THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

PETER KAGELEIRY, JR.
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar Number 35031

JACOB D. BASHORE
Major, Judge Advocate
Deputy Chief, Defense Appellate Division
USCAAF Bar Number 32153

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF Bar Number 31186

INDEX

Page

Issues Presented

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.

II.

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

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.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

U.S. Constitution

U.S. Supreme Court

Court of Appeals for the Armed Forces

Court of Criminal Appeals

Federal Courts

Statutes

Uniform Code of Military Justice

Manual for Courts-Martial, United States, 1998 Edition

Other Authorities

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,
Appellant

ANSWER ON BEHALF OF APPELLEE

v.

Crim.App. No. 20110914

Sergeant (E-5)
Eric W. Cooper,
United States Army,
Appellee

USCA Dkt. No. 12-6004/AR

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

Summary of Argument

When a suspect facing interrogation invokes his right to remain silent, law enforcement must "scrupulously honor" that invocation. *Michigan v. Mosley*, 423 U.S. 96 (1975); *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004); *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). The *Mosley* analysis provides for a flexible totality of the circumstances type analysis which includes multiple factors. *See Watkins*, 34 M.J. at 345. Whether the police or the suspect re-initiated the interrogation is just one of the many factors which courts consider in the right to remain silent context. *See Mosley*, 423 U.S. at 104; *Watkins*, 34 M.J. at 345-46. The military judge and the Army Court of Criminal Appeals (Army Court) were correct to analyze Sergeant (SGT) Cooper's invocation of his right to

remain silent under *Mosley* rather than under the right to counsel cases *Edwards* and *Bradshaw*.

The Supreme Court developed the bright line re-initiation test enunciated in *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) for a limited purpose. In *Bradshaw*, the Court explained that suspect re-initiation with police is a "necessary fact" for determining whether a suspect in continuous custody, such as in *Edwards*, validly waived his right to counsel after previously invoking that right. *See Edwards*, 451 U.S. at 486, n.9; *Bradshaw*, 462 U.S. at 1044-45. There is no parallel requirement for suspect re-initiation as a "necessary fact" in the right to remain silent cases because there is no parallel need to allow the suspect adequate opportunity to consult with an attorney. *See Mosley*, 423 U.S. at 101, n.7. The government seeks to create a bright line rule where there is none. This Court should therefore reject the government's argument as to Issue I.

Even if this Court disagrees that SGT Cooper's statement should be suppressed due to a violation of Article 31(b), UCMJ, the government has not shown by a preponderance of the evidence that the statement was voluntary. The military judge applied the totality of the

circumstances analysis and concluded that SGT Cooper's physical injuries, medicated condition during the interrogation, and his attempts to invoke his Fifth Amendment rights led to the conclusion that SGT Cooper's will had been overborne.

Finally, this Court should also reject the government argument as to Issue III. Sergeant Cooper unequivocally invoked his right to remain silent for a second time near the end of the interrogation. For a second time, the interrogator ignored that invocation by directing SGT Cooper to adopt the statement the interrogator had typed. By doing so, the interrogator failed to scrupulously honor SGT Cooper's second unequivocal invocation of his right to remain silent and the statement must be suppressed.

Statement of Statutory Jurisdiction

The Army Court reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §862 (2008). On February 7, 2012, the Judge Advocate General of the Army filed a certificate of review with this Court in accordance with Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2)(2008).

Statement of the Case

On September 6, 2011, the military judge granted a defense motion to suppress SGT Cooper's statement to CID.

(JA 25-37). On September 9, 2011, the government provided the military judge with a "Notice of Appeal Pursuant to R.C.M. 908." (JA 266). The Army Court set aside the military judge's decision and returned the record of trial for reconsideration of his ruling. *United States v. Cooper*, Army 20110914, (Army Ct. Crim. App., December 21, 2011) (JA 1-7). On January 6, 2012, appellant filed a motion for reconsideration with the Army Court. (JA 8). The Army Court denied that motion for reconsideration on January 9, 2012. (JA 23).

Statement of Facts

Around midnight on September 23, 2010, the military police (MPs) knocked on SGT Eric W. Cooper's door waking him and his family. (JA 123-24). The military police separated SGT Cooper from his family. (JA 124). They then transported him to the military police station on Fort Stewart, Georgia, and placed him in a detention cell until about 3 A.M. (JA 124-25). The MPs took SGT Cooper to the Criminal Investigation Division (CID) where he was placed in an interrogation room. (JA 126). Sergeant Cooper waited for an extended period of time before anyone came into the room. SGT Cooper was exhausted and became "really drowsy" when his medication "kicked in." (JA 133).

Sergeant Cooper suffered several injuries while serving on active duty as the driver of a Bradley fighting vehicle. He has bulging discs in his lower back and one disc that is completely ruptured. Sergeant Cooper also requires a total knee replacement. Finally, he has a torn rotator cuff and two torn tendons in his chest. (JA 120-21). Sergeant Cooper is also undergoing extensive medical treatment for his injuries and is assigned to the Fort Stewart Warrior Transition Unit. *Id.* On the night at issue, SGT Cooper wore a knee brace and walked with a cane. (JA 54). Sergeant Cooper was taking several medications including Oxycodone (Percocet) and Baclofen for pain. These drugs make him drowsy and dizzy. (JA 123, 243 (Medication Profile)).

Special Agent (SA) Kapinus was aware that SGT Cooper needed medication on a regular basis. (JA 42-43). Sergeant Cooper's sworn statement, taken by SA Kapinus, lists nine medications, including "Percocet for pain." (JA 194). Sergeant Cooper testified that he needed the medication at 0600 each day. (JA 137). Special Agent Kapinus testified he was under the impression SGT Cooper needed his medication at 0800 "or sometime in the morning." (JA 83). Under the Oxycodone (Percocet) entry, SGT Cooper's Medication Profile directs SGT Cooper, "Take 1 to 2 tablets by mouth every 4-6

hours as needed for pain." (JA 243). Sergeant Cooper took his medication at about 2300 on the night of his arrest. (JA 122). Sergeant Cooper signed the statement at issue in this case at "8:57 AM" without any access to his medication since prior to his arrest by CID the night before. (JA 73, 190).

Special Agent Swierk conducted the initial interview of SGT Cooper. She first obtained biographical information and developed rapport with SGT Cooper by discussing, among other things, fishing and nature. (JA 45). During this rapport-building process, and before completing the rights advisal form, SGT Cooper started asking SA Swierk "what the allegations were against him." (JA 46-47).

Special Agent Swierk then initiated the rights advisal. (JA 45-46). Sergeant Cooper "repeatedly asked what the allegations were, and what his daughter had said about him." (JA 30 (MJ Ruling); JA 46, 48). Sergeant Cooper invoked his right to remain silent by writing "No" on the reverse side of the rights advisal form. (JA 189). The applicable portion of the form states:

> At this time are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you? (If the suspect/accused says "no," stop the interview and have him/her read and

> sign the non-waiver section of the waiver certificate on the other side of this form.

Id.

Special Agent Swierk did not stop the interview or have SGT Cooper sign the non-waiver section. (JA 57). Special Agent Swierk and the defense counsel had this exchange:

> Q: [Y]ou told him that you couldn't tell him . . . [what his daughter was saying] if he wasn't willing to discuss the allegations with you?
>
> A: Yes. That is correct. If he was willing -- if he said "no" and didn't want to speak with me, I did tell him I couldn't tell him about the allegation.
>
> . . . .
>
> Q. So when he wrote "no," [invoked his right to remain silent] you didn't stop this interview?
>
> A. No, I did not.

(JA 57).

The military judge found that, "[N]ear concurrent with his invocation of his right to remain silent . . . [SGT Cooper] again asked about the allegations against him. Special Agent Swierk responded that she could not or would not inform him of those allegations if . . . [SGT Cooper] was unwilling to continue the interview." (JA 30, MJ

Ruling). The military judge made findings as to the significance of SA Swierk's response to SGT Cooper:

> SA Swierk, in response to SGT Cooper's invocation, did not terminate the interview, leave the room, or do anything that signified the interview had concluded. Instead, she said "I cannot talk to you about the allegations if you aren't willing to speak to me," or words to that effect. She then awaited SGT Cooper's response. Implicit in these actions is that SA Swierk would talk about the allegations if SGT Cooper was willing to talk about them as well. Thus the statement of SA Swierk offered SGT Cooper a *quid pro quo*: "I'll give you the information you want if you give me the information I want. In offering this choice to SGT Cooper, SA Swierk failed in her duty to scrupulously honor SGT Cooper's invocation of his right to remain silent.

(JA 34 (MJ Ruling)).

Special Agent Swierk testified that by writing "No" on the backside of the DA Form 3881, SGT Cooper meant to indicate he did not want a lawyer. (JA 189) She explained:

> 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 offenses," is what I assumed he was meaning. He said, "No, that is not what I mean. I don't need a lawyer. I stated I don't need a lawyer right above. It says no to needing a lawyer." He said that he wanted to tell his side of the story.

(JA 48, lines 2-9). The military judge found that SA Swierk's testimony was not credible. (JA 30 (MJ Ruling, n. 2)). The military judge compared that testimony with her previously admitted testimony from the Article 32, UCMJ, pretrial hearing in which SA Swierk testified that, "We don't have to terminate an interview when a person says that they don't want to make a statement, SGT Cooper didn't ask for a lawyer. . . ." (JA 30, 229).[1] Special Agent Swierk also failed to inform SA Kapinus, the agent who completed the interrogation, that SGT Cooper invoked his right to remain silent. (JA 57). Instead, SA Swierk told SA Kapinus that SGT Cooper made statements about a lawyer. *Id.*

The military judge suppressed SGT Cooper's statement on two distinct grounds: 1) SGT Cooper's statement was taken in violation of Article 31(b), UCMJ, because SA Swierk failed to scrupulously honor SGT Cooper's invocation of his right to remain silent, and; 2) the government failed to show by a preponderance of the evidence that the statement was voluntary under the totality of all the surrounding circumstances. (JA 32, 35 (MJ Ruling)).

[1] Page 229 of the JA is the same as page 17 of the Article 32 testimony referenced by the military judge. The version submitted as part of the JA lacks the renumbering which is present in appellee's record of trial.

The military judge also found that SGT Cooper invoked his right to remain silent a second time before the interrogation ended. Special Agent Kapinus failed to "scrupulously honor" SGT Cooper's invocation. The military judge therefore suppressed the typewritten portion of the statement. (JA 36 (MJ Ruling)).

The Army Court subsequently set aside the military judge's ruling relating to Issue I. The court explained, "The military judge must find whether and to what extent the purported fresh set of warnings was rendered; and in any event, the judge must also conclude whether the accused's waiver was knowing, intelligent, and voluntary." (JA 5 and 7). The Army Court did not specifically address the military judge's rulings relating to Issues II and III.

Standard of Review

1. Light Most Favorable To The Prevailing Party.

When reviewing a ruling on a motion to suppress, the Court should "consider the evidence in the light most favorable to the prevailing party." *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). Sergeant Cooper is the prevailing party in this case, and therefore the court should consider the evidence in a light most favorable to him, not the government.

2. Matters Of Law.

In the course of an Article 62 appeal, a reviewing court may act only with respect to matters of law. *United States v. Baker*, 70 M.J. 283, 290 (C.A.A.F. 2011). The courts are "bound by the military judge's findings of fact unless they were clearly erroneous." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

"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.' " *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)(quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)). "If the findings are incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995)(quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)).

3. Abuse of Discretion.

The Court reviews a military judge's "ruling on a motion to suppress for abuse of discretion." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)(citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)). "In reviewing a military judge's ruling on a motion to

suppress, we review fact-finding under the clearly-erroneous standard and conclusions of law under the de novo standard." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "Thus on a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.*

The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.' " *United States v. White,* 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd,* 69 M.J. 95, 99 (C.A.A.F. 2010)).

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.

Argument

Sergeant Cooper unequivocally invoked his *right to remain silent* in response to SA Swierk's advisal. The government does not dispute this fact. Even so, the government asks this Court to apply the *right to counsel* cases of *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) and

Edwards v. Arizona, 451 U.S. 477 (1981) to this case. This Court has long held that in analyzing a suspect's invocation of his right to remain silent, the Court applies the "scrupulously honored" analysis set for by *Michigan v. Mosley*, 423 U.S. 96 (1975). *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004); *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992).

The Fifth Amendment privilege against self-incrimination encompasses two distinct rights: the right to silence and the right to counsel. *Seay*, 60 M.J. 73, 77. "While *Mosley*, protects the right to remain silent, *Edwards* protects the right to counsel." *Id.* at 78. "We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was "scrupulously honored.'" *Seay*, 60 M.J. at 77-78 (quoting *Mosley*, 423 U.S. at 100). Because SGT Cooper unequivocally invoked his right to remain silent, the military judge and the Army Court were required by this Court's precedent to apply the *Mosley* "scrupulously honored" analysis. *See id.*

1. The Government Seeks To Transform One Factor In The *Mosley* "Scrupulously Honor" Analysis Into A Bright-Line Exception To That Analysis.

This Court's prior holdings that *Mosley* controls in right to remain silent cases is entirely consistent with Supreme Court precedent: "In *Michigan v. Mosley*, the Court noted that *Miranda* distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney . . . ." *Edwards*, 451 U.S. at 485 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474). The requirement to afford a suspect an opportunity to consult with counsel requires a different approach than when a suspect invokes his right to remain silent. *See Mosley*, 423 U.S. at 101, n. 7 ("The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer . . . . Those procedures are detailed in . . . *Miranda*. . . .").

In *Bradshaw*, the Supreme Court explained that suspect re-initiation with police is a "necessary fact" in determining whether a suspect in continuous custody such as in *Edwards* validly waived his *right to counsel* after previously invoking that right to counsel. *Bradshaw*, 462 U.S. at 1044-45 (quoting *Edwards*, 451 U.S. at 486, n. 9). The government now seeks to transform what is a "necessary fact" to find a knowing and voluntary waiver of right to

counsel into a bright-line exception to the "scrupulously honor" analysis required in right to remain silent cases.

The Army Court correctly noted, "In *Mosley*, the Court ruled that 'the admissibility of statements obtained after the person in custody has decided to remain silent' must be determined by looking to the totality of the circumstances indicating whether the accused's 'right to cut off questioning' was 'scrupulously honored.'" *Cooper*, slip op. at 5, (JA 5) (quoting *Mosley*, 423 U.S. at 104); *Watkins*, 34 M.J. at 345-46. The Army Court correctly explained that courts look to several factors to determine whether the right to remain silent was "scrupulously honored" including, "which right was invoked, who initiates communication, the subject matter of the communication, when the communication takes place, and the time between invocation of the right and the second interview." *Watkins*, 34 M.J. at 345.

In a right to silence case, whether the suspect or the police initiated contact is just one factor for the Court to consider and not a bright-line exception to the "scrupulously honored" analysis. As this Court 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. *See id.* If SGT Cooper "reinitiated" contact with SA Swierk, that factor would not remove the case from the *Mosley* analysis: SGT Cooper still invoked his right to silence, not his right to counsel.

The government mistakes the *Edwards/Bradshaw* "prophylactic rule" intended to ensure a suspect an opportunity to consult with counsel for a rule of general applicability whenever a suspect "reinitiates" contact with the police regardless of the right invoked. *See Bradshaw*, 462 U.S. at 1044. The *Edwards/Bradshaw* rule was "designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Bradshaw*, 462 U.S. at 1044.

In *Edwards*, the accused invoked his right to counsel and was taken to the county jail. The next morning, without first allowing Edwards an opportunity to consult with counsel, the police detectives visited Edwards at the jail and readvised him of his *Miranda* rights. After listening to a taped statement of his alleged accomplice, Edwards gave a statement to the detectives. *Edwards*, 451 U.S. at 479.

In holding that Edwards did not properly waive his right to counsel, the Court emphasized that the police reinitiated contact with Edwards without first allowing him access to an attorney. *See id.* at 486, n.9, 487-88. The

Edwards Court found that in a right to counsel case, it is a "necessary fact that the accused, not the police, reopened the dialogue with the authorities" in order to find an exception to the general rule that questioning must cease when a suspect invokes his right to counsel. *Id.* There is no parallel requirement for suspect re-initiation as a "necessary fact" in the right to remain silent cases because there is no parallel need to allow the suspect adequate opportunity to consult with consul. *See Mosley*, 423 U.S. at 101, n. 7. The *Mosley* Court explained:

> The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request. . . . Those procedures are detailed in the *Miranda* opinion as follows . . . "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, *the individual must have an opportunity to confer with the attorney*. . . .

Id. (quoting *Miranda*, 384 U.S. at 474)(emphasis added). The fact that an accused reopened contact with the police is just one factor in the "scrupulously honored" analysis. In issue I, the government seeks to convert this rule favoring a suspect in the right to counsel context into a bright line exception to *Mosley* "scrupulously honored" analysis.

2. Sergeant Cooper Could Not "Reinitiate" Contact With SA Swierk Because He Was Never Out Of Contact With Her.

Sergeant Cooper was subjected to one continuous interrogation and therefore could not "reinitiate" contact with law enforcement. (JA 33, (MJ Ruling)). Because SGT Cooper immediately followed his unequivocal invocation of his right to remain silent with a continuation of the same interrogation, the *Edwards/Bradshaw* re-initiation analysis is of no use in this case. On the other hand, the *Mosley* "scrupulously honored" analysis is useful because it allows the court to consider all the relevant facts including whether or not SGT Cooper "initated" communication with SA Swierk concerning the allegations in the case. *See* (JA 33, (MJ Ruling)). The military judge considered this factor in his ruling. *Id.*

The government cites the military judge's use of the term "initiate" to describe SGT Cooper's asking SA Swierk about what his daughter was saying. The military judge was taking that fact into account as part of the "scrupulously honored" analysis. *Watkins*, 34 M.J. at 345. The government's argument rests upon the faulty premise that if SGT Cooper "initiated" a particular conversation with SA Sweirk, then he was reinitiating the interrogation. That argument fails to account for the facts of the case and the

meaning of "initiate" in the context of a custodial interrogation. As described below, SGT Cooper could not have "reopened" or "reinitiated" contact with SA Swierk as required by the case law because he was never out of contact with SA Swierk.

The government brief skims quickly past the military judge's finding of fact that there was no "second interview" between SA Swierk and SGT Cooper and that therefore, logically SGT Cooper could not "reinitiate" or "reopen" contact with SA Swierk. (JA 33, (MJ Ruling)); *Edwards v. Arizona*, 451 U.S. 477, 486 n.9 (1981). The MJ does not find that SGT Cooper "reinitiates" contact with SA Swierk, because he was never out of contact with SA Swierk, not even for an instant.

The government's argument also rests upon a superficial and incorrect reading of the word "initiate." In fact, *Edwards* explained that a subsequent waiver of a previously invoked right to counsel or silence may occur only when "the accused, not the police, reopened the dialogue with the authorities." *See Id.* Sergeant Cooper's dialogue with SA Swierk never ended, so he could not "reopen" or "reinitiate" a new dialogue. The *Edwards/Bradshaw* rule, therefore, does not apply to this case. As explained in greater detail below, the civilian

cases cited by the government support this definition of "initiate" or "reopened."

Under the facts of this case, the *Edwards/Bradshaw* analysis does not apply to SGT Cooper's invocation of his right to silence:

> Although the "initiation" doctrine of *Edwards/Bradshaw* does apply to some right to silence cases, it does not affect the outcome in the instant case. The first prong of the initiation test requires that it was the suspect, not the police, who "initiated," or "reopened," the dialogue. *Bradshaw*, 462 U.S. at 1044-45. "Initiation" means to "begin" or "set going"; in the interrogation context, it means that the suspect "started," not simply "continued," the interrogation.

Christopher v. Florida, 824 F.2d 836, 845 (1987).

The government points to several cases in which courts have analogized to the *Edwards/Bradshaw* analysis when discussing a suspect's invocation of the right to remain silent. (GB at 34). In each of those cases, however, the courts still applied a *Mosley* analysis and found that the police "scrupulously honored" the suspect's invocation of silence. *United States v. Glover*, 104 F.3d 1570, 1581 (10th Cir. 1997)("Based on the specific facts outlined above, this court concludes Glover's right to cut off questioning was scrupulously honored after Glover invoked his right to remain silent."); *Davie v. Mitchell*, 547 F.3d

297, 304 (2009)("When Davie indicated in his interview . . . that he no longer wished to talk, his requests were scrupulously honored by the officers.") The courts in those cases conducted a *Mosley* analysis pointing to multiple factors for finding the suspects right to silence had been "scrupulously honored." *Glover*, 104 F.3d at 1581 (emphasizing that upon the invocation, all questioning ceased, there was a significant time gap between the first and second interrogation, and the officers reminded Glover of his previous invocation); *Davie*, 547 F.3d at 303-04 (pointing to repeated rights advisements, equivocal invocation of rights, and an hour and twenty-five minute gap between invocation and subsequent confession). In other words, the government cited cases are in agreement with the Army Court's conclusion that, even though in some cases the *Edwards/Bradshaw* analysis "may overlap or merge with a *Mosley* analysis, the ultimate question remains whether, under the circumstances, the right to silence was 'scrupulously honored.'" *Cooper*, Slip op. at 5, n. 2 (JA 5).

As the military judge in this case points out, some "break in contact" may be necessary after invocation of the right to remain silent. (JA 33) The cases the government cites support that conclusion. The *Mosley* analysis merges

or overlaps with the *Edwards/Bradshaw* analysis only when some measurable time elapses between the suspects invocation of the right to remain silent and the second interrogation.

The military judge cites *United States v. Delarosa* as an example of how the police might break contact with an accused who invokes his right to silence and thereby "scrupulously honor" that invocation. 67 M.J. 318, 322 (2009). In *Delarosa*, the detectives attempted to clarify Delarosa's ambiguous invocation. *Id.* The detectives left the interrogation room and approximately thirty-five minutes later returned and eventually readvised Delarosa of his rights before questioning him. *Id.* at 323.

Although *Delarosa* is an "ambiguous invocation" case, it is instructive as to how the police might satisfy the *Mosley* "scrupulously honor" requirement. In this case, if SA Swierk left the interrogation room or simply ended her interview with SGT Cooper for some measurable amount of time, she may have satisfied the "scrupulously honor" requirement. (JA 32-33, (MJ Ruling)). If SGT Cooper asked his question of SA Swierk after such a break in contact, then perhaps SGT Cooper arguably "reinitiated" a second interrogation. However, SGT Cooper "continued" the

interview; SGT Cooper did not "begin" or "set going" a second interview. *See Christopher*, 824 F.2d at 845.

In *Watkins*, this Court identified *Mosley* as the "seminal case" in analyzing right to silence cases even in a case where the suspect asks questions after invoking his right to silence. 34 M.J. at 345. In *Watkins*, the suspect invoked his right to silence during an interview at a CID office. More than two hours later, the CID agent re-approached Watkins at his quarters and asked Watkins if he was now willing to talk. The conversation took place on Watkins' porch; Watkins was not in custody. The agent reminded Watkins of his invocation of his right to remain silent. Watkins asked the agent two questions, "Should I get a lawyer?" and "How much time would I get?" The court emphasized that prior to answering Watkins' questions, the agent "[d]id not interrogate appellant but reminded him of his earlier rights warning." *Id.* The Court considered each of these factors before concluding that the agent "scrupulously honored" Watkins' prior invocation of his right to silence. *Id.*

Special Agent Swierk did nothing to "scrupulously honor" SGT Cooper's invocation of his right to remain silent. Instead of reminding SGT Cooper that he did not have to talk to her, saying nothing, or simply telling SGT

Cooper she could not talk with him because he invoked his right to silence, SA Swierk offered SGT Cooper a quid pro quo: talk to me and I will tell you what your daughter is saying. In stark contrast to the facts in *Watkins*, SA Swierk responded to SGT Cooper's question with an interrogation tactic. Special Agent Swierk told SGT Cooper, "I cannot talk to you about the allegations if you aren't willing to speak to me," or words to that effect. (JA 34, (MJ Ruling)). Special Agent Swierk offered SGT Cooper a *quid pro quo*: "I'll give you the information you want if you give me the information I want." *Id.* Furthermore, unlike Watkins, SGT Cooper was still in custody and was not afforded any time to reflect on his decision to invoke his right to silence. *Id.* at 33-34.

Whether a suspect "initiated" a conversation with police is just one factor in the totality of circumstances to consider. *Watkins*, 34 M.J. at 345-46. In *Christopher v. Florida*, the court explained that officers may ask questions to clarify a suspect's invocation of his right to remain silent:

> The rule, however, permits "clarification," not questions that, though clothed in the guise of 'clarification,' are designed to, *or operate to*, delay, confuse, or burden the suspect in his assertion of his rights. Because such questions serve to

> keep the suspect talking, not to uphold his right to remain silent, they constitute unlawful "interrogation," not permissible clarification.

824 F.2d 836, 841-42 (citing *Mosley*, 423 U.S. at 105-06).

If SA Swierk reasonably believed that SGT Cooper's invocation of his rights was ambiguous, she could ask clarifying questions. She could not, however, offer him a "quid pro quo" in order to keep him talking or induce him to make a statement. *Id.* Special Agent Swierk never asked SGT Cooper to clarify whether or not he was invoking his right to silence. She either did not understand that he had invoked his right to remain silent, did not realize the significance of SGT Cooper's invocation, or, worse chose to ignore it.

The military judge correctly emphasized the undue influence of the "quid pro quo" offered to SGT Cooper. In *United States v. Thongsophaporn*, the court pointed to the totality of circumstances, including the fact that, "at no time did . . . [the agent] attempt to resume questioning or persuade defendant to speak." 503 F.3d 51, 56-57 ("The question presented here is whether the defendant freely initiated further communications with law enforcement . . . or whether he was improperly coerced or pressured into making those communications.") The police agent in

Thongsophaporn went out of his way to scrupulously honor the suspect's right to cut off questioning. Special Agent Swierk, in contrast, responded to SGT Cooper's inquiry with the quid pro quo persuading him to give a statement.

3. The Army Court Exercised Proper Discretion By Returning The Case To The Military Judge For Additional Findings.

Relying on this Court's precedent, the Army Court determined that it was proper to remand the case to the military judge to determine "whether and to what extent . . . [a] fresh set of warnings was rendered." *Cooper*, slip op. at 5, (JA 5). The government asks this Court to deny the Army Court the discretion to remand the case when "the findings are incomplete or ambiguous. . . ." *Id.* at 4-5 (citing *Lincoln*, 42 M.J. at 320 (quoting Kosek, 41 M.J. at 64). Once again, the government asks this Court to reject its own precedent.

The government argues that the record of trial and the military judge's findings are "sufficiently clear to show a valid waiver as part of a properly applied *Bradshaw* analysis." (GB at 31.) However, this Court is limited to conducting a legal review and may not make its own findings of fact. The government also asks that this Court convert the military judge's finding that SGT Cooper's statement

was involuntary into a finding that SGT Cooper made a valid waiver of his right to remain silent even though he unequivocally invoked that right both at the beginning and toward the end of the interrogation.

II.

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

Argument

Even if this Court disagrees that SGT Cooper's statement should be suppressed for the Article 31(b), UCMJ, and Fifth Amendment violations, the government has not shown by a preponderance of the evidence that the statement was voluntary. The voluntariness of a statement is gauged by "the totality of the circumstances." *United States v. Bresnahan*, 62 M.J. 137, 141 (2005). Factors in the analysis include "the mental condition of the accused; his age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions." *Id.*

1. The Military Judge Applied The Correct Law.

In his findings, the military judge explained: "Whether a statement was voluntary or whether instead the

accused's will was 'overborne' is determined by looking at the totality of the circumstances." (JA 32, (MJ Ruling)). "In determining whether a defendant's will was overborne . . . the Court has assessed the totality of all the surrounding circumstances. . . ." (JA 35, (MJ Ruling) quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). The military judge then conducted a "totality of the circumstances analysis" consistent with *Schneckloth*. (JA 7-8).

The prosecution bears the burden of establishing by a preponderance of the evidence that the confession was voluntary. *United States v. Bubonics*, 45 M.J. 93 (1996). This Court has characterized voluntariness as follows:

> The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process. The burden in this regard is on the Government, as the proponent of admission of the evidence, to prove by a preponderance of the evidence that the confession was voluntary.

45 M.J. at 95(internal quotes and citations omitted). *See also* Mil. R. Evid. 304(e).

Consideration of "the totality of the surrounding circumstances, however, does not translate into a

prescription to weigh all such factors evenly. . . . [T]he import of the factors vary according to the circumstances and the state of mind of the accused." *Bubonics*, 45 M.J. at 95. Furthermore, the "[t]otality of the circumstances does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993). Sergeant Cooper's physical injuries, medicated condition during the interrogation, and his attempts to invoke his Fifth Amendment rights justify the military judge's findings. "Surely, there are worse recorded cases of psychological coercion. On the other hand, the military judge's detailed findings about what went on during the session and the atmosphere surrounding the session just as surely do offer support to a legal conclusion of involuntariness." *Id.* This court must give particular deference to the military judge's "vantage point . . . that simply cannot be reproduced . . . ." by the appellate courts. *See id.*

2. The Military Judge's Findings Of Fact Are Supported By The Record.

The military judge made extensive findings of fact describing SGT Cooper's condition during the interrogation and "the atmosphere surrounding the session." The military

judge listed detailed factors weighing against a finding of voluntariness:

> a. The interrogation took place while the accused was under the influence of prescription drugs, a fact known to the interrogators.
>
> b. The interrogation took place from approximately 0300 to 0900, with the accused entering custody at around midnight. . . . The accused was noticeably fatigued during much of the interrogation . . . .
>
> c. The accused walked with a cane and wore a knee brace. He was in pain and discomfort during the interrogation, a fact that was noticed by the interrogators.
>
> d. The accused asked for his morning dose of prescription medicine, which request was denied until conclusion of the interrogation. . . . [A]ccess to his medicine . . . was conditioned upon the interrogation being concluded at the discretion of the interrogators, and not at the discretion of the accused.

(JA 35-36 (MJ Findings)).

In addition to SGT Cooper's testimony describing his medical condition, SA Kapinus testified that, at the time of the interrogation, he was aware that SGT Cooper suffered injuries to his chest and knee and that he recently had surgery. (JA 72-73). On direct examination, SA Kapinus had this exchange with the trial counsel:

> Q: Did he appear to be in any pain to you, Agent Kapinus?
>
> A: At one point he had shifted in his chair like most of us do and he had grasped his knee. I recall him in a leg brace. I had asked - it prompted me to ask him what the leg brace was for and he had told me he had a combat related injury as well as one in his chest that I believe he had surgery for. He merely stated that it was stiff. . . .

Id. However, on cross-examination, SA Kapinus admitted that in his investigative report he wrote that SGT Cooper told him his leg "hurt." (JA 82). The military judge made credibility determinations based on this and other evidence.

Special Agent Kapinus also testified that he was aware that SGT Cooper was prescribed at least six different medications. (JA 74). Special Agent Kapinus apparently never bothered to ask SGT Cooper whether or not those drugs were influencing his ability to concentrate, even though the interrogation lasted from 0300 to 0900 and SGT Cooper had not slept since midnight. On the other hand, SGT Cooper testified that he told the agents "I was in a lot of pain." (R. at 103). He also testified that early in the interrogation his medicine "kicked in" and made him "very, very drowsy." (JA 133). Furthermore, by the time he got to the point of making his statement, SGT Cooper was "very,

very tired." (JA 157). Sergeant Cooper also testified that the medication he was on made him "drowsy," and that the medication helped with the pain "a little bit." *Id.* The military judge also relied upon SGT Cooper's "Medication Profile" in making his findings of fact. (JA 243). Among other drugs, SGT Cooper was on Oxycodone and Baclofen. *Id.*

Special Agent Kapinus was well aware that SGT Cooper needed medication at regular intervals. (JA 74). Sergeant Cooper testified that he needed the medication at 0600. (JA 137) Special Agent Kapinus testified he was under the impression SGT Cooper needed his medication at 0800 "or some time in the morning." (JA 83).

Special Agent Kapinus and SA Swierk were also employing their interrogation training against SGT Cooper: they employed rapport building (JA 44-47, 54, 30); themes JA 96); direct positive confrontation[2] (JA 58-59, 70, 95-96); and isolation (JA 125-26).[3] They also went to the

---

[2] *See* Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogation And Confessions*, 218-19 (Jones & Bartlett 4th ed. 2004)("[w]e recommend that the investigator initiate the interrogation with a direct statement indicating absolute certainty in the suspect's guilt.").

[3] Dep't of Army, Field Manual 3-19.13, *Law Enforcement Investigations* ch. 4 at 4-8 to 4-9 (Jan. 2005)("An interrogation needs to be strictly planned and controlled. An interrogation should rarely, if ever, be conducted in a suspect-supportive environment. The location selected for

accused's house at midnight, got him out of bed, immediately separated him from his loved ones, and prevented him from contacting anyone outside the interrogation room. (JA 123-24). Furthermore, although the agents were aware of SGT Cooper's medical condition, the government submitted no evidence that the agents did anything to grant SGT Cooper access to his medicine until after they secured the "confession."

Viewing the facts in a light most favorable to SGT Cooper, this Court should conclude 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. This is precisely the type of coercive police conduct *Miranda v. Arizona* was intended to guard against. 384 U.S. 436 (1966).

The military judge, with the benefit of hearing the evidence and assessing the credibility of the testimony determined that SGT Cooper's medical condition was a significant factor weighing against a finding of voluntariness, even more so when placed in the context of the interrogation tactics employed against SGT Cooper.

---

an interrogation should be supportive to the interrogator and provide absolute privacy.").

3. SGT Cooper's Repeated Attempts to Invoke His Fifth Amendment Rights Were Properly Considered By The Military Judge.

Sergeant Cooper twice unequivocally invoked his right to remain silent and twice he was ignored. (JA 36). The first unequivocal invocation is discussed at Issue I. The second unequivocal attempt is discussed at Issue III. Sergeant Cooper also made several ambiguous attempts to invoke his right to counsel. *Id.* As the military judge correctly points out, "this factor would not, by itself, call for a statement to be found involuntary." *Id.* However, the military judge is well within his discretion in considering this as one factor among many that weigh against voluntariness.

Sergeant Cooper's attempts to invoke his Fifth Amendment rights must be viewed in conjunction with the coercive interrogation environment in which he was placed. As the *Martinez* court explained, the "[t]otality of the circumstances does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." 38 M.J. at 86.

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.

Sergeant Cooper unequivocally invoked his right to remain silent for the second time prior to adopting the question and answer portion of the sworn statement at issue in this case. (JA 195, (Sworn Statement)). Sergeant Cooper hand wrote part of the statement and SA Kapinus typed the question and answer portion. (JA 103, 195). After SGT Cooper invoked his right to remain silent, SA Kapinus asked him three more questions and then printed the statement. (JA 93-94, 103-104). Special Agent Kapinus then told SGT Cooper to initial each page, made him take an oath, and made him sign the statement. (JA 74, 93-94). The military judge concluded:

> These actions transformed the notes that SA Kapinus had compiled during the interrogation into a statement that the accused swore was true. SA Kapinus' actions were inconsistent with his duty to "scrupulously honor" SGT Cooper's invocation of his right to remain silent, and would render the typewritten portion of the confession inadmissible under Mil. R. Evid. 304(a).

(JA 36).

The government argues that the military judge abused his discretion because his holding is contrary to *United States v. Sager*. 36 M.J. 137, 146 (C.M.A. 1992). The government quotes dicta from *Sager*: "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*." *Id;* (GB 52). This dicta is inapplicable to SGT Cooper's invocation of his right to remain silent because after the invocation of silence, SA Kapinus directed SGT Cooper to adopt SA Kapinus' typed statement as his own.

A close reading of *Sager* reveals that the military judge is correct to distinguish *Sager*. First, Sager never invoked either his right to remain silent or his right to counsel. *Sager*, 36 M.J.at 140. In *Sager*, the trial court found, and the Court of Military Appeals agreed, that Sager did not invoke his right to remain silent or right to counsel making the quoted language inapplicable dicta. *See id.* Second, as the military judge points out, after SGT Cooper invoked his right to silence for the second time, SA Kapinus did more than just type and secure SGT Cooper's signature; Special Agent Kapinus made SGT Cooper verify the accuracy of the statement, initial each page, and swore him to it. (JA 36).

Until SGT Cooper adopted the statement after invoking his right to remain silent, the typed portion of the statement was merely SA Kapinus' notes based on his interrogation of SGT Cooper. By insisting that SGT Cooper adopt those notes as his own statement, SA Kapinus violated SGT Cooper's right to cut off questioning at any time. *See Seay*, 60 M.J. at 77-78 (quoting *Mosley*, 423 U.S. at 100 ("[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'"). The military judge properly suppressed the typewritten portion of the statement.

Conclusion

Beginning with the midnight "knock at the door," the actions of law enforcement toward SGT Cooper were heavy handed, coercive, and inept. The police woke SGT Cooper at midnight; separated him from his family; isolated him in a detention cell by himself for three hours; then isolated him in an interrogation room where his only human contact was with CID agents. (R. at 92-95). The agents denied him access to his pain medication; employed direct positive confrontation;[4] ignored his repeated invocation of his right

[4] *See infra*, note 3.

to remain silent; and presented him with "themes" designed to "unbend . . . [his] reluctance."[5] *Columbe v. Connecticut*, 367 U.S. 568, 571-73 (1961). While the police did not physically torture SGT Cooper, under the facts of this case, the military judge appropriately concluded that the police went too far in exercising the types of subtle and perhaps not so subtle psychological manipulation *Miranda* intended to be remedy. The military judge properly found that the government failed to demonstrate by a preponderance of the evidence that the statement was voluntary.

Certainly, the military judge's decision is not an abuse of discretion. Given the standard of review on a government appeal, this Court should not now contradict the military judge's findings of fact and conclusions of law. The military judge's findings are "uniquely one of fact, and usually must and should be left to the judgment of the trial court . . . ." *Bradshaw*, 462 U.S. at 1051 (Powell, J.

---

[5] The Supreme Court describes the use of psychological interrogation methods that "unbend th[e] reluctance" of criminal suspects to confess. *Columbe*, 367 U.S. at 571-73). The *Miranda* Court quoted Inbau and Reid to describe the manipulative use of psychological interrogation methods by police: "To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.'" Miranda, 384 U.S. at 455(quoting Inbau & Reid, *Lie Detection And Criminal Interrogation* 185 (3d ed. 1953)).

concurring in the judgment). The military judge did not abuse his discretion when he found that the government failed to carry its burden of proving that law enforcement "scrupulously honored" SGT Cooper's multiple invocations of his right to remain silent or that the statement was voluntary.

Wherefore, appellee respectfully requests that this Court answer each of the certified issues in the negative and uphold the military judge's exercise of discretion in ruling to suppress SGT Cooper's statement.

PETER KAGELEIRY, Jr.
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
USCAAF Bar Number 35031

JACOB D. BASHORE
Major, Judge Advocate
Branch Chief,
Defense Appellate Division
USCAAF Bar Number 35281

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF Bar Number 31186

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,869 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New, using 12-point type with no more than ten and ½ characters per inch.

PETER KAGELEIRY, JR.
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
USCAAF Bar Number 35031

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Cooper, Crim. App. Dkt. No. 20110914, Dkt. No. 12-6004/AR, was delivered to the Court and Government Appellate Division on February 24, 2012.

Peter Kageleiry Jr.

PETER KAGELEIRY, Jr.
Lieutenant Colonel, Judge Advocate
Senior Appellate Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
USCAAF Bar Number 35031