

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

APPELLANT'S REPLY

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:

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Reply

A. The military judge erred in concluding law enforcement can mislead suspects about their rights to obtain a waiver.

The Government continues to make the same mistake the military judge did—conflating the voluntariness of a rights waiver with the voluntariness of statements made after the waiver.¹ But these are two separate inquiries employing different legal standards. As the Supreme Court has explained, a “waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or *deception*.”² And it must also have been knowing and intelligent, meaning the suspect had “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”³ That means law enforcement cannot obtain a waiver by misleading a suspect about his rights.

Nevertheless, the Government persists in arguing against this blackletter law in attempting to salvage the military judge’s clearly erroneous ruling that ploys may be used to mislead a suspect about his *Miranda* rights.⁴ And the Government does so by selectively quoting caselaw that is either inapplicable or cuts directly against its own arguments.

¹ See, e.g., Gov. Answer at 19-20, 27-30.

² *Berghuis v. Thompson*, 560 U.S. 370, 382 (2010) (internal quotation marks omitted) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)) (emphasis added).

³ *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013) (citing *Berghuis*, 560 U.S. at 370).

⁴ J.A. 275.

For example, the Government looks to *Colorado v. Spring*, arguing the Supreme Court specifically declined to rule that trickery alone is sufficient to invalidate a waiver absent evidence of duress or coercion.⁵ It did not. Rather, the Court first emphasized that *Miranda* protects the Fifth Amendment privilege by “ensuring that a suspect knows that he may choose [1] not to talk to law enforcement officers, [2] to talk only with counsel present, or [3] to discontinue talking at any time.”⁶ The Court then went on to find that “mere silence by law enforcement officials as to the *subject matter* of an interrogation is ‘trickery’ insufficient to invalidate a suspect’s waiver of *Miranda* rights.”⁷ But contrary to the Government’s claim, this implies that some forms of trickery (e.g., misleading the suspect as to the nature of his counsel rights) *are* sufficient to invalidate a waiver of *Miranda* rights.

Similarly, the Government quotes *Illinois v. Perkins* for the proposition that “*Miranda* forbids coercion, not mere strategic deception.”⁸ This might indeed cut against Appellant if the rest of the Court’s sentence didn’t read “*by taking advantage of a suspect’s misplaced trust in one he supposes to be a fellow prisoner.*”⁹ By omitting this language, the Government ignores the crucial context that *Perkins*

⁵ Gov. Answer at 14.

⁶ *Colorado v. Spring*, 479 U.S. 564, 575 (1987) (emphasis added). The Government, like the military judge, erroneously conflates [1] the right to silence with [2] the right to the presence of counsel. *See, e.g.*, Gov. Answer at 22, 24-25.

⁷ *Spring*, 479 U.S. at 576 (emphasis added).

⁸ Gov. Answer at 14.

⁹ *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) (emphasis added).

involved statements elicited by an undercover jailhouse snitch, not those obtained during a custodial police interrogation.¹⁰ Thus, *Perkins*' actual holding that "Miranda warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer" has nothing to do with Appellant's case.¹¹ Rather, the issue here is whether the law permits a law enforcement agent to obtain a rights waiver during a custodial interrogation by leading the suspect to believe he does not actually have the "right to have an attorney present, not only at the outset of interrogation, but at all times."¹² It does not.

The Government next looks to the Eleventh Circuit, citing *United States v. Farley* for the proposition that law enforcement can use ploys to trick suspects into waiving their rights.¹³ But the "trickery" in that case involved misleading the suspect as to the *purpose* of the questioning, not as to the nature of his *Miranda* rights.¹⁴ And the court found this was permissible only because it "did not cause [the suspect] to 'misunderstand the nature' of the right he waived" and was therefore "not relevant to determining whether [he] voluntarily, knowingly, and intelligently waived his *Fifth Amendment* privilege."¹⁵

¹⁰ *Id.* at 294.

¹¹ *Id.*

¹² *Florida v. Powell*, 559 U.S. 50, 62 (2010).

¹³ Gov. Answer at 16 (citing *United States v. Farley*, 607 F.3d 1294 (11th Cir. 2010)).

¹⁴ *Farley*, 607 F.3d at 1326.

¹⁵ *Id.* at 1327 (quoting *Spring*, 479 U.S. at 577).

That's not what happened in Appellant's case, where the agent's misleading statements caused Appellant to misunderstand the nature of his counsel rights. Here, there is little doubt that the agent's "explanation"—which the military judge himself construed as a "ploy[] to mislead a suspect or lull him into a false sense of security"¹⁶—was "constitutionally significant" to determining whether Appellant voluntarily, knowingly, and intelligently waived his rights.¹⁷ Indeed, this is just the sort of trickery the Eleventh Circuit (and the Supreme Court) has found "relevant to the constitutional validity of a waiver," as it "interfer[ed] with the defendant's ability to understand the nature of his rights and the consequences of abandoning them."¹⁸ In other words, it falls within the general rule prohibiting law enforcement from misleading suspects as to the nature of their rights in order to obtain a waiver.¹⁹

B. 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.

The military judge's finding that Appellant "was not objectively misinformed about his right to counsel" was clearly erroneous, and the Government's attempts to defend it are equally unavailing.²⁰ As the agent himself explained at trial, when a

¹⁶ J.A. 275.

¹⁷ See *Farley*, 607 F.3d at 1327, 1330 (quoting *Spring*, 479 U.S. at 576-77).

¹⁸ *Id.* at 1330 (quoting *Moran*, 475 U.S. at 423-24).

¹⁹ See *United States v. Erie*, 29 M.J. 1008, 1012 (A.C.M.R. 1990) (citing *Rhode Island v. Innis*, 446 U.S. 291, 291 (1980)).

²⁰ Gov. Answer at 21 (quoting J.A. 275).

suspect requests to have a defense attorney present during an interrogation, NCIS will “terminate[] the interview at that time. *And then, if he want[s] to go and get a defense attorney and return and continue the interrogation, [NCIS] w[ill] do[] that, yes.*”²¹ This explanation is certainly a more constitutionally permissible description of Appellant’s *Miranda* rights, and is generally consistent with the *Duckworth* rule that “*Miranda* does not require that attorneys be producible on call.”²²

But contrary to the Government’s assertions, that’s *not* the explanation the agent told Appellant when he was trying to get him to waive his rights, as the agent himself conceded at trial.²³ Rather, at the moment of truth, the agent informed Appellant “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”²⁴ And this is the crucial evidence that must be viewed from Appellant’s perspective because “[i]n determining whether there has been a valid waiver,” it’s “the perceptions of the accused” that are the legally relevant analysis, not what the agent thought.²⁵

²¹ J.A. 470 (emphasis added).

²² *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989).

²³ Gov. Answer at 20-21; J.A. 476.

²⁴ J.A. 85, 91.

²⁵ *Erie*, 29 M.J. at 1012 (citing *Innis*, 446 U.S. at 291); *see also Farley*, 607 F.3d at 1330 (“Because the issue is whether Farley’s decision to waive his rights was

Further, the explanation the NCIS agent provided to Appellant prior to the rights waiver also flies in the face of Military Rule of Evidence (M.R.E.) 305(d)—specifically entitled, “Presence of Counsel”—which requires that

[w]hen a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) *will be provided by the United States* at no expense to the person and without regard to the person’s indigency and *must be present before the interrogation may proceed*.²⁶

This rule contemplates the opposite of what the agent conveyed to Appellant when he told him that having counsel present “*is not something we do.*” To the contrary, ensuring the Fifth Amendment right to the presence of counsel is precisely something the Government *must do*, as the agent himself conceded at trial.

C. The military judge abused his discretion in ruling the agent’s explanation of counsel rights was legally permissible.

Faced with the NCIS agent’s misleading explanation of Appellant’s counsel rights—one that defies both the evidence and the law—the Government resorts to the straw-man argument that “*Miranda* does not create a right to be interrogated—just the right to have an attorney present *if* police choose to use that ‘particular investigative tool.’”²⁷ But this sidesteps the actual *Miranda* issue here: that suspects don’t just have the right to have counsel present during their interrogation; they also

knowing and voluntary under the totality of the circumstances, the only relevant state of mind is that of Farley himself.”) (citing *Moran*, 475 U.S. at 423).

²⁶ M.R.E. 305(d) (emphasis added).

²⁷ Gov. Answer at 22 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988)).

have the right to “be *clearly informed*” of that right.²⁸ By requiring the rights advisement in the first place, *Miranda*, from its inception, recognized that an unknown right is an illusory one. And the waiver of an illusory right is not a voluntary, knowing, and intelligent one.

That’s exactly what happened here. Telling Appellant that having counsel present for the interview was “not something we do” and that invoking that right would result in NCIS not “get[ting] to hear your side of this story and “just go[ing] with that we’ve got” was tantamount to telling him that right did not exist for him. In other words, it rendered it illusory. Therefore, Appellant’s waiver of that right could not have been voluntary, knowing, and intelligent.

The Government also suggests that, after *Florida v. Powell*, all *Miranda* requires is that law enforcement convey “the essential message: you can have a lawyer.”²⁹ But contrary to the Government claims, this is neither a “commonsense reading” of the agent’s explanation nor a proper reading of *Powell*.³⁰ If telling a suspect “you can have a lawyer” were all that *Miranda* requires, then the *Powell* Court would not have gone to such lengths to clarify that the officer in that case “reasonably conveyed [the suspect’s] right *to have an attorney present, not only at*

²⁸ *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (emphasis added).

²⁹ Gov. Answer at 23 (citing *Powell*, 559 U.S. at 62-63).

³⁰ *Id.*

the outset of interrogation, but at all times.”³¹ Suggesting that *Miranda* merely requires law enforcement to inform suspects that they “can have a lawyer” is a tacit invitation to ignore *Powell*’s controlling language. This Court should decline.

The Court should also decline the Government’s explicit invitation to overrule *United States v. Tempia*.³² *Tempia*’s view that *Miranda* requires that a suspect “must be warned that he has a right to . . . the presence of an attorney” during custodial questioning is still good law.³³ And its holding is consistent with M.R.E. 305’s requirement that upon invocation of the Fifth (or Sixth) Amendment right to counsel “a judge advocate or an individual certified in accordance with Article 27(b) *will be provided by the United States* at no expense to the person and without regard to the person’s indigency and *must be present before the interrogation may proceed.*”³⁴

Finally, the Government insists that the lack of coercion by NCIS means the rights waiver was valid.³⁵ But the validity of the waiver hinges on whether Appellant had “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”³⁶ He did not. Any suspect in his position

³¹ *Powell*, 559 U.S. at 62 (emphasis added).

³² Gov. Answer at 26-27 (discussing *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967)).

³³ *Tempia*, 37 C.M.R. at 257.

³⁴ M.R.E. 305(d) (emphasis added).

³⁵ Gov. Answer at 28.

³⁶ *Mott*, 72 M.J. at 330 (citing *Berghuis*, 560 U.S. at 370); see *Moran*, 475 U.S. at 421 (“Only if the totality of the circumstances surrounding the interrogation reveals

would reasonably interpret the agent's explanation to mean exactly what Appellant took it to mean: that the right to have counsel present is not something that actually applied at his NCIS interrogation.³⁷

D. The erroneous admission of Appellant's confession was not harmless beyond a reasonable doubt.

As for prejudice, contrary to its current claim of mere cumulativeness,³⁸ the erroneously admitted confession was the centerpiece of the Government's case that Appellant penetrated the victim's vagina *without her consent*. Indeed, the Trial Counsel specifically argued the evidence was *noncumulative* at trial, describing all the acts Appellant admitted doing "while [the victim] was asleep" (and so was unaware of).³⁹ The Trial Counsel referenced Appellant's confession forty times in its opening, closing, and rebuttal arguments, continually quoting his most damaging admissions as definitive proof of guilt particularly as to nonconsent.⁴⁰

Such use of a confession to establish a key element is exactly what this Court found prejudicial in *United States v. Mott*, emphasizing "[t]he Government's closing argument repeatedly exhorted the members to look at Appellant's statement and

both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.") (emphasis added).

³⁷ J.A. 117.

³⁸ Gov. Answer at 35.

³⁹ J.A. 1418.

⁴⁰ J.A. 280, 281, 284-285, 287-289, 426-432, 568, 570, 574-577, 579, 581-582, 606-608, 610, 612.

video.”⁴¹ Similarly, at the trial in this case, the Trial Counsel told the members to “watch [the interrogation video] as many times as you need,” that Appellant “was being honest in this interrogation . . . because he knew he was caught,” and that “you know that he knew he was caught when he starts to cry. He confesses to what he’d done to her, and he starts to cry.”⁴² The Trial Counsel argued that Appellant “knows he didn’t get consent from [her] that night because he tells NCIS that he raped her, unwanted sexual advantages.”⁴³ In concluding his rebuttal argument, the Trial Counsel urged the members to “[t]rust the accused’s own words to NCIS.”⁴⁴

Given this focus on Appellant’s confession throughout the case, it’s no surprise the members convicted him of the one charged sexual offense he confessed to and acquitted him of the others.⁴⁵ These circumstances present far more than a “reasonable possibility” that this erroneously admitted evidence “might have contributed” to Appellant’s conviction for sexual assault.

Conclusion

WHEREFORE, Appellant respectfully requests that this Court set aside the guilty findings for Charge II and Specification 3 thereunder and the sentence.

⁴¹ *Mott*, 72 M.J. at 333.

⁴² J.A. 607-608.

⁴³ J.A. 582.

⁴⁴ J.A. 612.

⁴⁵ J.A. 83, 613.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. L. Gaston III", with a horizontal line extending from the end.

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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 August 7, 2026.

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Certificate of Compliance with Rule 24(b)

This brief complies with the type-volume limitations of Rule 24(b) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. The brief contains 2,730 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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