eventually admitted to remembering going into Cpl Bravo's room and trying to wake Cpl Bravo. He admitted that when Cpl Bravo did not wake up, he penetrated HM3 Charlie's vagina with his penis while he believed she was asleep.

Prior to trial, Appellant filed a motion to suppress his statements to SA Foxtrot. As an enclosure to his motion, Appellant signed an affidavit in which he stated that SA Foxtrot's "explanation" with regard to his right to counsel

> led me to believe that I did not have a right to have a lawyer present during the interview because that right does not apply to NCIS or me as a Marine. Because of [SA Foxtrot's] explanation, I believed the right to consult with an attorney before questioning and the right to have an attorney present during questioning only applies to civilian law enforcement, not NCIS because it's not "what we do."[12]

The military judge heard evidence, including the testimony of SA Foxtrot on the motion to suppress. Although the Defense did submit Appellant's affidavit, Appellant did not testify at the hearing, despite his right to do so for the limited purpose of the suppression motion pursuant to Military Rule of Evidence 304(f)(3). The military judge also watched the video of Appellant's confession. During the hearing, SA Foxtrot testified that he was not trying to confuse Appellant and that what he intended to convey by the language quoted

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[10] App. Ex. LI at 6.

[11] App. Ex. LI at 6-7.

[12] App. Ex. XLIX.

above was that the logistics of obtaining an attorney was not like what is portrayed on television.

After hearing argument, the military judge issued a 17-page ruling denying Appellant's motion to suppress. In his ruling, the military judge took into account the fact that Appellant was 22 years old at the time of the interrogation, had more than 2.5 years of service, had previously studied mechanical engineering in college, and was intelligent – having a GT score of 126 and an AFQT of 92/99.[13] The military judge also stated that

> Nothing the Agent told [Appellant] was factually untrue. It is a matter of common practice that if a subject invokes their right to counsel then NCIS will simply terminate the interview. SA [Foxtrot] did not tell him he did not have the right to have an attorney present, he simply told him that if he invoked that right it would be the end of the interview . . . . While SA [Foxtrot's] explanation was made in an attempt to persuade [Appellant] to waive his rights, it has long been held 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 level of compulsion or coercion . . . . The Court does find that if SA [Foxtrot's] explanation of the right to an attorney was a factor in [Appellant's] decision to waive his rights, it was the product of his own balancing and competing considerations.[14]

Appellant subsequently pleaded guilty to one specification of use of LSD, and not guilty to three specifications of sexual assault – two for penetration of HM3 Charlie's anus with his penis and one for penetration of HM3 Charlie's vagina with his penis without her consent. After trial on the merits, the members convicted Appellant of penetrating HM3 Charlie's vagina with his penis, but acquitted him of the other two specifications. Appellant then elected sentencing by military judge alone, and the military judge sentenced him to confinement for 48 months, reduction to E-1, and a dishonorable discharge.

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[13] App. Ex. LX at 14.

[14] App. Ex. LX at 15 (citing *Illinois v. Perkins*, 496 U.S. 292 (1990)).

II. DISCUSSION

A. The military judge did not abuse his discretion in denying Appellant's motion to suppress.

1. Law

We review the military judge's denial of a motion to suppress Appellant's statements for an abuse of discretion.[15] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion."[16] A military judge abuses his discretion when he: (1) "predicates a ruling on findings of fact that are not supported by the evidence of record," (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."[17] We will not disturb the military judge's findings of fact in ruling on a motion to suppress unless those findings are clearly erroneous.[18]

In the military, investigators must inform suspects of their rights prior to questioning them. These rights are set forth in two sources. First are the constitutional rights recognized in the Fifth Amendment to the Constitution as set forth by the Supreme Court in *Miranda v. Arizona*.[19] Second are the statutory rights as set forth in Article 31(b), UCMJ. "The Fifth Amendment right to counsel applies only during custodial interrogations."[20] "Article 31(b) is a statutory precursor to *Miranda* warnings that implements the Article 31(a) privilege against compulsory self-incrimination."[21]

"A confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through

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[15] *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009) (citing *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003)).

[16] *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000).

[17] *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).

[18] *Chatfield*, 67 M.J. at 437.

[19] 384 U.S. 436 (1966); *see United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967) (applying *Miranda* warning requirements to custodial interrogations in the military).

[20] *United States v. Flanner*, 85 M.J. 163, 169-70 (C.A.A.F. 2024).

[21] *United States v. Evans*, 75 M.J. 302, 304-05 (C.A.A.F. 2016).

the use of coercion, unlawful influence, or unlawful inducement.'"[22] When a suspect unambiguously invokes his or her rights under *Miranda* or Article 31(b), law enforcement officials may not conduct any further questioning of the suspect about the offense unless they do so in a manner demonstrating that they have scrupulously honored the suspect's invocation of rights.[23]

In ruling on a motion to suppress, "whether a petitioner made a knowing and voluntary waiver of his *Miranda* rights is a separate inquiry from a voluntariness claim."[24] In our review of the military judge's rulings, we may consider not only the reasons given by the military judge, but also other legal bases upon which the action of the military judge is defensible.[25]

We have previously held that an investigator's statements may invalidate a rights advisement when the investigator lies to an accused about the nature of the rights warning. In *United States v. Patterson*, we stated "While an investigator need not use the 'precision and expertise of an attorney in informing an accused of the nature of the accusation,' he may not mislead the person by informing him he is not accused of criminal conduct when the opposite is true."[26]

Waiver of the rights to remain silent and to counsel are not valid unless they are made freely, knowingly, and intelligently.[27] The analysis a court must undertake in determining whether a waiver of rights was knowing, intelligent, and voluntary is based on the totality of the circumstances.[28] In considering the totality of the circumstances, courts have historically considered an accused's "age, experience, education, background, and intelligence and [his] ca-

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[22] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (quoting Mil. R. Evid. 304).

[23] *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009).

[24] *Etherly v. Davis*, 619 F.3d 654, 662 (7th Cir. 2010) (*citing Edwards v. Arizona*, 451 U.S. 477, 484, (1981)), *cert*. denied, 562 U.S. 1257 (2011) .

[25] *See United States v. Bess*, 80 M.J. 1, 11-12 (C.A.A.F. 2020).

[26] No. 202200262, 2024 CCA LEXIS 130, at *13 (N-M. Ct. Crim. App. Apr. 4, 2024) (quoting *U.S. v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000)).

[27] Military Rule of Evidence 305(e)(1).

[28] *United States v. Morgan*, 40 M.J. 389, 393 (C.M.A. 1994).

pacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[29] None of these factors alone is controlling.

2. Analysis

We begin by noting that the Government here concedes that Appellant was in custody at the time of his interrogation. While we are not bound by the Government's concessions in every case, here we will treat the Government's concession and the military judge's finding that Appellant was subjected to a custodial interrogation as the law of the case.[30] As a result, SA Foxtrot was required, under *Miranda* and *Tempia*, not only to advise Appellant of his rights under Article 31(b), but also to advise him of his right to counsel.[31]

Having found that Appellant had a right to counsel, we nevertheless find that the military judge did not abuse his discretion in admitting Appellant's statements. Appellant levels two primary attacks against the military judge's ruling, which we address in turn. First, Appellant claims that the military judge abused his discretion in finding that SA Foxtrot's statements to Appellant were "true." Second, Appellant claims that the military judge's ruling was based on a misstatement of the law when the military judge said that "ploys to mislead a suspect or lull him into a false sense of security do not render a statement involuntary" in analyzing SA Foxtrot's rights advisement.

Central to Appellant's arguments is his claim that SA Foxtrot's statements misled Appellant into believing the rights to consult with counsel, or have counsel present during questioning, did not apply to him as a Marine. We reject this argument, as did the military judge. The military judge had before him the video of Appellant's interrogation, the testimony of SA Foxtrot, and Appellant's affidavit. He was also presented with Appellant's age, education, military experience, and test scores.

While SA Foxtrot's explanation to Appellant was certainly not the model of clarity, what is clear from the video is that SA Foxtrot told Appellant several times that Appellant had both the right to remain silent and the right to counsel. Appellant's claim in his affidavit that he believed that the right to consult with counsel before questioning, or to have counsel present during questioning,

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[29] *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

[30] *See United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006) ("When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case.").

[31] *See Flanner*, 85 M.J. at 169.

did not apply to him is simply unbelievable based on the totality of the circumstances of the rights advisement. SA Foxtrot informed Appellant six times of his right to consult with counsel prior to and during questioning. At no time did SA Foxtrot say that the right did not apply to Appellant specifically or Marines generally.

We find, as did the military judge, that SA Foxtrot's message during his "SVU" speech was focused on the logistics involved if Appellant wanted to speak with a lawyer or be represented during questioning. This is supported by SA Foxtrot's statement that "it's not like the shows where *we call somebody* and the guy comes."[32] Furthermore, the military judge's finding that "It is a matter of common practice that if a subject invokes their right to counsel then NCIS will simply terminate the interview" is not clearly erroneous—it is the law. When a suspect invokes his right to counsel, law enforcement may not conduct any further interrogation without first scrupulously honoring the suspect's invocation. In most cases, this means that the interview ends.

This case is readily distinguishable from *United States v. Patterson*. In *Patterson*, we set aside the findings and sentence after the agent actively and deliberately sought to minimize the Article 31(b) rights.[33] There, the agent told First Lieutenant (1stLt) Patterson that the rights advisement form was "just a piece of paper," created a false distinction between the words "accused" and "suspected[,]" and falsely told 1stLt Patterson, "I don't want you to think we are accusing you of anything."[34] Furthermore, *Patterson* involved not only outright misstatements by investigators but also other coercive factors not at play in this case, including an order from 1stLt Patterson's executive officer not to "squirrel around" with the investigators and the investigators' repeated references to 1stLt Patterson's commanding officer.

Here, SA Foxtrot told Appellant multiple times that he had the right to consult with counsel and to have counsel present. Even after telling Appellant that the interrogation was not like "SVU," SA Foxtrot still reiterated that Appellant had those rights: "But that's -- that's one of your rights."[35] Appellant then acknowledged his rights and still agreed to speak with the SAs. Appellant does not suggest, and there is no evidence in the record to show, that anyone in Appellant's chain of command directed him in any way as to how to interact with the NCIS SAs.

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[32] App. Ex. LI at 5 (emphasis added).

[33] 2024 CCA LEXIS 130.

[34] *Id.* at *13.

[35] App. Ex. LI at 6.

The military judge also found that Appellant "was not objectively misinformed about his right to counsel." We agree. Although Appellant claimed in an untestable affidavit that he did not understand that he could speak to a lawyer before or during questioning, this claim was unreasonable. Appellant was told both in writing and verbally by the SA that he could do exactly that. Special Agent Foxtrot's statement that "that's not something that we do" is properly understood to be that NCIS agents would not call a lawyer for Appellant. Appellant's responses indicated that he understood this. Rather than inquiring as to the apparent dichotomy, which Appellant now asks us to find SA Foxtrot created, Appellant paused, considered his rights, and agreed to waive them. This is bolstered by the fact that Appellant is well educated and intelligent, with more than two years of experience in the military prior to the interrogation. The military judge's findings of fact that rejected Appellant's claims were not clearly erroneous.

We likewise find that the military judge's ruling was not based upon an incorrect view of the law. Appellant points to the military judge's statement that interrogators may use ploys to mislead a suspect as evidence that the military judge wrongly conflated what investigators may do post rights advisement with what is required during the advisement phase. While the military judge's unnecessary citation to *Illinois v. Perkins*[36] is, again, not the model of clarity, the entirety of the military judge's ruling shows that he used the proper legal principles in evaluating the Defense motion and the evidence.

The military judge properly stated that in order to knowingly and intelligently waive his rights, a suspect must have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[37] In light of our review of the military judge's ruling, we do not find that the military judge relied upon an erroneous view of the law. While 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, it is 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.

Finally, we are convinced that even if the military judge did hold an erroneous view of the law based on the idea that an investigator may lie to an accused during the rights advisement, we find that this view did not influence the military judge's decision. This is because, again, the military judge affirm-

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[36] Note 14, *supra*.

[37] App. Ex. LX at 10.

atively found that SA Foxtrot did not lie to Appellant and that Appellant understood his rights. We therefore hold that we can 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.[38]

III. CONCLUSION

After careful consideration of the record, the briefs, and oral argument of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[39] The findings and sentence are **AFFIRMED.**

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[38] *See Bess*, 80 M.J. at 11-12.

[39] Articles 59 & 66, UCMJ, 10 U.S.C. §§ 859, 866.

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 January 9, 2026.

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