IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Cadet **JORGE A. HURTADO**, United States Army, Appellant	)	Crim. App. Dkt. No. 20240609 USCA Dkt. No. 25-0212/AR

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

Issues Presented

I. WHETHER THE MILITARY JUDGE'S RULING WAS NOT AN ABUSE OF DISCRETION.

II. WHETHER THE MILITARY JUDGE MADE CLEARLY ERRONEOUS FACTUAL FINDINGS AND THE ARMY COURT'S "MERE DISAGREEMENTS" JUSTIFY DEVIATING FROM THE STANDARD THIS COURT MANDATES UNDER ARTICLE 62.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 62, Uniform Code of Military Justice (UCMJ); 10

U.S.C. § 862.[1] This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Appellant is charged with ten specifications of abusive sexual contact, two specifications of sexual assault, and one specification of indecent exposure in violation of Articles 120 and 120c, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 920c (2019) [UCMJ]. (JA 114). On November 11, 2024,[2] the military judge granted the trial defense counsel's motion to suppress Appellant's statement to SA NL. (JA 125). On November 13, 2024, the United States filed a notice of appeal under R.C.M. 908. (JA 113). On January 7, 2025, the Government filed its brief. (JA 095). On January 27, 2025, Appellant filed his answer. (JA 080). On February 3, 2025, the Government filed its reply brief. (JA 071).

On March 25, 2025, a panel on the Army Court granted the Government's appeal. (JA 062). On April 24, 2025, Appellant filed a motion for reconsideration by the Army Court *en banc*. (JA 011). On May 2, 2025, the Government filed its

[1] All references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM] with the 2020 and 2021 National Defense Authorization Act Amendments.

[2] On 8 October 2024, Appellant, through his counsel, moved to suppress his 23 January 2024 videotaped statement to Special Agent (SA) NL of the United States Army Criminal Investigation Command (CID) on the basis that SA NL allegedly failed to scrupulously honor Appellant's invocation of his right to counsel. (JA 160). The trial court held a hearing on Appellant's motion on 17 October 2024. (JA 126).

opposition to the motion for reconsideration. (JA 005). On May 13, 2025, the Army Court denied Appellant's motion. (JA 004). On July 11, 2025, Appellant filed a petition for grant of review to this Court. (JA 002). On August 26, 2025, this Court granted Appellant's Petition for Review. (JA 001).

Statement of Facts

Appellant's charges encompass alleged sexual misconduct against four separate victims: RR, AM, SS, and BH, all of whom were fellow cadets at the United States Military Academy (USMA). (JA 114). Appellant's statement to Army CID agents on January 23, 2023 only involved questioning about allegations involving Cadet BH. (JA 193).

On January 23, 2023, SA NL and SM interviewed Appellant at the USMA CID Office. (JA 193). In the first portion of the interview, SA NL collected administrative data from Appellant. (JA 193, 00:00:00–00:27:30). Once SA NL gathered all of the information necessary to complete the administrative data sheet, she asked Appellant to join her at a table in the interview room so he could follow along with her on the Department of the Army (DA) Form 3881 as she went through it line-by-line to fully advise him of his Article 31(b) rights. (JA 193, 00:27:40–00:32:20).

During the rights advisement, the exchange between SA NL and Appellant was as follows:

[SA NL]: Do you understand your rights?

[Appellant]: (Nodded his head in acknowledgment)

[SA NL]: Have you ever requested a lawyer after being read your rights?

[Appellant]: No this is the first time.

[SA NL]: Do you want a lawyer at this time?

[Appellant]: Like, I would like to speak to a lawyer, but um, yeah.

[SA NL]: That's okay so you want a lawyer at this time?

[Appellant]: I just I don't . . . I don't . . .

[SA NL]: So I'll let you I'll, I'll kind of explain. So if you want a lawyer now, we would sign or I would have you check the lawyer block down here and you sign here and that would be the end of the interview today, okay. And then your Chain of Command would come pick you up and they would take you. You would have the opportunity to go get a lawyer. And then once you have that lawyer, you would be able to cut, come back, call us, you know, schedule another interview. If you did not want to do that or if you're not sure we could proceed on. And then you could like it says on here, you can end the interview or stop to talk to a lawyer.

[Appellant]: Yeah I want to know what I am here for first.

[SA NL]: Okay, so then, did you want to talk to a lawyer before we, before we talked today at all?

[Appellant]: So if I, if we proceed and then at a certain point I am like okay I need a lawyer before I respond to these questions, like is that possible?

[SA NL]: Yea, yes, yeah so basically we would go through the form as, as if you're waiving your rights, you, so you would need to waive your rights in order

to, for you to ask me questions about details and vice versa, right? So we'd go through waiving your rights and then number four at any time, if you say, okay, I need a lawyer, you just say that, hey, I'd like to consult a lawyer or something along those lines. Or I would like to end something like that, right. Just so that you make it clear to me that you want to stop here and then we'll go from there.

[Appellant]: Yeah I just don't want to say or do something I shouldn't and then the lawyer is like why did you do that and yea.

[SA NL]: Oh yea, it's all your call.

[Appellant]: I do want to know what this is about (inaudible) so proceed.

[SA NL]: Okay so proceed. At this time are you willing to discuss the offenses under investigation and make a statement without talking to a lawyer or having a lawyer present with you?

[Appellant]: Yeah.

(JA 192, 00:30:00–00:32:20).

Summary of Argument

Appellant made an ambiguous statement about wanting to consult with counsel. SA NL acted reasonably by re-asking the question about whether Appellant wanted a lawyer to clarify his intent. This question served a legitimate law enforcement function to clarify whether Appellant was in fact invoking his

right to counsel. After hearing the clarifying question, Appellant made it clear he wanted to continue and waive his right to counsel.

I.

WHETHER THE MILITARY JUDGE'S RULING WAS NOT AN ABUSE OF DISCRETION.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Cote,* 72 M.J. 41, 44 (C.A.A.F. 2013). "In reviewing a military judge's ruling on a motion to suppress, we review factfinding 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). The Court of Appeals for the Armed Forces (C.A.A.F.) applies this standard when reviewing evidentiary rulings under Article 62(b), UCMJ. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014). Therefore, on mixed questions 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." *Ayala*, 43 M.J. at 298. The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be arbitrary . . . clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (internal quotation marks omitted). Whether an accused has invoked his right to counsel is a question of law. *United States v. Sager*, 36 M.J. 137, n.2 (C.M.A. 1992). "In an Article 62, UCMJ, petition, the

court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Baker*, 70 M.J. 283, 287–88 (C.A.A.F. 2011).

Argument

The Fifth Amendment privilege against self-incrimination contains two separate but critical rights: the right to remain silent and the right to counsel, specifically during pretrial questioning. *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004). In *Miranda*, the Supreme Court held that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent," and that he "has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

In *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), the Court further held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." The *Edwards* rule embodies two distinct inquiries:

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b)

knowingly and intelligently waived the right he had invoked.

Smith v. Illinois, 469 U.S. 91, 95 (1984) (citations omitted).

When invoking the right to counsel, an accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). The determination of whether an invocation is unequivocal is an objective inquiry based on how a reasonable officer would view the comments. *See Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (finding that a requirement of an unambiguous invocation of *Miranda* rights results in an "objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity.") (quoting *Davis,* 512 U.S. at 458–59).

Here, the military judge abused his discretion when he (1) misapplied the law to determine appellant unequivocally invoked the right to counsel; and (2) made a clearly erroneous finding of fact when he found SA NL "interjected" to explain to appellant what the process would be if he decided to ask for a lawyer.

A. The military judge abused his discretion to determine Appellant unequivocally invoked his right to counsel.

First, the military judge improperly and summarily applied the judicial rule on postrequest responses to conclude appellant's statement was unequivocal. Second, he failed to apply the "reasonable officer" test from *Davis v. United*

States. Finally, the military judge erred when he failed to recognize law enforcement acted within the bounds of Supreme Court precedent.

1. Appellant's alleged invocation was objectively equivocal.

In analyzing the threshold inquiry of whether the accused actually invoked his right to counsel, the Supreme Court in *Smith* narrowly held that "an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." *Smith v. Illinois*, 469 U.S. 91, 100 (1984). However, courts consider the events immediately preceding and concurrent with the invocation and "nuances inherent in the request itself" when analyzing whether a statement was equivocal or ambiguous. *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009) (quoting *Smith*, 469 U.S. at 99–100). Equivocal means "having different significations equally appropriate or plausible; capable of double interpretation; ambiguous." *United States v. Rittenhouse*, 62 M.J. 509, 511 (A. Ct. Crim. App. 2005); *see also Black's Law Dictionary* 682 (11th ed. 2019) (defining "equivocal" as "of doubtful character; questionable" and "[h]aving more than one meaning or sense; ambiguous").

Here, the military judge cited *United States v. Herman*, ARMY 20220248, 2023 CCA LEXIS 535 (A. Ct. Crim. App. Dec. 15, 2023) (mem. op.) for the proposition that courts may not consider subsequent responses, but conducted no

analysis, and immediately followed the *Herman* citation with "CDT Hurtado's response of 'I mean, I would like to speak to a lawyer, but um, yea' was an invocation of his rights." (JA 125). He then cites to *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017), rather than conduct the appropriate analysis, which "is whether an invocation is 'sufficiently clear such that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney . . . .'" *Herman*, 2023 LEXIS 535, at *7 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)).

When SA NL asked Appellant for the first time whether he would like a lawyer, Appellant responds with "like, I would like to speak to a lawyer, but um, yeah." (JA 193, 00:30:15). The use of "but" is concurrent with Appellant's alleged invocation, and thus consideration of the word is proper. The plain language of the word "but" is inherently equivocal—there is no meaning other than to indicate a change in direction of the sentence. Oxford English Dictionary defines "but" as a conjugation "used to introduce a phrase or clause contrasting with what has already been mentioned." *But*, Oxford English Dictionary (3rd ed. 2024); *see also* (JA 154–55). Merriam Webster similarly defines "but" as "except for the fact" and "on the contrary," "on the other hand," "notwithstanding." Merriam-Webster, *But*, https://www.merriam-webster.com/dictionary/but (last visited Sep. 3, 2025); *see also* (JA 061).

A review of the interview footage and Appellant's body language and tone of voice supports this interpretation. When Appellant says "like, I would like to speak to a lawyer," the pitch of his voice gets higher, but when he says "but" the pitch of his voice comes back down, he rotates his left hand outward slightly and offers a small shrug, says "um yeah." (JA 193, 00:30:15–00:30:21.). His body language and the changes to the inflection in his voice throughout the course of the sentence suggest a possible change in intent. Appellant's use of "um yeah" at the end of the sentence does not negate the equivocation of "but," as Appellant argues. (JA 015). If anything, it adds to the ambiguity of his alleged invocation because it suggests he had another thought to add to the conversation that he had not yet fully articulated out loud.

Appellant's use of the word "but," coupled with his body language and the changes to the inflection in his voice is evidence of equivocation. The military judge abused his discretion when he failed to perform any analysis on whether Appellant's alleged invocation was equivocal—he instead summarily decided that it was not.

2. The military judge failed to use the "reasonable officer" test from *Davis v. United States*.

Because Appellant's alleged invocation was equivocal and ambiguous, SA NL behaved as a "reasonable officer" when she asked follow-up questions to clarify his intent. In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme

Court discussed how law enforcement officers should respond when an accused makes a reference to counsel that is unclear. The Court said:

> To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this [whether the accused actually invoked his right to counsel] is an objective inquiry. Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.

Id. at 459–60 (internal citations omitted).

In fact, "when a suspect makes an ambiguous or equivocal statement it will often be *good* police practice for the interviewing officers to clarify whether or not he actually wants an attorney." *Id.* at 461 (emphasis added). Clarifying questions protect the rights of the suspect and help avoid second guessing as to what the suspect meant. *See id*.

Under *Davis*, SA NL acted as a "reasonable officer." Faced with Appellant's equivocal statement "like, I would like to speak to a lawyer but, um yeah," she understood only that Appellant *might* be invoking the right to counsel. In line with Supreme Court precedent, she followed up with a clarifying question to confirm whether he wanted a lawyer.

The circumstances surrounding Appellant's alleged invocation are similar to those in *Davis*. In *Davis*, the accused originally waived his right to counsel, and

then approximately an hour and half into the interview said, "Maybe I should talk to a lawyer." *Id.* at 455. The law enforcement agents then clarified whether the subject wanted a lawyer. *See id.* "[W]e weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer . . . ." *Id.* In response, the subject stated, "no, I don't want a lawyer." *Id.* After a short break, the agents reminded the subject of his right to counsel. The interview then continued for another hour, until the subject said, "'I think I want a lawyer before I say anything else' . . . At that point, questioning ceased." *Id.* at 455 (internal citations omitted). The *Davis* court said, "[t]he courts below found that petitioner's remark to the NIS agents—'Maybe I should talk to a lawyer'—was not a request for counsel, and we see no reason to disturb that conclusion." *Id.* at 462. The Supreme Court added, "it was entirely proper for [the agents] to clarify whether [the subject] in fact wanted a lawyer." *Id.* at 462. The circumstances surrounding the invocation to the right to counsel in *Davis* are similar to this case: Appellant provided an invocation that was not clear, at which point SA NL properly went on to clarify his intent, just as the officers did in *Davis*.

While the military judge cited to *Davis* and the need for an objective inquiry in his "Conclusions of Law," nowhere does he actually apply the law from *Davis* to the facts in the present case. *See generally* (JA 124–25). His failure to provide any analysis of the "reasonable officer" standard affords his ruling less deference.

See United States v. Finch, 79 M.J. 389, 397–98 (C.A.A.F. 2020) (finding the military judge's decision merited little deference when, in part, he included neither analysis nor application of the law to the facts on the record). As such, the military judge abused his discretion.

3. Law enforcement did not compel Appellant's admissions.

The military judge properly acknowledged that "[t]he *Edwards* rule serves the prophylactic purpose of preventing officers from badgering a suspect into waiving his previously asserted *Miranda* rights, and its applicability required courts to determine whether the accused actually invoked his right to counsel." (JA 123). However, his analysis failed to address that SA NL's subsequent questions served solely to clarify an ambiguous request, not to badger Appellant into submission.

SA NL's clarifying questions were permissible and in accordance with Supreme Court precedent. The *Davis* Court specifically provided that

> . . . a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

Davis, 512 U.S. at 460 (citing *Michigan v. Mosley*, 423 U.S. 96, 102 (1975). Further,

> [i]n considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for

> effective law enforcement . . . if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney . . . clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.

Id. at 461.

SA NL's legitimate clarifying questions in light of a statement she thought *might* be a request for an attorney was objectively the behavior of a "reasonable officer." A holding otherwise risks transforming the *Miranda* safeguards into a wholly irrational obstacle to legitimate police activity and does not serve the purpose of *Edwards*. *See Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) (discussing the purpose of *Edwards* is not served by extending the safeguard to situations in which a suspect decides to cooperate with law enforcement based on a belief that it is in his best interest, rather than "badgering").

In the military judge's "Custodial Interrogation of the Accused" paragraph, he relied on the "totality of the circumstances" to summarily decide Appellant's alleged invocation was unequivocal ("Given the totality of the circumstances, the interview should have stopped until he was provided with an opportunity to speak with counsel."). (JA 124–25); *see also* (JA 142–44). The military judge also cited *United States v. Mitchell* and M.R.E. 305(e)(3) (Waiver After Initially Invoking the Right to Counsel) for the proposition that the interview should have stopped until

Appellant was provided the right to counsel.[3] In *United States v. Mitchell*, 76 M.J. 413 (C.A.A.F. 2017), this Court found the Government violated the accused's Fifth Amendment right to counsel protected by *Miranda* and *Edwards* when the accused clearly invoked, was subject to custodial interrogation, and was nonetheless asked to provide the passcode to his phone. This Court said, "badgering an unrepresented suspect into granting access to incriminating information threatens the core Fifth Amendment privilege . . . ." *Id.* at 419.

The military judge's ruling here failed to take into account SA NL's clarifying questions in the face of an unclear invocation of the right to counsel. To be sure, a law enforcement agent who takes advantage of asking clarifying questions to "badger a suspect" into waiving their *Miranda* rights is not behaving as a "reasonable officer" under *Davis*. However, there is simply no evidence SA NL "badgered the suspect." Indeed, the military judge later wrote that the assertion that the agents were hostile, abrasive, and coercive in overbearing the will of the accused was *without merit*. (JA 125).

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[3] Whether an accused's waiver of his right to counsel is knowing and intelligent necessarily comes after a finding that he actually invoked that right. *See Smith,* 469 U.S. at 95. Whether an accused's confession is voluntary is determined by the totality of the circumstances to determine whether the confession "is the product of an essentially free and unconstrained choice." *United States v. Bubonics*, 45 M.J. 93, 94–95 (C.A.A.F. 1996). The "totality of the circumstances" is the legal standard for determining whether an accused's confession is voluntary; it is not the standard for whether the accused actually invoked that right under *Edwards'* first prong.

This distinction between clarifying questions and "badgering the suspect" is critical. SA NL was not trying to elicit a retraction of the request for counsel or attempting to surreptitiously deprive Appellant of the right. In contrast to *Mitchell*, in her direct follow-up questions, SA NL neither went on to interrogate Appellant nor did she ask questions reasonably likely to elicit an incriminating response.[4] She provided clarification and explained that Appellant could end the interview, his chain of command would pick him up, and he could talk to a lawyer. (JA 193, 00:32:27). As the Army Court correctly found, "[t]his served the legitimate law enforcement function of dispelling ambiguity and clarifying whether [Appellant] was indeed invoking his rights." (JA 022).

Here, too, a review of the interview footage to determine the agent's mannerisms and tone of voice is imperative. SA NL maintains a reasonable and conversational tone when she starts to respond with "that's [pause] okay, so you want a lawyer at this time?" and goes on to explain the process of what getting a lawyer looks like when Appellant gives her an indication he might not understand or be unsure about something. (JA 193, 00:32:27). The change in inflection in SA NL's voice from "that's" to "okay, so you want a lawyer at this time?" indicates she started one sentence and then changed direction to confirm whether Appellant

[4] In *Mitchell*, the request for the subject's PIN code was "reasonably likely to elicit an incriminating response." 76 M.J. at 418.

wanted a lawyer.

The military judge erred by not applying the reasonable officer standard to SA NL's follow up questions. Further, the military judge's findings invite an extension of *Edwards* by requiring law enforcement officers to cease questioning immediately upon an ambiguous invocation of the right to counsel. *See Davis v. United States*, 512 U.S. 452, 459 (1994) ("We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney."). This Court should also decline such an invitation.

B. The military judge made an erroneous finding of fact when he found SA NL "interjected" to explain the process for getting a lawyer.

Appellant attributes to the Army Court the finding that SA NL "interjected" to further explain Appellant's right to counsel. (Appellant's Supp. Petition 12). However, the Army Court did not make such a finding. It did summarize the factual findings and conclusions of law made by the military judge: "SA Lucas then stated, in response, 'That's okay,' and re-asked the question a second time: 'So you want a lawyer at this time?' SA Lucas then interjected to explain to appellant what the process would be if he decided to ask for a lawyer." (JA 020).

Indeed, the military judge's finding that the agent "interjected" is *not* supported by the record and is a clearly erroneous factual finding. A review of the interview shows that Appellant had shrugged and trailed off from his previous

sentence of "I just I don't . . . I don't . . ." in response to SA NL's clarifying question as to whether he wanted a lawyer. (JA 193, 00:30:24). Calling SA NL's actions an "interjection" implies the agent was trying to unreasonably take an action to speak over Appellant, which is not what the dialogue in the interview shows. The agent reasonably tried to explain the process for getting a lawyer when it seemed to her that Appellant did not understand. This finding of fact is more than just maybe or probably wrong—it is wrong. *See United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993) (to be "clearly erroneous" a finding of fact "must be more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish."). This finding of fact was clearly erroneous.

Thus, the military judge abused his discretion when he (1) applied the law incorrectly to determine appellant unequivocally invoked; and (2) made a clearly erroneous finding of fact when he found SA NL "interjected."

II.

WHETHER THE MILITARY JUDGE MADE CLEARLY ERRONEOUS FACTUAL FINDINGS AND THE ARMY COURT'S "MERE DISAGREEMENTS" JUSTIFY DEVIATING FROM THE STANDARD THIS COURT MANDATES UNDER ARTICLE 62.

Additional Facts

The Army Court determined the military judge's finding of fact that SA NL

"interjected" to explain the process of exercising the right to counsel in more detail was clearly erroneous and that the military judge failed to consider key facts in making his ruling. (JA 020–22). The Court also determined the plain language of the word "but" at the end of Appellant's statement is inherently equivocal, and thus SA NL exercised the legitimate law enforcement function of asking a clarifying question in line with Supreme Court precedent in *Davis*. (JA 022). The Court ultimately concluded Appellant did not unequivocally invoke his right to counsel and returned the record of trial to the military judge for action consistent with the opinion. (JA 022–23).

Standard of Review

A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. *United States v. Cote,* 72 M.J. 41, 44 (C.A.A.F. 2013). "In reviewing a military judge's ruling on a motion to suppress, we review factfinding 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). The Court of Appeals for the Armed Forces (C.A.A.F.) applies this standard when reviewing evidentiary rulings under Article 62(b), UCMJ. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014). Therefore, on mixed questions 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." *Ayala*, 43 M.J. at 298. The abuse of discretion

standard calls "for more than a mere difference of opinion. The challenged action must be arbitrary . . . clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (internal quotation marks omitted). Whether an accused has invoked his right to counsel is a question of law. *United States v. Sager*, 36 M.J. 137, n.2 (C.M.A. 1992). "In an Article 62, UCMJ, petition, the court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Baker*, 70 M.J. 283, 287–88 (C.A.A.F. 2011).

Argument

A. The military judge made a clearly erroneous factual finding.

The Army Court properly cited *Finch* for the proposition that "[t]he omission of and failure to consider key and competing facts afford a military judge's ruling less deference." (JA 022); *see United States v. Finch*, 79 M.J. 389, 397–98 (C.A.A.F. 2020). The Army Court also properly considered the inflection and behavior displayed in the video recording of the interview. (JA 022). The Court cannot assume the military judge properly considered the same in his analysis when they are not included as findings of fact and his conclusions of law are incorrect.

Where the military judge places his or her findings and analysis on the record, appellate courts will provide more deference. But the military judge did not

do that here. His findings are devoid of analysis and are riddled with standards of law inapplicable to the issue at hand—whether Appellant's alleged invocation was equivocal and if so, whether SA NL behaved as a "reasonable officer" in asking clarifying questions about what might have been an invocation. There is sufficient evidence throughout the military judge's ruling to overcome the presumption that he applied the correct legal standards. *See supra* Part I.

B. The Army Court properly conducted an abuse of discretion review.

When deciding an appeal under Article 62, "the Court of Criminal Appeals may act only with respect to matters of law." 10 U.S.C. § 862(b). On questions of fact, the appellate court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995).

While the evidence must be reviewed in the light most favorable to the prevailing party, "[i]f the military judge fails to place his findings and analysis on the record, less deference will be accorded." *Finch*, 79 M.J. at 397 (quoting *United States v. Flesher*, 73 M.J. 303 (C.A.A.F. 2014)); *see also United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) (recognizing that "w[h]en the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual

findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion").

The Army Court here did not "merely disagree" with the military judge's decision. The military judge used the improper law, failed to provide any analysis in reaching his conclusions, and failed to consider key facts, leading to an erroneous finding of fact. The Army Court properly (1) determined de novo that Appellant's use of the word "but" was inherently equivocal and thus it was reasonable for SA NL to ask clarifying questions to confirm appellant's intent under *Davis* as a conclusion of law; and (2) noted that describing the agent's actions as an "interjection" was a finding of fact that was clearly erroneous.[5] *See* discussion *supra* Part I. Further, the Court's discussion of "that's okay so you want a lawyer at this time?" was also proper because it first found Appellant's alleged invocation to be ambiguous and equivocal. Thus, the "reasonable officer" test from *Davis* applies, and it was permissible for SA NL to ask clarifying questions to better understand whether appellant wanted a lawyer. The Court used the proper standards of review and determined both that the judge's factual findings were clearly erroneous and that his conclusions of law were incorrect—a far cry from a

[5] The Army Court explicitly noted that it was unable to make its own findings of fact and did not include those facts in its legal analysis: "We merely note them to reflect a finding which is clearly erroneous"—a finding that is well within its authority under Article 62. (JA 022).

"mere disagreement."

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the Army Court's order.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 6,434 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins on all four sides.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 10 September 2025 and electronically filed to Defense Appellate on September 10, 2025.

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