IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	) REPLY BRIEF ON BEHALF OF) APPELLANT
v.	)
	) Crim. App. No. MISC 20110914
Sergeant (E-5) **ERIC W. COOPER** United States Army, Appellee	) USCA Dkt. No. 12-6004/AR

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

Statement of the Case

The Government hereby incorporates the statement of the case from its original brief in support of the Article 62 appeal.

Statement of Facts

The Government hereby incorporates the statement of facts from its original brief in support of the Article 62 appeal.

Law and Argument

This reply to the accused's answer addresses four arguments made by the accused. First, the accused cites to *United States v. Watkins*[1] for the proposition that, in the suspect reinitiation context, "this Court has long held that in analyzing a suspect's invocation of his right to remain silent, the Court applies the

[1] 34 M.J. 344 (C.M.A. 1992).

'scrupulously honored' analysis set [forth] by *Michigan v. Mosley*, 423 U.S. 96 (1975)."[2] Second, the accused interprets several federal cases to stand for the principle that he could not have "reinitated" dialogue on the subject of the investigation because he was never out of physical contact with Special Agent (SA) Swierk.[3] Third, he apparently argues that this Court cannot look to the record in order to draw legal conclusions, even after finding that the military judge abused his discretion in applying the wrong law.[4] Finally, the accused states that the military judge's findings as to the alleged denial of the accused's pain medication by law enforcement agents are based on a "reasonable inference" deduced from facts in the record.[5]

Each argument lacks merit and should be rejected by this Court.

A. *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992) does not establish a "test" for suspect reinitiation cases following the invocation of a suspect's right to remain silent.

The accused leans heavily on language in *Watkins* for the notion that *Mosley* extends to the factual situation (not addressed by *Mosley*) where the suspect reinitiates communication with law enforcement following his invocation of the right to

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[2] Accused's Brief (AB) 13.
[3] *Id.* 18-20.
[4] *Id.* 26-27.
[5] *Id.* 33.

remain silent.[6] The language cited in *Watkins* by the accused is as follows:

> 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.[7]

This language in *Watkins* was not designed to serve as the definitive test for admissibility in post-invocation right to remain silent cases, most obviously because the language does not limit itself to the right to remain silent. One of the factors the accused would have this Court believe is part of the alleged test is: "which right was invoked." Apparently, the accused contemplates a court weighing the fact that a suspect invoked his *right to counsel* as part of a right to remain silent "scrupulously honored" test. This is illogical and unpersuasive.

This language in *Watkins* does not reflect a dispositive test, but simply a sweeping overview of all generally relevant factors in cases involving questioning subsequent to the invocation of either the right to remain silent *or* the right to

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[6] *Id.* 15-16; the accused argues: "[a]s this Court in explained in *Watkins*, in the right to silence context, who initiated the communication is just one of a non-exclusive list of factors to be examined under the totality of the circumstances."
[7] 34 M.J. at 345 (emphasis added).

counsel. *Watkins* did not have the opportunity to address the test for suspect reinitated communication in the right to remain silent context, because the *Watkins* facts reflected only law enforcement reinitiation following Watkins' invocation of his right to remain silent.

Nothing in *Watkins* confines the *Oregon v. Bradshaw*[8] test to suspect reinitation in the right to counsel context, or extends the *Mosley* test to cases in the suspect reinitiation context. Nor is there any legal reasoning in the military judge's decision, the Army Court's opinion, or the accused's brief to this Court that would justify extending *Mosley*, or confining *Bradshaw*, in such a way.

B. Suspect reinitation is in no way dependent on a "break" in physical contact.

The accused, without any authority for the proposition, argues that a suspect cannot effectively reinitiate dialogue with law enforcement following the invocation of his right to remain silent, unless there is a physical break in contact separating the suspect from his questioners.[9] However, the key to effective reinitiation is not the reinitiation of physical contact, but of a *discussion* about the investigation with law enforcement. Specifically, the communication must demonstrate a

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[8] *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).
[9] AB 18-20.

"willingness and a desire for a generalized *discussion* about the investigation."[10] The fact that a suspect, such as the accused in this case, shows a "willingness and a desire for a generalized discussion about the investigation" before law enforcement can leave the interview room in no way renders that reinitiation ineffective.

The civilian cases in this area clearly support the Government's position. For example, in the First Circuit case *United States v. Thongsophaporn*, the suspect invoked his right to remain silent.[11] The agent "then sat silently in the room with him" until the suspect "initiated further communication of his own free will" thereby rendering his reinitiation, and subsequent confession, valid under *Bradshaw*.[12] There was no break in physical contact. Several other federal and state cases hold similarly.[13]

Once an accused has unequivocally invoked his right to remain silent, the next party to engage in a discussion of the

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[10] *Bradshaw*, 462 U.S. at 1045-46 (emphasis added).
[11] *United States v. Thongsophaporn*, 503 F.3d 51, 56 (1st Cir. 2007).
[12] *Id.*
[13] *See* Brief On Behalf Of Appellant, fn. 114; *People v. Bell*, 577 N.E.2d 1228, 1238 (Ill.App. 1 Dist. 1991) ("[T]he cases of *Bradshaw* and *Edwards* teach us that where the defendant initiates further communications, the passage of time after the invocation of *Miranda* rights is not a critical element. What is important is the fact that further communications were initiated by the defendant.").

investigation "reopens" the dialogue. That is the threshold issue in this case. "Any previous police-initiated interrogation [must] have ended *prior* to the suspect's alleged initiatory remark."[14] The issue has nothing to do with physical break in contact between the parties, and everything to do with the nature of the communications between the parties. If the first communication following invocation is law enforcement driven, *Mosley* applies.[15] If the first communication following invocation is suspect driven and *bona fide* suspect reinitiation, then *Edwards/Bradshaw* applies.[16] This is because once a suspect reinitiates communication about the investigation with law enforcement, the *Mosley* concern that suspects retain control over the timing, duration, and subject matter of the interrogation evaporates completely.[17] The suspect that reinitiates controls all of those things.

To find examples of the application of this principle, this Court need only look to the federal cases that apply *Mosley* up until the point of suspect reinitation. After suspect reinitiation, the cases clearly look to *Bradshaw*. "[B]ecause [the suspect's] subsequent willingness to talk was volunteered

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[14] *Christopher v. Florida*, 824 F.2d 836, 845 (11th Cir. 1987) (emphasis in original).
[15] *Id.* at 844-45.
[16] *Id.*
[17] *Mosley*, 423 U.S. 96, 104 (1975).

by him and did not result from interrogation or questioning initiated by [law enforcement], the *Mosley* analysis urged by [the suspect] does not apply."[18] "When [the suspect] indicated in his interview with [law enforcement] that he no longer wished to talk, his requests were scrupulously honored by [law enforcement]...it is clear that [the suspect's later] conversation with police, in which he implicated himself in the murders, was properly admitted, since he initiated that conversation himself."[19]

Here, there was no communication, and certainly no interrogation, whatsoever between law enforcement and the accused between the points in time when invocation occurred and when the accused reinitiated a discussion of the subject matter of the investigation.[20] Between these two "nearly concurrent"[21] points in time, the accused's invocation of his right to remain silent was obviously "scrupulously honored" by SA Swierk. In then analyzing the subsequent accused reinitiated discussion

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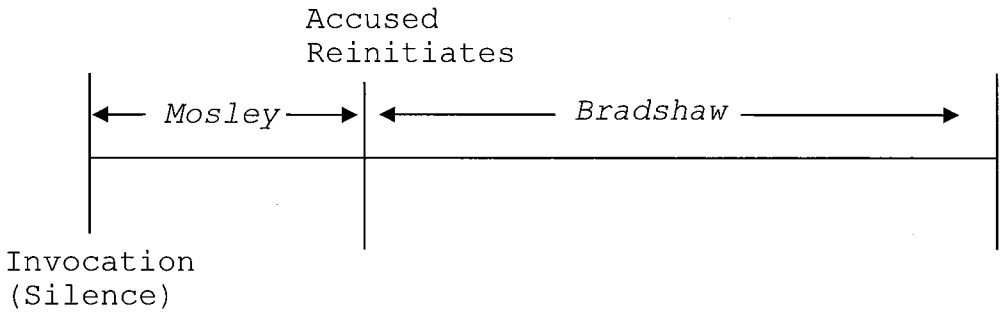
[18] *United States v. Glover*, 104 F.3d 1570, 1581-82 (10th Cir. 1997) (overruled on other grounds) (after finding suspect reinitiation applying the *Edwards/Bradshaw* test for knowing, intelligent and voluntary waiver).
[19] *Davie v. Mitchell*, 547 F.3d 297, 304 (6th Cir. 2008) (quoting *State v. Davie*, 686 N.E.2d. 245, 256-57 (Ohio 1997)) (applying the *Mosley* test prior to suspect reinitiation and the *Edwards/Bradshaw* test following suspect reinitiation).
[20] JA 47-48. Moreover, there was no interrogation at all by SA Swierk prior to the accused's reinitiation because she had yet to complete the rights warnings process.
[21] JA 30, 33; AE XLVII, pg. 2, 5.

about the investigation, both the military judge and the Army Court erred in failing to apply the Supreme Court's test in *Bradshaw*. Nothing about the physical presence of SA Swierk or the lack of the passage of a certain amount of time mandates a different result.



C. Upon determining that the military judge abused his discretion, this Court can look to the record when drawing the proper legal conclusions.

The accused suggests that this Court is prohibited from looking to the record when drawing legal conclusions, apparently even if this Court determines that the military judge abused his discretion by applying the wrong law.[22] Both the accused, and the Army Court, misconstrue the power of appellate courts when hearing Article 62 appeals.[23]

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[22] AB 26.

[23] The Army Court apparently believed that appellate courts hearing Article 62 cases cannot look to the record and are completely constrained by the four corners of the military judge's ruling. *United States v. Cooper*, ARMY MISC 20110914, 5 ("We cannot find the facts necessary to review the matter by reference to the record."). JA 5.

It is axiomatic that courts reviewing Article 62 appeals may only act with respect to "matters of law."[24] On Article 62 appeal, courts may not make findings of fact and are bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous.[25] These powers are similar to the powers of this Court pursuant to Article 67(d) restricting review to "matters of law."[26]

This principle means that the reviewing courts cannot simply disagree with the military judge's factual findings and substitute their own.[27] But it does not follow that *after* finding that a military judge has abused his discretion as a matter of law, either by applying the wrong law or making clearly erroneous findings of fact, the appellate court is limited only to those facts contained in the four corners of the military judge's ruling.

In *United States v. Lincoln*, this Court permitted appellate defense counsel to assert alternate grounds for affirming a ruling suppressing Lincoln's confession in responding to an Article 62 appeal.[28] This Court acknowledged that the military judge "made no findings of fact or conclusions of law" regarding

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[24] UCMJ, art. 62(b).
[25] *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).
[26] *United States v. Burris*, 21 M.J. 140, 144 fn.6 (C.M.A. 1985).
[27] *United States v. Baker*, 70 M.J. 283, 292 (C.A.A.F. 2011).
[28] *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995).

the alternative grounds advanced by Lincoln on appeal. However, this Court held that the record was sufficiently clear and developed upon which to draw legal conclusions and rule upon those alternative grounds.[29] Moreover, the military judge's findings, while an abuse of discretion because of the application of incorrect legal principles, were not incomplete and ambiguous, despite his lack of factual findings on matters relevant to the right law.[30] *Lincoln* confined the doctrine of remand for "incomplete and ambiguous" findings to situations where "it was impossible to determine from the record whether the military judge had ruled on key predicate issues or even what he had ruled."[31]

To hold otherwise would be to render a case where the military judge made no findings at all unreviewable on Article 62 appeal. Moreover, because a military judge applying the wrong law will almost inevitably fail to make "proper" findings of fact relevant to the correct law, to prohibit appellate courts from looking to the record in drawing new legal conclusions would render Article 62 appeals toothless and almost always result in a remand. This would be totally inconsistent

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[29] *Id. at* 321.
[30] *Id.*
[31] *Id.* (citing *United States v. Kosek,* 41 M.J. 60 (C.M.A. 1994)).

with considerations of judicial economy.[32] In Article 67 cases following Article 66 review by a Court of Criminal Appeals, where the military judge fails to make factual findings on an issue on appeal, this Court is permitted to examine the record when reviewing matters of law in order to establish the proper legal conclusions.[33] Similarly, in Article 62 cases where an abuse of discretion on a matter of law has been identified, courts need not reflexively remand the case to the military judge, but may look to the record to determine the correct legal conclusions.

D. No fact in the record supports a "reasonable inference" that SA Kapinus repeatedly denied the accused his pain medication by "each time explain[ing] that they would take care of it later."

The accused argues that the military judge "made a reasonable inference when he concluded that the agents would not allow SGT Cooper to leave the interrogation room in order to obtain his medicine."[34] However, the military judge's factual findings that (1) the accused told SA Kapinus that he needed to take his morning dose of medication; (2) SA Kapinus said they would take care of that later in the morning; (3) the accused asked for his medications more than once; (4) each time SA

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[32] *United States v. Finn*, 502 F.2d 938, 940 (7th Cir. 1974) ("such a procedure could easily result in [multiple] pretrial appeals by the Government").
[33] *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009).
[34] AB 33.

Kapinus explained they would take care of it later[35] are nowhere to be supported by the record. No testimony or other evidence in the record supports these highly specific factual findings that were the only factual findings made by the military judge going to the alleged denial of pain medication.

The accused argues that because there is "no evidence that the agents did anything to grant SGT Cooper access to his medicine until after they secured his confession" a "reasonable inference" follows that "the agents would not allow [the accused] to leave the interrogation room in order to obtain his medication."[36] This argument is a fallacy. In order to find a denial, there must be evidence of a request. There is no evidence of such a request in the record, let alone evidence that multiple requests were met with multiple denials in the form of "they would take care of it later." Nor are there any facts in the military judge's findings, or in the record, from which could be deduced the logical consequence that the agents denied the accused's his requested pain medication.[37]

Given the importance of this allegation of police misconduct to the military judge's involuntariness analysis,

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[35] JA 31, AE XLVII, pg. 3.
[36] AB 33.
[37] Black's Law Dictionary (9th ed. 2009) defines an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them."

especially in light of the host of powerful factors going to voluntariness, this clearly erroneous finding of fact infected the military judge's decision on the voluntariness of the accused's confession and rendered it an abuse of discretion.[38]

Conclusion

Wherefore, the Government respectfully requests this Court set aside the decision of the Army Court 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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[38] *Cf. Baker*, 70 M.J. at 292 (ruling set aside where it was based in large part on impermissible findings of fact).

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Robyn Henry on 29 February 2012, and delivered to defense appellate counsel by hand on February 29, 2012.

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