IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	) BRIEF ON BEHALF OF APPELLANT)
v.	) Crim. App. No. MISC 20110914)
Sergeant (E-5) **ERIC W. COOPER** United States Army, Appellee	) USCA Dkt. No. _____)))

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(2), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."[2]

Statement of the Case

The accused is being tried by a general court-martial on charges of attempted sodomy, aggravated sexual contact, aggravated sexual assault, indecent acts, wrongful sexual

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[1] Joint Appendix (JA) 1-7; 10 U.S.C. § 862 (2008).
[2] 10 U.S.C. § 867(a)(2).

contact, and abusive sexual contact in violation of Articles 80 and 120, UCMJ.[3]

On September 6, 2011, following a motion hearing, the military judge issued a ruling suppressing the statement of the accused stating "the statement made by SGT Cooper is suppressed," without further explanation.[4] On September 7, 2011, the military judge sent counsel an email stating that the "statement of SGT Cooper is suppressed because SA Swierk did not scrupulously honor SGT Cooper's unequivocal invocation of his right to remain silent."[5] On September 15, 2011, following the Government's timely filing of the notice of appeal, the military judge issued a nine page ruling finding that both SA Swierk and SA Kapinus had violated the accused's right to remain silent, and that the accused's confession was made involuntarily.[6]

On October 19, 2011, the Government filed a timely appeal under Article 62(a)(1)(B), UCMJ, with the Army Court challenging the military judge's ruling. On December 21, 2011, the Army Court issued its decision setting aside the military judge's

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[3] JA 38-41.
[4] JA 25-26, Appellate Exhibit (AE) XLII. The motion to suppress is at JA 254-61, AE I and the Government's response is at JA 262-65, AE II.
[5] JA 27, AE XLVI.
[6] JA 29-37, AE XLVII.

ruling.[7] The Army Court found that the military judge's ruling was ambiguous and incomplete, and returned the record to the military judge for additional findings of fact and conclusions of law.[8] The Army Court, however, ruled that the military judge properly applied *Michigan v. Mosley*, 423 U.S. 96 (1975) to determine whether Special Agent (SA) Jennifer Swierk of Army Criminal Investigation Command (CID) violated the accused's right to remain silent.[9]

On January 6, 2012, the Government filed a timely motion for reconsideration with the Army Court arguing that the Army Court misapplied a material legal matter by failing to apply *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) to the facts of the case.[10] On January 9, 2012, the Army Court denied the Government's motion for reconsideration.[11] The Judge Advocate General of the Army certified the Army Court's decision with this Honorable Court.[12]

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[7] JA 6-7, *United States v. Cooper*, ARMY MISC 20110914 at 6-7 (Army Ct. Crim. App. 21 Dec. 2011 (unpublished)).
[8] *Id.*
[9] JA 5, *Cooper*, ARMY MISC 20110914 at 5.
[10] JA 8-24.
[11] JA 23.
[12] JA 268-69.

Statement of Facts

A. Background

At approximately 2200 on September 22, 2010, Ms. BC reported to her neighbor, Mrs. Kimberly Crosby, that the accused (Ms. BC's stepfather) was sexually molesting her.[13] Shortly thereafter, Mrs. Crosby and her husband notified the military police (MPs).[14] Sometime between 2300 and 2400 on September 22, 2010, the MPs arrived at the accused's residence.[15] The MPs escorted Ms. BC and her mother (the accused's wife) to the military police station.[16] The accused was placed in a detention cell around midnight.[17]

Sergeant (SGT) Gregory McCall, a military police investigator, monitored the accused while he was in the detention cell.[18] SGT McCall and the accused had a short conversation in which the accused told SGT McCall that he was okay and didn't need anything.[19] SGT McCall noticed that the

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[13] JA 240-241, AE XVII, Article 32 Testimony of Mrs. Kimberly Crosby, pg. 21-22.
[14] *Id.*
[15] JA 211, AE XXII, Sworn Statement of Mrs. Trana Cooper pg. 1. Although Mrs. Cooper references the time as "11:00 pm on 9-23-2010," clearly the date was 22 Sept 2010 because the accused's sworn statement was not made until the morning of 23 September 2010. The accused places the arrival of military police at the Cooper residence "about midnight." JA 123.
[16] JA 211, AE XXII, Sworn Statement of Mrs. Trana Cooper, pg. 1.
[17] JA 119.
[18] JA 114.
[19] JA 116-17.

accused looked "tired,"[20] but "believe[d] [the accused] when he said he was okay."[21]

At approximately 0034 on September 23, 2010, the MPs notified CID of Ms. BC's sexual assault allegation.[22] Shortly thereafter, SA Jason Kapinus of CID began taking a statement from Ms. BC.[23] Sometime during the victim interview, SA Kapinus telephoned SA Jennifer Swierk, informed her that a sexual assault investigation was underway, and instructed that she report to the CID office.[24] SA Kapinus told SA Swierk that she was to conduct a subject interview of the accused.[25] Around 0300, the accused was transported from the MPs' detention cell to the CID office.[26]

B. <u>SA Swierk</u>

Upon the accused's arrival to the CID office, SA Swierk met him in the CID interview room, introduced herself, and began the "44 process."[27] While obtaining the accused's biographical

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[20] JA 114.
[21] JA 117. The military judge found that "Investigator MacGill [sic] noticed that the accused appeared to be tired and in pain." JA 29, AE, XLVII, pg. 1. However, Investigator McCall never testified to facts regarding any appearance of pain or discomfort by the accused while in the detention cell.
[22] JA 79.
[23] JA 43-44.
[24] *Id.* SA Kapinus was SA Swierk's team chief. JA 44.
[25] *Id.*
[26] JA 79.
[27] JA 45. The "44" refers to a CID form designed to aid in obtaining biographical information from interviewees.

information, SA Swierk had a fairly lengthy conversation with the accused about matters unrelated to the investigation, including "fishing, nature, [and] the area."[28] During this conversation, the accused asked SA Swierk about the allegations that had been made against him.[29] SA Swierk deferred answering because the accused had not yet been read his rights.[30] Then, SA Swierk advised the accused of his Article 31 rights.[31] SA Swierk used a Department of the Army (DA) Form 3881 during the rights warnings process.[32] After informing the accused of the nature of the offense under investigation, SA Swierk advised the accused of his right to counsel and his right to remain silent using the standard questions on the reverse side of the DA Form 3881.[33]

The accused stated that he understood his rights by writing "Yes" next to the question "Do you understand your rights?" and initialing by his answer.[34] Next, the accused stated that he did not want a lawyer by writing "No" next to the question "Do you want a lawyer at this time?" and initialing next to his answer.[35]

Then, SA Swierk asked the question, "At this time, are you willing to discuss the offense under investigation and make a

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[28] JA 55.
[29] JA 46.
[30] *Id.*
[31] *Id.*
[32] JA 45-47; JA 188-89, AE XV.
[33] JA 188-89, AE XV.
[34] *Id.*
[35] *Id.*

statement without talking to a lawyer and having a lawyer present with you?".[36] The accused wrote "No" and initialed by the response.[37] As SA Swierk started to return to the front side of the DA Form 3881 to obtain the accused's signature on the "non-waiver" portion of the form, the accused asked SA Swierk to tell him about the details of the allegations and what his step-daughter was saying that he had done to her.[38]

When the accused asked SA Swierk to discuss the allegations further, SA Swierk told him that she would not give him details about the offense, because he had just invoked his right to remain silent.[39] SA Swierk told him this so as to avoid a detailed discussion of the offense that would have, in her words, "prompted him to ask questions, make statements and thus

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[36] JA 47.
[37] JA 47; JA 188-89, AE XV.
[38] JA 47-48; SA Swierk testified, "Immediately after stating 'No,' I was about to go to the other side of the portion when he then asked me what the allegations were about. What the daughter was stating because he was aware, I believe, that she was in the room with the mother."
[39] JA 48; SA Swierk testified, "I told him I couldn't tell him exactly what the allegations were if he wasn't willing to speak to me at that time, which by stating 'No' to 'Are you willing to discuss the offense,' is what I assumed he was meaning." SA Swierk restated her answer on cross-examination, "it was simply that if you say "no" on this, it means that you are invoking your right [not] to speak with me so I can't speak with you any further." JA 58.

more than likely I would be violating the right he just stated no for."[40]

Then, the accused stated that he was willing to tell his side of the story.[41] SA Swierk asked the accused if he understood his rights and wanted to make a statement.[42] The accused said that he understood his rights.[43] SA Swierk had the accused read aloud the waiver portion of the DA Form 3881.[44] The accused waived his rights and signed the waiver portion of the DA Form 3881 at 0352.[45]

The accused proceeded to talk to SA Swierk for about an hour.[46] The accused was offered breaks during this period.[47] He never requested any additional breaks and never was denied any breaks.[48] SA Swierk repeatedly asked the accused if he was okay to continue.[49] The accused told SA Swierk that he was.[50] The accused did not appear tired during his conversation with SA Swierk.[51] The accused told SA Swierk that he had a stiff knee from past surgery, but never told SA Swierk that he was in any

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[40] JA 48.
[41] JA 49.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] JA 49; JA 188, AE XV.
[46] JA 51.
[47] JA 53.
[48] *Id.*
[49] JA 60.
[50] *Id.*
[51] JA 53-54.

pain.[52] He declined offers to "get up and walk around" in order to alleviate any discomfort from his knee.[53] The accused told SA Swierk, "simply that his knee is always stiff because he had surgery on it."[54]

The accused discussed the allegations with SA Swierk, admitting that he was in Ms. BC's bed late one night; that he had massaged her legs after soccer practice; that he may have touched her vagina at some point during a tickling session; and that Ms. BC might look at him as something "more" than a father figure.[55] The accused denied that he was ever unclothed in Ms. BC's room or that he had ever penetrated her vagina.[56] He blamed the family dog for any licking of Ms. BC's buttocks.[57]

While making these admissions, the accused became emotional and started to cry.[58] The accused asked SA Swierk whether he should get a lawyer and "if [I] did do this, what is going to happen to me?".[59] SA Swierk declined to give him legal advice or speculate on his future.[60] She asked the accused whether he

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[52] JA 54.
[53] *Id.*
[54] *Id.*
[55] JA 50-51.
[56] JA 58.
[57] JA 50.
[58] JA 52.
[59] *Id.*
[60] *Id.*

wanted a break before continuing.[61] Although the accused said that he did not need a break, SA Swierk stepped out of the room anyway to give the accused some time to think about what he wanted to do and decide whether he wanted a lawyer.[62]

C. SA Kapinus

SA Kapinus entered the room to continue the interrogation of the accused.[63] He did so believing that the accused might be more likely to talk openly about the allegations to a male agent.[64] SA Kapinus' interrogation lasted four hours.[65]

During the interrogation, the accused was offered and given breaks.[66] SA Kapinus testified that the accused appeared able to continue at all times.[67] The accused never told SA Kapinus that he was tired, and never complained about his physical condition beyond repeating that he had a "stiff knee."[68] The accused told SA Kapinus that he was on medication on account of his surgery.[69]

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[61] *Id.*
[62] *Id.*
[63] JA 69.
[64] *Id.*
[65] JA 90.
[66] JA 71.
[67] JA 72; SA Kapinus stated, "He didn't appear tired where he needed to stop the interview, sir. It was late at night. I think we were all somewhat fatigued, but as far as him falling asleep or me noticing anything where he needed a break or anything, no, sir. Absolutely not."
[68] JA 73.
[69] *Id.*

He stated that he "usually" took his medication in the morning, so he wouldn't need anything until the following morning.[70]

The accused told SA Kapinus that on September 22, 2010 he entered Ms. BC's bedroom, and started tickling her.[71] As he was tickling her, he believed that she was becoming aroused, so he digitally penetrated her.[72] He denied licking his step-daughter, instead choosing to continue to blame any licking on the family dog.[73] He also denied placing his penis on his step-daughter, or taking his penis out of his pants while in Ms. BC's room.[74]

The accused memorialized a portion of his statement in his own handwriting.[75] By approximately 0757, he had completed a two page handwritten portion of the statement admitting to touching Ms. BC's vagina, but denying licking her or touching her with his penis.[76] Between approximately 0757 and approximately 0850, SA Kapinus and the accused conducted a question and answer session that was memorialized in a four page typewritten statement.[77] SA Kapinus typed out the questions and answers while the accused looked at his computer screen.[78] At

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[70] *Id.*
[71] JA 70.
[72] *Id.*
[73] JA 71.
[74] *Id.*
[75] JA 190-91, AE XVI, pg. 1-2.
[76] JA 105; JA 190-91, AE XVI, pg. 1-2.
[77] JA 105; JA 192-95, AE XVI, pg. 3-6.
[78] JA 104.

approximately 0850, the accused told SA Kapinus that he wanted to terminate the interview.[79] SA Kapinus documented this event in the typewritten sworn statement.[80] SA Kapinus asked the accused three questions following invocation.[81] Then, SA Kapinus asked the accused to review, initial and sign the statement.[82]

Additional facts necessary for the disposition of this case are set forth in argument.

Standard of Review

This Court's standard of review of a military judge's ruling on the suppression of evidence is for an abuse of discretion.[83] "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable."[84] An abuse of discretion may occur "when a relevant factor that

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[79] JA 91.
[80] JA 195, AE XVI, pg. 6.
[81] *Id.* The questions were as follows: (1) Q: Did you have an opportunity to review this statement and change anything that you needed? A: Yes. (2) Q: Did I type the questions and answers to this statement, while you actually provided the answers? A: Yes. (3) Q: Do you have anything else to add to this statement? A: No.
[82] JA 94-95.
[83] *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005).
[84] *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."[85] This Court conducts a *de novo* review of the military judge's conclusions of law.[86]

When reviewing issues under Article 62(b), reviewing courts may only act with respect to matters of law.[87] "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'"[88]

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[85] *Verizon Commc'ns, Inc. v. Inverizon Int'l, Inc.*, 295 F.3d 870, 872-73 (8th Cir. 2002); *United States v. Baker*, 70 M.J. 283, 293 (C.A.A.F. 2011) (Baker, J. dissenting) ("An abuse of this particular grant of discretion may occur when the trial judge has considered incorrect factors or has failed to consider necessary factors.") (citing 2 Steven Childress & Martha Davis, *Federal Standards of Review* § 7.06 (4th ed. 2010)).
[86] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[87] *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).
[88] *Id.*

I.

WHETHER THE MILITARY JUDGE AND THE ARMY COURT OF CRIMINAL APPEALS ERRED IN APPLYING MICHIGAN v. MOSLEY, 423 U.S. 96 (1975) AS OPPOSED TO OREGON V. BRADSHAW, 462 U.S. 1039 (1983) AND EDWARDS V. ARIZONA, 451 U.S. 477 (1981) TO THE FACTS OF THIS CASE.

Summary of Argument

The military judge abused his discretion as to the "rights warnings" portion of his ruling where he found that SA Swierk violated the accused's right to remain silent because his conclusions were drawn from an erroneous view of the law. Contrary to the position of the military judge and the Army Court, the admissibility of statements made subsequent to suspect reinitiation following the invocation of the right to remain silent is governed by the analysis in *Oregon v. Bradshaw*, not *Michigan v. Mosley*.

The military judge incorrectly held that *Miranda*[89] and its progeny require, as a matter of law, a break in time between a suspect's invocation of the right to remain silent and subsequent interrogation, even where the *suspect* reinitiates contact. A break in time is only required where it is *law enforcement* that seeks to reinitiate questioning following the invocation of the right to silence.

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[89] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Furthermore, because the military judge applied the incorrect law to a suspect reinitiation case, he wrongly believed that the question of whether SA Swierk interrogated the accused post-suspect reinitiation was a dispositive issue in determining whether the accused's right to remain silent was violated. The proper legal question was whether the accused's post-reinitiation waiver of his rights was valid under *Bradshaw*. The record clearly reflects that the post-suspect reinitiation waiver was knowing, intelligent, and voluntary. Regardless, when SA Swierk told the accused that she could not talk to him about the details of the alleged offenses because he had invoked his right to remain silent, that statement was not reasonably likely to elicit incriminating information under the test established by the Supreme Court in *Rhode Island v. Innis*.[90]

Law and Argument

A. The Military Judge Abused His Discretion by Using Incorrect Legal Principles in Improperly Applying *Michigan v. Mosley* to a Suspect Reinitiation Case.

The military judge held that there were "two distinct" reasons for his finding that SA Swierk did not scrupulously honor the accused's invocation of his right to remain silent: (1) the failure of SA Swierk to "break contact" with the accused after invocation and (2) SA Swierk's continued interrogation of

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[90] 446 U.S. 291 (1980).

the accused after invocation.[91] Both findings were predicated on the military judge's incorrect legal conclusion that *Michigan v. Mosley* applies to *suspect* reinitiation cases.

1. *Mosley* applies only to law enforcement reinitiation cases following invocation of the right to remain silent. *Bradshaw* applies to suspect reinitation cases following the invocation of the right to remain silent.

In *Mosley*, the Supreme Court examined a factual situation in which a law enforcement agent reinitiated communication with and questioned a suspect after the invocation of the suspect's right to remain silent. The Supreme Court focused on the constitutional procedures that law enforcement must follow in order to properly respect, or "scrupulously honor," the suspect's invocation of his right to remain silent.[92] At its core, *Mosley* was concerned about controlling law enforcement so that the suspect retained the ability to cut off questioning and control the timing, subject, and duration of the interrogation.[93] Therefore, the Supreme Court looked to procedural safeguards which would control police conduct in the law enforcement reinitiation context and "counteract the coercive pressures of the custodial setting."[94]

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[91] JA 32, AE XLVII, pg. 4.
[92] *Mosley*, 423 U.S. at 103.
[93] *Id.* at 103-04.
[94] *Id.*

The Supreme Court articulated that the *Mosley* "scrupulously honor" test would examine factors that focused on the behavior of law enforcement, such as whether (1) the suspect was informed of his or her *Miranda* rights at the outset of each interrogation; (2) the police immediately ceased questioning after the suspect invoked the right; (3) there was a sufficient lapse of time between the invocation of the right and the resumption of questioning; (4) the questioning resumed at different locations, and (5) the rounds of questioning concerned different crimes.[95] *Mosley* did not address the situation where the suspect reinitiates discussion of the offense following invocation of the right to remain silent.[96]

In *Bradshaw*, the Supreme Court had the opportunity to examine a suspect reinitiation case, on facts following the *Bradshaw* suspect's invocation of his right to counsel. The *Bradshaw* suspect reinitiation test is first, whether the dialogue reinitiated by the suspect demonstrated a "willingness and a desire for a generalized discussion about the investigation."[97] If the first prong is satisfied, the second part of the test is whether a subsequent "valid waiver of the

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[95] *Id.* at 104-06.
[96] *Id.*
[97] *Bradshaw*, 462 U.S. at 1045 (distinguishing comments that are "routine incidents of the custodial relationship" such as requests for a drink of water or to use the telephone).

right to counsel and the right to silence had occurred, that is whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities."[98]

Although *Bradshaw* is a suspect reinitiation case following invocation of the right to counsel, civilian courts that have analyzed suspect reinitiation in the right to remain silent context have repeatedly applied the *Bradshaw* test.[99] This is because the same legal principle applies to both rights in the suspect reinitiation context. To apply the *Mosley* test, born from the Supreme Court's concern that persistent police badgering would "wear down [the suspect's] resistance and make him change his mind,"[100] makes no sense in a suspect reinitiation case, where the suspect himself seeks to discuss the investigation and control the duration, timing, and subject matter of the interrogation.

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[98] *Id.* at 1046.
[99] *Christopher v. Florida*, 824 F.2d 836, 844 (11th Cir 1987); *United States v. Thongsophaporn*, 503 F.3d 51, 56 (1st Cir. 2007); *United States v. Glover*, 104 F.3d 1570, 1581 (10th Cir. 1997) (overruled on other grounds); *United States v. Alexander*, 447 F.3d 1290, 1294 (10th Cir. 2006); *Davie v. Mitchell*, 547 F.3d 297, 308 (6th Cir. 2008).
[100] *Mosley*, 423 U.S. at 105-06.

The civilian courts, both federal and state, have repeatedly recognized this legal principle. In *Christopher v. Florida*, the Eleventh Circuit held:

> While we recognize that *Edwards* and *Bradshaw* are right to counsel cases, and that *Mosley* governs the admissibility of statements made following the suspects invocation of his right to cut off questioning, we accept the State's implicit claim that there are situations where the 'initiation' test of *Edwards/Bradshaw* **governs** the admissibility of statements made after a suspect has invoked his right to terminate questioning.[101]

The *Christopher* Court further stated:

> We conclude therefore that during this 'significant period' the *Edwards/Bradshaw* rule merges with the test of *Mosley* to render inadmissible statements obtained during a 'significant period' after a request to cut off questioning, **unless the statements were the product of a conversation initiated by the suspect under the test of *Edwards/Bradshaw***. We further conclude that both prongs of the *Edwards/Bradshaw* rule apply: where the 'initiated' conversation is not 'wholly one-sided,' but instead involves interrogation by the police, the suspect's statements are admissible only if the suspect both initiated the dialogue and waived his previously asserted right to silence.[102]

In *United States v. Thongsophaporn*, the First Circuit held:

> The question presented here is whether the defendant freely initiated further communications with law enforcement (and the subsequent questioning was therefore lawful) or whether he

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[101] *Christopher*, 824 F.2d at 844 (internal citations omitted and emphasis added).
[102] *Id.* (internal citations omitted and emphasis added).

> was improperly coerced or pressured into making those communications.[103]

The *Thongsophaporn* Court, citing to *Bradshaw*, further held:

> It is well-settled that law enforcement may resume questioning a defendant in custody who has exercised his right to remain silent if the suspect subsequently initiates further discussion about the investigation.[104]

Other courts have held similarly.[105] This is because the same legal principle relevant to suspect reinitiation applies regardless of the right invoked.

2. As the military judge found, the facts of this case reveal suspect reinitiation.

On page 2 of his ruling, the military judge makes the factual finding that "near concurrent with [the accused's] invocation of his right to remain silent, the accused again asked about the allegations against him."[106] On page 5 of his ruling, the military judge again states that "nearly concurrent with that invocation, [the accused] asked about the allegations against him, thus 'initiating' communication."[107] Essentially, the military judge correctly found that the party reinitiating

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[103] *Thongsophaporn*, 503 F.3d at 56.
[104] *Id.*, 503 F.3d at 56 (citing *Bradshaw*, 462 U.S. at 1044).
[105] *Glover*, 104 F.3d at 1581; *Davie*, 547 F.3d at 308; *Welch v. State*, 992 So.2d 206, 213-15 (Fla. 2008); *State v. Hunt*, 14 So.3d 1035, 1039 (Fla.App. 2 Dist. 2009); *People v. Bell*, 577 N.E.2d 1228, 1237-38 (Ill.App. 1 Dist 1991); *Knox v. Commonwealth*, 663 S.E.2d 525, 529 n.1 (Va.App. 2008).
[106] JA 30, AE XLVII, pg. 2.
[107] JA 33, AE XLVII, pg. 5.

communication about the investigation was the accused. The record is clear that SA Swierk made no attempt to interrogate the accused between the point in time when the accused invoked and the point in time when the accused reengaged her about the allegations.[108]

Applying the first prong of *Bradshaw*, the accused's question to SA Swierk about the specifics of his stepdaughter's allegations evidenced a willingness to discuss the offenses under investigation.[109] The accused's question was far more pointed and case-specific than the question posed by the *Bradshaw* appellant to law enforcement which was found by the Supreme Court to satisfy the first prong of the suspect reinitiation test: "Well, what is going to happen to me now?".[110] The accused's question clearly demonstrated a "willingness and a desire for a generalized discussion about the investigation."[111]

Although the military judge found that the accused reinitiated contact with SA Swierk, he makes reference in his ruling that there was "no second interview" of the accused by SA

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[108] JA 47-48.
[109] *Id.*
[110] *Bradshaw*, 462 U.S. at 1045; *See also, United States v. Conley*, 156 F.3d 78, 83 (1st Cir. 1998) ("what's this all about?"); *Knox*, 663 S.E.2d at 530-532 ("can we just talk later?").
[111] *Bradshaw*, 462 U.S. at 1045 (distinguishing comments that are "routine incidents of the custodial relationship" such as requests for a drink of water or to use the telephone).

Swierk, instead calling what occurred between SA Swierk and the accused a "single interview."[112] This language reflects a factual finding that there was no break in contact between the points in time of invocation, suspect reinitiation, waiver, and subsequent interrogation.[113] Such a factual finding of "no break in contact" by the military judge would be correct, but irrelevant as a legal matter. No break in contact is required in order for a suspect to reinitiate communication with law enforcement for purposes of *Bradshaw*.[114]

However, if as the accused argued at the Army Court,[115] this language reflects a finding of fact that the accused did not, or could not, reinitiate communication with SA Swierk, that finding would be clearly erroneous and unsupported by the record. It would also be in obvious and direct conflict with the military judge's factual finding that the accused "initiated" a discussion about the investigation with SA Swierk by asking about the allegations against him.

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[112] JA 33, AE XLVII, pg. 5.
[113] *Id.* ("there was literally no measureable amount of time between the [accused's] communication and the 'second interview.'").
[114] *Thongsophaporn*, 503 F.3d at 57; *Christopher*, 824 F.2d at 844-845; *Knox*, 663 S.E.2d at 530; *Hunt*, 14 So.3d at 1039; *Bell*, 577 N.E.2d at 1237-38.
[115] Accused's Brief at Army Court, pg. 2.

3. Because this is a suspect reinitation case, "break in contact" is not a relevant, let alone dispositive, factor. Therefore, the military judge was influenced by an erroneous view of the law when he relied on *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992) and *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009) to extend *Mosley* to suspect reinitiation cases.

After finding that the accused reinitiated communication with SA Swierk, the military judge relied on this Court's holdings in *Watkins* and *Delarosa* to extend *Mosley* to suspect reinitiation cases. The military judge held that these cases require, even where the suspect reinitiates communication that "law enforcement must break contact with the accused and give him some time to reflect before attempting a subsequent interview."[116] However, neither case remotely supports this finding. *Watkins* held that a two and one-half hour break in interrogation between invocation and law enforcement reinitiation was lawful under *Mosley*.[117] *Delarosa*'s holding was limited to the finding that the *Delarosa* accused never

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[116] JA 33, AE XLVII, pg. 5.

[117] *Watkins*, 34 M.J. at 346. Although the military judge states that *Watkins* provides a dispositive "test" on this issue, he misreads *Watkins*. *Watkins* states, "Whether there is a violation of *Miranda* by approaching an individual after invoking his rights depends on which right was invoked, who initiates communication, the subject matter of the communication, when the communication takes place, where the communication takes place, and the time between invocation of the right and the second interview." This is not a test, and certainly not a test for suspect reinitiation cases, but instead a sweeping overview of all factors conceivably relevant in cases involving questioning after invocation of either the right to remain silent *or* the right to counsel.

unambiguously invoked his *Miranda* rights, and therefore, could claim no Fifth Amendment remedy.[118]

A close reading of each case reveals that neither involved suspect reinitiated interrogation. Merely because those cases involved a measureable break in contact between invocation (albeit ineffective invocation in *Delarosa*) and law enforcement reinitiation in no way supports the military judge's ruling that this Court has "implicitly" required a break in time in suspect reinitiation cases.

Moreover, the Supreme Court's reasoning in *Mosley* logically does not apply to suspect reinitation cases. The *Mosley* break in time in right to remain silent cases was designed to prevent persistent badgering by the police intended to "wear down [the accused's] resistance and make him change his mind."[119] To apply the same analysis to a suspect reinitiation case, where the suspect himself seeks to discuss the offenses, would be an "'absurd' reading of *Miranda* which would exclude from evidence statements made after the cessation of an interrogation even if those statements 'were volunteered by the person in custody without further interrogation whatever.'"[120]

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[118] *Delarosa*, 67 M.J. at 325. Issues of "break in contact" were not part of this Court's holding.
[119] *Mosley*, 423 U.S. at 105-06.
[120] *Hunt*, 14 So.3d at 1039 (citing and quoting *Mosley*, 423 U.S. at 102).

4. Because this is a suspect reinitation case, post-suspect reinitiation "interrogation" by law enforcement is not a dispositive factor. Moreover, SA Swierk did not interrogate the accused prior to waiver.

(a) Whether SA Swierk "interrogated" the accused after he reinitiated communication on the subject matter of the investigation, but prior to waiver, is not a dispositive factor.

The military judge stated that the second reason for his finding that SA Swierk violated the accused's right to remain silent was that SA Swierk "continued her interrogation of SGT Cooper upon the invocation."[121] The military judge believed that SA Swierk's statement "'I cannot talk to you about the allegations if you aren't willing to speak to me,' or words to that effect" amounted to interrogation under *Innis*.[122] The military judge apparently believed that any post-invocation interrogation per se violated the accused's right to remain silent.

This holding flowed from the military judge's misunderstanding of the law and application of incorrect legal principles. Because the military judge did not apply the law flowing from the line of suspect reinitiation cases, he was still working within the *Mosley* framework and the law enforcement reinitiation jurisprudence.

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[121] JA 32, AE XLVII, pg. 4.
[122] JA 34-35, AE XLVII, pg 6,7.

Certainly, if law enforcement sought to reinitiate dialogue about the offenses (especially with no break in time following invocation), the question of whether SA Swierk's statement to the accused met the legal definition of "interrogation" may have been relevant.[123] However, the question of "interrogation" or "non-interrogation" is not relevant to the *Bradshaw* test. The appropriate question is whether, after a proper suspect reinitiation, the accused knowingly, intelligently, and voluntarily waived his post-reintiation rights to remain silent.[124] The *Bradshaw* Court stated that:

> If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.[125]

Clearly, the Supreme Court contemplated that post-suspect reinitiation discussions could involve interrogation. If the Supreme Court had wanted to prohibit all conceivable post-

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[123] *See Mosley*, 423 U.S. at 104 (discussing the fact that the reinitiating police officer re-advised Mosley of his *Miranda* rights and obtained a waiver prior to interrogation).
[124] *Bradshaw*, 462 U.S. at 1046.
[125] *Id.*, at 1044-45 (quoting *Edwards*, 451 U.S. at 486 n.9).

suspect reinitiation interrogation prior to an express waiver, it could easily have done so with a bright line test.

Instead, in *Wyrick v. Fields*,[126] cited by *Bradshaw*, the Supreme Court held that by reinitiating contact with the police after invocation, a suspect may waive his right to be free of interrogation unless the circumstances changed so seriously that his answers were no longer knowing, intelligent, or voluntary. In *United States v. Velasquez*,[127] the Third Circuit articulated the law as follows:

> When the accused [then] initiates a conversation...further interrogation of the accused may take place. After the first *Bradshaw* prong, initiation, has been satisfied, interrogation is permitted. Satisfaction of the second prong, voluntary, knowing, and intelligent waiver, is then possible, depending on the totality of the circumstances.

Therefore, the question is not whether SA Swierk's words amounted to "interrogation," but how they, viewed in the context of the totality of the circumstances, impacted whether the accused's post-suspect reinitiated waiver was knowing, intelligent, and voluntary.

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[126] 459 U.S. 42, 47 (1982).
[127] 885 F.2d 1076, 1087 (3rd Cir. 1989).

(b) SA Swierk did not interrogate the accused when she told him that she could not talk to him about the offenses under investigation following his invocation of his right to remain silent.

The military judge found that when SA Swierk told the accused that she could not talk to him about the allegations because he invoked his right to remain silent, she interrogated the accused.[128] The military judge's finding was based solely on "the words [SA Swierk] used in responding to SGT Cooper."[129] The military judge refused to examine whether "SA Swierk 'sought' an incriminating statement from the accused."[130]

The military judge found that "SA Swierk should have known that her statement was inconsistent with her duty to 'scrupulously honor' SGT Cooper's invocation, in that her statement was reasonably likely to induce SGT Cooper to discuss the allegations against him."[131] However, at the same time, the military judge believed that SA Swierk should have answered the accused's questions, and entered into a discussion of what his stepdaughter was telling the police.[132] Obviously, the military judge's findings are internally inconsistent.[133]

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[128] JA 35, AE XLVII, pg. 7.
[129] *Id.* The military judge made no findings of any other words or actions that may have amplified SA Swierk's response; i.e., a raised eyebrow, a tone of voice, etc.
[130] *Id.*
[131] *Id.*
[132] JA 33, AE XLVII, pg. 5. The military judge stated "SA Swierk did not meet these questions with a straight answer about the

More importantly, his findings regarding whether SA Swierk's words amounted to interrogation are an abuse of discretion in that they are a clearly unreasonable application of the law to the facts of the case. Under *Innis*, "interrogation" is defined as any words or actions by the police that they should know are "reasonably likely to elicit an incriminating response."[134] Apparently, the military judge believed that entering into a specific discussion with the accused of the underlying allegations was somehow *less* likely to result in an incriminating response than informing him that she could not talk to the accused about the evidence in the case, because he had just invoked his rights.

Although certainly declaratory statements by law enforcement to a suspect about the state of the evidence in a case are not per se "interrogation," such statements are surely

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allegations. Nothing prevented SA Swierk from answering the accused's question, as the officers did in *Watkins*." Importantly, Watkins did not ask about the details of the offense. Rather, Watkins only asked: (1) if he should get a civilian as opposed to military lawyer; and (2) how much time in jail he would get. 34 M.J. at 345.

[133] Apparently, the military judge believed that after invocation SA Swierk was supposed to simultaneously "terminate the interview, leave the room, or do anything that signified the interview had concluded" while "forthrightly answer[ing]" the accused's inquiries. JA 33-34, AE XLVII, pg. 5-6. This is clearly logically inconsistent.

[134] *Innis*, 446 U.S. at 301 (the Supreme Court found that the police remark "it would be too bad if [a] little girl would pick up [the gun police were searching for] and maybe kill herself" in the accused's presence was not interrogation).

more likely to invite incriminating responses than a statement by an agent to an accused that the agent cannot discuss the details of the case because it risks violating the accused's right to remain silent.[135] In at least one military case, *United States v. Byers*,[136] this Court has held that a detailed description of the evidence against an accused amounted to interrogation.

SA Swierk actively attempted to *prevent* further incriminating statements by informing him that his invocation precluded further discussion of the offense.[137] She told the accused that she wasn't going to speak to him about the offense

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[135] *See United States v. Payne*, 954 F.2d 199, 203 (4th Cir. 1994) (holding the remark by law enforcement officers to the suspect "they found a gun in your house" not to be interrogation); *Shedelbower v. Estelle*, 885 F.2d 570, 573 (9th Cir. 1989) (officer's false statement that suspect had been identified by a rape victim was not the type of comment that would encourage the accused to make incriminating responses); *cf. United Sates v. Orso*, 266 F.3d 1030, 1033-34 (9th Cir. 2001) (holding that officer should have known it was reasonably likely that engaging in "detailed discussion" about evidence and witnesses against the accused as well as the penalties for the crime would cause the suspect to respond and make incriminating statements).

[136] 26 M.J. 132, 135 (C.M.A. 1988).

[137] JA 47-48; *See United States v. Conley*, 156 F.3d 78, 83 (1st Cir. 1998) (not interrogation where law enforcement told accused "that he had requested an attorney and that this circumstance prevented the postal inspectors from entering into a dialogue with him"); *United States. v. McDavid*, 37 M.J. 861, 866 (A.F.C.M.R. 1993) (no finding of interrogation where law enforcement told accused that "since he had requested a lawyer they could not speak with him").

and she told him why.[138] The most reasonably predictable response to her assertion, given that the accused had seconds earlier invoked his right to remain silent, was an acceptance by the accused that there would be no further discussion of the allegation. That the accused chose to press on with the object of his reinitiation, waiver of his right to remain silent, was his own unprompted and unpressured choice.

5. The record and the military judge's findings of fact are sufficiently clear to show knowing, voluntary, and intelligent waiver by the accused.

Although the Army Court invites the military judge to determine on remand, as part of a new *Mosley* analysis, whether the accused's waiver was knowing, intelligent and voluntary,[139] the record and the military judge's findings are more than sufficiently clear to show a valid waiver as part of a properly applied *Bradshaw* analysis.[140] The record and the military judge's ruling reflect that a matter of moments after being advised of his rights, and a matter of seconds of after invoking his right to remain silent, the accused reinitiated conversation

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[138] JA 47-48.
[139] JA 6-7, *Cooper*, ARMY MISC 20110914 at 6-7.
[140] The military judge's findings of fact are sufficiently clear and unambiguous to support a legal conclusion as to waiver. *See United States v. Lincoln*, 42 M.J. 315 (C.A.A.F. 1995).

about the offenses and then affirmatively acknowledged that he was revoking a previously invoked right.[141]

Following reinitiation, SA Swierk actively avoided a discussion of the offenses.[142] She focused him on his right to remain silent, telling the accused that because he had invoked his right to remain silent, she could not discuss the offenses with him.[143] Then, when the accused affirmatively indicated that he wanted to "tell his side of the story," SA Swierk ensured that the accused understood his rights and wanted to make a statement.[144] Finally, she had the accused sign the rights waiver portion of the DA Form 3811.[145]

Given this incredibly brief period of time, there was no need to re-advise him of his Article 31 or *Miranda* rights, because there was no risk that he would have forgotten the rights of which he was advised, that he understood, and which he invoked moments before.[146]

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[141] *Glover*, 104 F.3d at 1581.
[142] JA 30, AE XLVII, pg. 2; JA 48-49.
[143] *Id.*
[144] JA 30, AE XLVII, pg. 2; JA 49.
[145] *Id.*
[146] *Fields*, 459 U.S. at 49 (in a *suspect* reinitiation case, second set of rights unnecessary where first set of rights given "moments earlier"); *State v. Castaneda*, 724 P.2d 1, 6 (Ariz. 1986) (rejecting accused's assertion that he must be re-Mirandized after a reinitiation); *Knox*, 663 S.E.2d at 531 n.6 (same).

In a matter of moments, the accused was advised of his right to remain silent and repeatedly stated that he understood that right.[147] SA Swierk had the accused read the waiver portion of the DA Form 3881 aloud to ensure he knew and understood what his rights were.[148] The accused clearly knew of and understood the right to remain silent, since he invoked that right initially. He then reinitiated conversation about the offense, indicated that he wanted to talk to SA Swierk, and affirmatively waived his right to remain silent verbally and in writing on the DA Form 3881.[149] The record and the military judge's findings of fact reflect that the waiver was a product of the accused's free and deliberate choice to "tell his side of the story" and valid under *Bradshaw*.

B. The Army Court Erred by Holding that *Michigan v. Mosley* Applied to the Facts of this Case.

The Army Court held that "the military judge properly addressed the issue surrounding the accused's invocation of the right to remain silent under [*Mosley*] rather than under the right to counsel cases of [*Bradshaw*] and [*Edwards*]."[150] The Army Court made no effort to explain why the different rights require

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[147] JA 30, AE XLVII, pg. 2; JA 47-49.
[148] JA 49.
[149] JA 30, AE XLVII, pg. 2; JA 47-49.
[150] JA 5, *Cooper*, ARMY MISC 20110914 at 5.

different tests in the suspect-reinitiation context. The Government submits that the Army Court's inability to articulate a reason is because no principled reason exists for maintaining different tests.

Furthermore, the Army Court made no mention or attempt to distinguish the civilian cases that apply *Bradshaw* when a suspect reinitiates discussion after invoking his right to remain silent. For example, in *United States v. Glover*, the Tenth Circuit held that:

> The key issue addressed by *Mosley* is when it is permissible for police officers to initiate questioning or interrogation of a person in custody after that person has exercised her right to remain silent. What *Mosley* does not address are circumstances, such as those found in the case at hand, where the individual in custody, rather than the police, initiates further discussion. Although the Supreme Court was focusing on a different issue, *Edwards v. Arizona*, is instructive on the issue at hand.[151]

In *Davie v. Mitchell*, applying *Bradshaw* to a suspect reinitation case following the invocation of the right to remain silent, the Sixth Circuit held:

> It is true that *Bradshaw* dealt with the initiation of questioning after invocation of the right to counsel, and that there was no invocation of the right to counsel in Davie's case. But this distinction if anything cuts against Davie, as asking for counsel requires 'additional safeguards' to those where a suspect

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[151] *Glover*, 104 F.3d at 1581 (applying the *Bradshaw* articulation of the *Edwards* rule in the suspect reinitiation context).

has, for instance, simply refused to sign a waiver.[152]

Moreover, the Army Court held that a "critical factor" in a *Mosley* analysis is the extent to which a waiver of the right to remain silent after rights warnings was valid under the circumstances.[153] However, waiver was not discussed by *Mosley*, nor is it a factor that can assist in determining whether law enforcement "scrupulously honors" a suspect's right to remain silent. Waiver is suspect focused, whereas the *Mosley* factors are wholly law enforcement focused. The significant majority of civilian cases separate the "scrupulously honor" analysis from a "wavier" analysis.[154] As discussed above, the trial court should have tested for waiver, but not under a *Mosley* analysis. Waiver should be tested for as the second prong in a properly applied *Bradshaw* analysis once bona fide suspect reinitiation is found.

The threshold issue in this case was who reinitiated contact following invocation: law enforcement or the accused. The military judge correctly found suspect reinitiation, but then applied the wrong law to the facts. Both the military judge and the Army Court applied incorrect legal principles when

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[152] *Davie*, 547 F.3d at 308 (citations omitted) (applying *Bradshaw* to a suspect reinitiation case post-invocation of the right to remain silent).
[153] JA 5, *Cooper*, ARMY MISC 20110914 at 5.
[154] *United States v. Barone*, 968 F.2d 1378, 1384 (1st Cir. 1992); *State v. Hartley*, 511 A.2d 80, 84 (N.J. 1986).

holding that *Mosley*, not *Bradshaw*, controlled the analysis in the initial rights warnings and waiver issue in this case.

II.

WHETHER THE MILITARY JUDGE ERRED IN FINDING THE ACCUSED'S STATEMENT WAS INVOLUNTARILY MADE

Summary of Argument

The military judge's analysis of the voluntariness of the accused's statement was rooted in clearly erroneous findings of fact and considerations of improper voluntariness factors. These clearly erroneous findings of fact infected his application of the law and rendered it clearly unreasonable. Once those clearly erroneous factual findings and improper factors are removed from the analysis, the voluntariness of the accused's statement was not a matter upon which reasonable minds can differ.

Law and Argument

A. The Military Judge Abused his Discretion by Making Clearly Erroneous Findings of Fact, Considering Improper Factors, and Making a Clearly Unreasonable Application of the Law to the Facts of the Case as to the Voluntariness of the Accused's Statement.

The military judge found the Government failed to prove that the accused's statement was voluntarily given.[155] To support this conclusion, the military judge found that the

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[155] JA 35-36, AE XLVII, pg. 7-8.

following factors went to involuntariness:[156] (1) the accused was on prescription drugs at the time of questioning; (2) the interrogation took place from 0300 to 0900, without sufficient evidence showing the need to conduct the interrogation at that time; (3) the accused was fatigued during the interview; (4) the accused was in pain and discomfort from surgery; (5) the accused was denied his prescription medication for some period of time; (6) the accused made several ambiguous requests for counsel; (7) the accused made two unequivocal requests to terminate the interrogation which the military judge believed were not respected by law enforcement.[157]

The Government has the burden of showing that a confession is "the product of an essentially free and unconstrained choice by its maker."[158] Courts must examine the totality of the circumstances to determine whether the accused's will was overborne and his capacity for self-determination critically impaired.[159] Factors to be considered include "both the

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[156] *Id.*

[157] The military judge found that the following factors weighed in favor of voluntariness: (1) the accused's education; (2) the accused's rank; (3) the accused's confession included information not known to the investigators; (4) a portion of the confession was handwritten; (5) the accused indicated a desire to "tell his side of the story"; (6) the confession was in large part self-serving and a minimization of his misconduct. JA 36, AE XLVII, pg. 8.

[158] *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996).

[159] *United States v. Chatfield*, 67 M.J. 432, 439 (C.A.A.F. 2008).

characteristics of the accused and the details of the interrogation."[160] In order to find involuntariness, the Supreme Court has held that there must be some predicate of coercive police activity.[161] In this case, the military judge's voluntariness conclusion was an abuse of discretion because it was a clearly unreasonable application of the law to the facts, predicated on clearly erroneous findings of fact and improper voluntariness factors.

1. The military judge made clearly erroneous findings of fact as to all evidence of coercive police activity.

The military judge's conclusions that go to "overreaching" or "coercive" tactics by SA Swierk or SA Kapinus in the manner of interrogation are predicated on 2 findings: (1) the alleged denial of the accused's pain medication by SA Kapinus and (2) the allegedly gratuitous "off-hours" interrogation of the accused.[162]

(a) Denial of pain medication.

The military judge made very specific factual findings as to the alleged "denial of pain medication":

> SGT Cooper told SA Kapinus that he needed to take his morning dose of medication; SA Kapinus said they would take care of that later in the morning. SGT Cooper asked for his medications

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[160] *Bubonics*, 45 M.J. at 95 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).
[161] *Colorado v. Connelly*, 479 U.S. 157, 166 (1986).
[162] JA 35-36, AE XLVII, pg. 7-8.

> more than once, each time SA Kapinus explained that they would take care of it later.[163]

None of these facts are in the record. First, there is no evidence in the record that the agents "denied" the accused his medication. The accused never testified to that effect. He merely testified at the motions hearing that he "needed" his next dose of medication at 6 AM on the morning of September 23, 2010.[164] However, there is no evidence whatsoever that the accused *told the agents* that he needed the medication precisely at that time. Furthermore, there is no testimony as to why he needed it at a 6 AM hard time. SA Kapinus testified that he believed that the accused needed his medication at "8 AM or sometime in the morning,"[165] but there is no evidence anywhere in the record that the accused either requested, or was denied, his pain medication at any time during the interrogation.[166]

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[163] JA 31, AE XLVII, pg. 3. The military judge reiterated this finding in his conclusions of law saying: "the ability of the accused to have access to his medicine, medicine he needed for, *inter alia*, pain management, was conditioned upon the interrogation being concluded at the discretion of the interrogators, and not at the discretion of the accused." JA 36, AE XLVII, pg. 8.

[164] JA 136.

[165] JA 73, 83. SA Kapinus testified: "he stated that he usually takes his medication in the morning...and he didn't need it until the next morning, so he didn't need it at that point."

[166] Although the interrogation lasted until after 0800, if this testimony was the basis for the military judge's finding that the accused requested his medication, more than once, and that SA Kapinus repeatedly denied that medication by saying "they

(b) Off-hours questioning.

The military judge stated "insufficient evidence was presented justifying the midnight arrest of the accused and the subsequent all night interrogation."[167] Such a finding is clearly erroneous, because the military judge ignores highly probative facts in the record. First, the sexual assault was reported after 2200 on the night of the interrogation.[168] Second, the sexual assault as reported did not take place days or weeks or months previous to the time of report. It happened the night before.[169] And the alleged victim lived in the same house as the accused.[170]

Surely, these facts justified removing the victim from the accused's home and initiating a prompt investigation.[171] Even more certainly, they cannot be ignored by the military judge absent an abuse of discretion. Delaying the investigation, including interrogation of the accused, while the victim spends the night in her attacker's home (1) places the victim at further risk and (2) endangers her testimony and the testimony

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would take care of it later," it would have been a completely arbitrary manipulation of this testimony and clearly erroneous.

[167] JA 35, AE XLVII, pg. 7.

[168] JA 240-41, AE XVII, Article 32 Testimony of Mrs. Kimberly Crosby, pg. 21-22.

[169] JA 222, AE XVII, Article 32 Testimony of Ms. BC, pg. 3.

[170] *Id.*

[171] SA Kapinus was conducting a simultaneous interview of the victim at the same time that SA Swierk began an interrogation of the accused. JA 47-48, 66.

of other members of the family whom might be witnesses in the case.[172] Nothing about the nighttime hours provide sanctuary for a suspect of child molestation to avoid investigation by law enforcement, where law enforcement objectively and reasonably believes that a suspect is in control of his physical and mental capacities.[173]

2. The military judge improperly considered ambiguous requests for counsel as a voluntariness factor.

The military judge considered the accused's "several ambiguous requests for counsel" as an involuntariness factor.[174] According to the military judge, such requests "[are] considered as a factor weighing against voluntariness...under *Schneckloth*."[175] However, ambiguous requests for counsel are not an involuntariness factor.

The military judge cites to no case in which this specific factor impacted the voluntariness analysis. Although courts have held that the lack of an unambiguous invocation of counsel

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[172] *See Commonwealth v. Hunter*, 690 N.E. 2d 815, 823 n.3 (Mass. 1998) (surveying confession cases and finding that the Court was "unaware of any cases in which off-hour questioning is the sole circumstance suggestive of coerciveness in the police interrogation"); *Commonwealth v. Belad*, 764 N.E. 2d 324, 334 n.5 (Mass. 2002) (finding off-hour questioning proper where "new information...made reinterrogation appropriate" at that time).
[173] *See United States v. Campos*, 48 M.J. 203, 206 (C.A.A.F. 2003).
[174] JA 36, AE XLVII, pg. 8.
[175] *Id.*

suggests a voluntarily made statement,[176] the converse is not true. The right to counsel and the right not to have one's will overborne by police interrogation require separate analytical inquiries. The fact that a suspect may consider having counsel assist him in negotiating a police investigation, and express that consideration ambiguously, has no logical connection to whether the subsequent statement was the free choice of its maker.

3. The military judge made a clearly unreasonable application of the law to the facts of the case.

After the clearly erroneous findings of fact and improper involuntariness factors are removed from the analysis, the voluntariness analysis remaining is not one upon which reasonable minds can differ.[177] In considering the "characteristics of the accused" in a voluntariness analysis, courts are to examine the accused's age, education, experience, and intelligence.[178] Here, as the military judge found, the accused was a noncommissioned officer who had been in the Army for over 5 years.[179] He was 34 years old with a high school

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[176] *Delarosa*, 67 M.J. at 326.
[177] *See Baker*, 70 M.J. at 294 (Baker, J. dissenting); *See* fn. 153, *supra*, military judge's findings of fact that weighted in favor of voluntariness.
[178] *United States v. Freeman*, 65 M.J. 451, 454 (C.A.A.F. 2008).
[179] JA 29, AE XLVII, pg. 1.

equivalent education.[180] He was married with a family.[181] He was a combat engineer.[182] The accused stated that he was not suffering from any mental deficiencies that would have prevented him from understanding the details of the interrogation.[183] The military judge did not find that the accused was of low intelligence or had any mental disability that prevented him from understanding the investigative procedures.[184]

(a) Effect of prescription medication.

Although the accused was on prescription medication, it is unclear what impact the military judge believed this medication had on the accused. The accused stated that he had taken 13 pills the night of his interrogation.[185] Apparently, the military judge did not find this to be credible testimony, as he found that the accused took "no fewer than four and up to a

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[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] JA 192, AE XVI, pg. 3.
[184] Although the accused testified that he was "in special education" from eighth grade until graduation, there was no evidence presented by the defense as to what that term meant in regard to the accused's level of intelligence or education. R. 116. The military judge did not cite to the accused's education level as a factor weighing toward involuntariness. The accused's GT score of 91 (JA 196, AE XVIII) while relatively low, was also not cited by the military judge as an involuntariness factor.
[185] JA 123.

dozen pills."[186] The accused's wife testified at the Article 32 that the accused took "maybe four pain pills, I don't know what."[187] While the military judge found that the accused may have been prescribed several different types of pills, it is unclear which pills the military judge believed he actually took, and what the effects of those pills were on the accused. The record is devoid of evidence that the accused told SA Swierk anything about his medications.[188] While the accused told SA Kapinus about his medications, there is no evidence in the record that he told SA Kapinus that his medications caused any cognitive or physical shortcomings.

Certainly, there is no rule prohibiting police from talking to an accused who is taking prescription medication.[189] The test for voluntariness involving an accused's physical and mental state is one of objective reasonableness on the part of the

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[186] JA 29, AE XLVII, pg. 1. The military judge states that the accused was "prescribed several medications," but does not state which medications that he believes the accused took. The military judge states that the evidence presented in the form of the accused's testimony, his prescription profile, and the defense motion are contradictory. (JA 129, AE XLVII, pg. 1, n.1).

[187] JA 238, AE XVII, Article 32 Testimony of Ms. Tran Cooper, pg. 19.

[188] JA 59.

[189] *Campos*, 48 M.J. at 206 (finding accused statement voluntary where law enforcement interrogated accused while accused was in hospital recovering from head injury and paralysis and taking codeine); *United States v. Bell*, 38 M.J. 523, 528 (A.C.M.R. 1993) ("statements taken while a person is under the influence of drugs or alcohol can be voluntary").

investigating agents.[190] When asked if he was sleepy, or confused, or fatigued on account of his medication, the accused told the agents he was not.[191] The accused was an active participant in the interrogation and the agents reasonably believed that the accused's medication was no barrier to giving a voluntary statement.[192] The military judge makes no finding to the contrary. Furthermore, the military judge did not cite to any evidence of confusion or befuddlement on the part of the accused due to his medication that informed a lack of voluntariness.[193]

(b) Effect of pain or discomfort.

Both SA Swierk and SA Kapinus testified that the accused merely stated that he had a "stiff knee."[194] They were sensitive to his situation by allowing him breaks to walk around, which the accused repeatedly declined.[195] Moreover, the accused flatly

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[190] *Campos*, 48 M.J. at 205 (affirming findings of military judge that it was "objectively reasonable" for the agents to conclude that the accused was not under any type of medication or drug that would have prevented him from participating in an interrogation).
[191] JA 55, 73-74
[192] JA 74. When asked whether the accused appeared to comprehend everything that was going on, SA Kapinus stated "Absolutely."
[193] *Campos*, 48 M.J. at 207 (confession voluntary despite "possibility of mental befuddlement" at the time of confession).
[194] JA 54, 72-73.
[195] *Id.*

denied that he needed medication to alleviate any discomfort during the period of interrogation.[196]

Both SA Kapinus and the accused testified as to their understanding that the accused's next dose of medication was to be taken the following morning. SA Kapinus believed the next dose was due at "8 AM or sometime in the morning."[197] The accused testified that he "needed" his next dose of medication at "6 AM," several hours before the interrogation actually ended.[198] However, the record is absent of any evidence that the accused actually told SA Kapinus that he needed his medication at a 6 AM hard time and equally absent of any evidence as to why the medication needed to be taken at precisely 6 AM. Moreover, both the accused and the defense counsel conceded that "*the medications...do not help with the pain,*"[199] so it is unclear why the time that the accused received his next dose has any relevance to voluntariness. Furthermore, the military judge made no finding that the accused's pain level was any barrier to a voluntary statement.

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[196] JA 73-74.
[197] JA 83.
[198] JA 136.
[199] JA 157 (Cross of the Accused: Q: "Ok, so you're on medication that just basically makes you tired and doesn't help with the pain." A: "Yes sir."); JA 182 (Defense argument on the motion: "So yes, these are medications that make him tired and don't help with the pain.").

(c) Effect of fatigue.

Again, both SA Swierk and SA Kapinus testified that the accused did not exhibit any level of fatigue that would prevent him from participating in the interview.[200] At all times, he appeared objectively lucid, coherent, and aware to the law enforcement agents.[201] The military judge did not find otherwise. The accused was certainly sufficiently aware that he was capable of invoking his rights (twice), reinitiating contact with SA Swierk in order to "tell his side of the story," and successfully completing a DA Form 3881, a handwritten statement, and a typewritten statement.[202] Clearly, under the totality of the circumstances, appellant's characteristics weigh in favor of his statement being found voluntary.

(d) Character of the detention and manner of the interrogation.

In considering the character of the detention, courts are to examine "the conditions of the questioning and the rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[203]

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[200] JA 55, 72-73.
[201] JA 55, 72.
[202] Both parts of the statement contain numerous self-serving remarks.
[203] *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005).

(1) Conditions Of The Detention And The Questioning

The detention itself was not oppressive. The accused was initially placed alone in a detention cell at the MP station with a bed, a sink and a toilet.[204] Investigator McCall did not harass the accused, but instead asked him if he was alright and if he needed anything.[205] The accused told Investigator McCall that he was fine.[206] The accused had every chance to rest, sleep, and use the latrine during his initial detention at the MP station. Once at the CID station, the accused was offered breaks and opportunities to move around.[207] He was never physically restrained at CID or punished in any way.

The military judge also found the fact that the interrogation was held from 0300 to 0900 weighed in favor of involuntariness.[208] However, the interrogation did not actually begin until 0352 when the accused waived his rights and decided to discuss the events with SA Swierk.[209] The interrogation ended at approximately 0857 when the accused signed his sworn statement.[210] Therefore, the interrogation itself lasted approximately 5 hours. To the extent that the military judge

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[204] JA 115.
[205] JA 116.
[206] *Id.*
[207] JA 71-73.
[208] JA 35, AE XLVII, pg. 7.
[209] JA 188, AE XV.
[210] JA 195, AE XVI, pg. 6.

found that the interrogation lasted for six hours, this finding reflects another clearly erroneous finding of fact.

(2) Manner of the interrogation.

The facts that detention lasted for approximately nine hours, and interrogation lasted for approximately five hours, do not render a statement involuntary without other evidence of coercive police tactics.[211] The military judge did not conclude that the agents used any physical or psychological coercion to compel the statement.[212] The accused was informed of his rights and the agents repeatedly ensured that he understood his rights.[213] Although the interrogation took approximately five hours, the military judge did not find that it involved prolonged or repeated questioning. The agents never threatened the accused.[214] They were not confrontational or intimidating.[215]

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[211] *United States v. Washington*, 46 M.J. 477, 481 (C.A.A.F. 1997) (confession voluntary despite 2 day interrogation); *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) (confession voluntary despite 10 hour interrogation).

[212] *Cf. Bresnahan*, 62 M.J. at 142 (confession voluntary even though detectives "exploited emotional ties" between accused and victim in order to get accused to confess).

[213] JA 46-50.

[214] *Cf. United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002) (confession voluntary even though detectives told the accused he would be removed from his home for child abuse).

[215] *Cf. Bubonics*, 45 M.J. at 96 (confession involuntary where accused placed in irons and investigator screamed threats at the accused).

No promises were made.[216] No lies were told.[217] No deception was used.[218] The agents developed "themes" in order to guide their interrogation of the accused, but such themes are wholly acceptable police practice.[219]

The military judge's voluntariness conclusion was clearly unreasonable, predicated on clearly erroneous findings of fact and improper voluntariness factors. The accused's confession was a voluntarily made statement and the product of a free and unconstrained choice. The accused was an adult, married, noncommissioned officer with over five years as a combat engineer in the Army. His statement is replete with exculpatory or self-serving references: he had done an "awesome" job raising his kids; the family dog was the culprit of any "licking" behavior; he never pulled down Ms. BC's pants; he never pulled his penis out of his pants while in Ms. BC's room; he never massaged her groin area; he did not know if Ms. BC had any pubic

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[216] *Cf. United States v. Morris*, 49 M.J. 227, 229 (C.A.A.F. 1998) (confession voluntary despite promise of leniency by law enforcement).
[217] *Cf. Freeman*, 65 M.J. at 456 (confession voluntary despite lies by law enforcement to the accused about the evidence against him and threats to turn his case over to civilian authorities who would punish him more severely).
[218] *Cf. United States v. Davis*, 6 M.J. 875, 879 (A.C.M.R. 1979) (confession voluntary despite use of deception).
[219] *Davis*, 6 M.J. at 879.

hair;[220] he wasn't thinking about anything sexual while he was inserting his finger into Ms. BC's vagina; and he was not attracted to Ms. BC sexually.[221] Such remarks are the sign of a voluntarily made statement.[222]

Because the accused's statement was taken late at night, from an accused who took some undetermined amount of ineffective pain medication, during a five hour interrogation, the military judge seeks to suppress this statement, without any legitimate evidence of coercive police activity and in the face of repeated indications that the accused had no difficulty in participating in the interrogation. Such a ruling runs contrary to well-established case law and is an abuse of the military judge's discretion.

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[220] The accused's answer to the question about whether Ms. BC had pubic hair was "I don't. My God, that's a bit too personal." JA 192, AE XVI, pg. 3. Clearly, the accused was sufficiently able to distinguish and choose between those questions that he wanted to answer and those questions which answering would require divulging details he was unwilling to disclose.

[221] JA 190-95, AE XVI.

[222] *United States v. Henderson*, 52 M.J. 14, 18 (C.A.A.F. 1999) (no indication of involuntariness where accused framed his admissions in a self-serving story to authorities); *Washington*, 46 M.J. at 482 (confession voluntary where accused tried to talk his way out of trouble).

III.

WHETHER THE MILITARY JUDGE ERRED IN SUPPRESSING THE ACCUSED'S ENTIRE TYPEWRITTEN STATEMENT BASED ON A SECOND ALLEGED VIOLATION OF HIS RIGHT TO REMAIN SILENT.

Law and Argument

The military judge found that SA Kapinus violated the accused's right to remain silent by having him sign and swear to the contents of his confession after invoking (the second time) his right to remain silent. After the accused invoked his right to remain silent, SA Kapinus allowed him to review the typed questions and answers, and then had the accused sign and swear to the statements already made.[223]

The military judge abused his discretion by using incorrect legal principles directly contrary to military case law. In *United States v. Sager,* this Court held "we are not convinced that the mere typing and securing of appellant's signature concerning his prior admissions can be likely perceived as interrogation for purposes of *Miranda*."[224] The military judge attempted to distinguish *Sager* by stating "this is not a case of SA Kapinus merely 'typing and securing' (SGT Cooper's)

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[223] JA 106-07.

[224] *United States v. Sager,* 36 M.J. 137, 146 (C.A.A.F. 1997) (holding that such "typing and securing" is not testimonial under *Pennsylvania v. Muniz,* 496 U.S. 582 (1990)).

signature."[225] However, the military judge fails to show how it is not. Printing the statement and securing a signature is exactly what SA Kapinus did following the invocation. Therefore, the typewritten questions and answers up to the point of invocation should not be suppressed because of the accused's subsequent signature.

The first two questions recorded on the sworn statement that follow invocation cannot reasonably be construed to be interrogation. The question "*Did you have an opportunity to review this statement and change anything that you needed*?"[226] does not call for an incriminating answer; it simply operates to obtain the accused's certainty that what he has said previously is correct. In this way, it is the same as securing a signature, which *Sager* holds is not interrogation.

The question "*Did I type the questions and answers to this statement, while you actually provided the answers*?"[227] does not call for any incriminating information; it merely identifies the "maker" of the statements. Again, this is analytically no different than a signature.

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[225] JA 36, AE XLVII, pg. 8.
[226] JA 195, AE XVI, pg. 6.
[227] *Id.*

The question "*Do you have anything else to add to this statement?*" [228] comes closest to calling for a testimonial response about the offense. However, even if that question calls for a testimonial response, or even if the other two questions call for a testimonial response, the proper remedy is to exclude those questions and answers alone, as opposed to the entire typewritten statement.

All the questions and answers prior to invocation are untainted. Any questions, answers, or signatures that were a result of "interrogation" following invocation can easily be redacted.[229] At a minimum, SA Kapinus should be allowed to give testimony as to the content of the accused's responses up to the point of invocation. The military judge apparently recognized this legal principle, since he did not suppress the handwritten portion of the accused's statement. However, he fails to explain why he treats the handwritten statement differently than the typewritten questions and answers that preceded the accused's second invocation of his right to remain silent. The Government submits that is because there is no analytical difference. The military judge's remedy reflected another abuse of discretion.

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[228] *Id.*

[229] The same way that the question and answer documenting invocation itself would presumably have to be redacted prior to admission of the confession.

Conclusion

The military judge abused his discretion in finding that SA Swierk and SA Kapinus violated the accused's right to remain silent and that the accused's statement was involuntarily made. Wherefore, the Government respectfully requests this Court set aside the Army Court's decision and rule that the accused's statement was voluntarily made and pursuant to a properly obtained waiver of his Article 31 and *Miranda* rights.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellant was electronically filed with the Court to efiling@armfor.uscourts.gov on February 7, 2012 and contemporaneously served electronically on military appellate defense counsel.

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