IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Granted Issues

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.

Argument

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

The military judge did not abuse his discretion. The military judge properly concluded that Cadet Hurtado's statement, "Like, I would like to speak to a lawyer, but umm yeah" was an unequivocal invocation of his right to counsel, and the

military judge did not make clearly erroneous findings of fact. (JA 122-125; JA 193, 00:30:15-00:30:21).

A. The Military Judge Did Not Abuse his Discretion When he Found Cadet Hurtado Unambiguously Invoked His Right to Counsel.

The Government claims the military judge abused his discretion in finding Cadet Hurtado unequivocally invoked his right to counsel. (Gov Br. at 8). The Government argues that the military judge conducted no analysis regarding the post request responses and second, that the military judge failed to apply the "reasonable officer" test from *Davis v. United States*, 512 U.S. 452, 459-60 (1994). (Gov Br. at 8-9).

The military judge cited the correct precedent, *Herman*, *Edwards* and *Davis*.[1] *(*JA 124-125). The military judge applied the correct legal standard in his ruling. Although he did not use the words "reasonable police officer," that concept is inherent in his findings and conclusions as he cited to the applicable case law discussing that standard. Absent evidence to the contrary, the military judge is presumed to the know the law. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Here, the presumption is buttressed by the military judge's citation to the very cases applying the applicable standard.

[1] *United States v. Herman*, 2023 CCA LEXIS 535 (Army Ct. Crim. App. Dec. 15, 2023) (mem. op.); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Davis v. United States*, 512 U.S. 452 (1994).

Because Cadet Hurtado's invocation was unequivocal, there should have been no follow-up questions. An unequivocal or unambiguous invocation requires immediate cessation of questions under Military Rule of Evidence 305(c)(4). If a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. *Davis*, 512 U.S. at 458.

If there were any question as to what Cadet Hurtado meant, then SA Nicole Lucas would have asked a follow-up question. She didn't. Instead, she affirmed Cadet Hurtado's invocation by saying "that's okay." The fact that SA Nicole Lucas didn't follow-up with a clarifying question shows that she knew, without question, that Cadet Hurtado invoked his right to counsel. Special Agent Nicole Lucas not only affirmed Cadet Hurtado's request for an attorney by replying "that's okay," she then ignored his request. (JA 193; 00:30:20-00:30:25).

The Army Court of Criminal Appeals [Army Court] disagreed with the military judge's determination that Cadet Hurtado's invocation was unequivocal because it found the word "but" inherently equivocal.[2] But this too is an inherently factual determination to which a judge is owed deference. In some scenarios, this would be very relevant. For example, in a case out of Ohio, *State v. Howard*, 2014

[2] The Army Court stated, "Without the word 'but', the ambiguity in [Cadet Hurtado's] statement dissipates. With the word 'but' [Cadet Hurtado's] statement is anything except clear and unequivocal." (JA 061).

Ohio App. LEXIS 662 (1st Dis. Ohio Ct. App. Feb 26, 2014), Howard stated, "I would like to talk to a lawyer, I also want to talk to you, but like you say, I'm first. Always good to be first." *Howard*, 2014 Ohio App. LEXIS 662 * 14. Howard's statement contained two options and a comment that could be interpreted as welcoming further questioning. *Id.* In this case however, the word "but" merely affirms the preceding portion of the sentence. "I would like to speak with a lawyer, but umm yeah." In other words, the Appellant stated, "I would like to speak with a lawyer, but umm yeah [I would like to speak with a lawyer]." (JA 193; 00:03:15-00:30:20). Thus, while the Army Court might disagree with the significance of the word, "but" it cannot reverse the military judge's decision based on that disagreement.

The Government argues that the use of "umm yeah" at the end of the sentence injected ambiguity into Cadet Hurtado's invocation because it suggested he had another thought to add to the conversation that he had not fully articulated. (Gov Br. at 11). But SA Nicole Lucas immediately acknowledged Cadet Hurtado's invocation. She recognized it for what it was; a clear and unequivocal request to speak with counsel. The military judge recognized this as well. And it is his factual determinations that are afforded great deference in this Article 62 appeal.

The Government claims "the [military judge] failed to perform *any* analysis on whether Appellant's [Cadet Hurtado] alleged invocation was equivocal—he [military judge] summarily decided that it was not." (Gov Br. at 11). But the military judge wrote a detailed ruling consisting of findings of fact, citations to the appropriate case law, and thorough analysis. (JA 122-125). The Government is simply wrong in arguing the military judge failed to conduct analysis of the nature of Cadet Hurtado's statement.

The Government also argues the military judge abused his discretion when he failed to recognize law enforcement acted within the bounds of Supreme Court precedent. (Gov Br. at 9, 11-13). The Government bases that claim on the military judge rejecting the Defense claim at trial that the agents "engaged in any misconduct during the custodial interrogations." (JA 125). But the finding of an invocation does not necessitate a finding of hostility on the part of the agents. In any event, the Army Court did not address this argument.

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.

The Army Court determined the military judge's finding that SA Nicole Lucas "interjected" to further explain appellee's right was not supported by the record and was erroneous. (JA 022). Overturning a finding of fact as clearly

erroneous is a very high bar, and here the military judge made this finding of fact after he watched the interview. (JA 122-125; JA 193). This finding is supported by the record and is not the type that "strike[s] . . . with the force of a five-week-old unrefrigerated dead fish, which is needed for it to be found clearly erroneous. *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993) (quoting *Parts and Electric Motors Inc. v. Sterline Electric, Inc.* 866 F.2d 228, 233 (7th Cir. 1988)).

The interview should have been terminated upon Cadet Hurtado's invocation as SA Nicole Lucas recognized his invocation with her immediate response of "that's okay." (JA 193; 00:30:20-00:30:25). The Army Court stated most of the military judge's findings of fact were supported by the record. (JA 021). Specifically, the Army Court did not find the fact that "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?" to be a clearly erroneous finding. (JA 020). Therefore, any factual finding after the invocation is not dispositive on the outcome of the case. When evaluating ambiguity, Courts may not consider subsequent responses. *Smith v. Illinois*, 469 U.S. 91, 98-99 (1984). Therefore, the Army Court's reference to the words that came after the invocation was error.

The Government also relies on the Army Court's finding that the military judge "failed to consider" the pitch of Cadet Hurtado's voice and his behavior during the interview. (Gov Br. at 21). But the military judge identified time

hacks from Cadet Hurtado's interview that correspond to the very same pitch and gestures the Army Court found lacking. (JA 124). For the Army Court to conclude that the military judge failed to consider key facts is in direct contradiction to the military judge's ruling, which must be provided deference.

Also, the Army Court's reliance on *United States v. Finch*, 79 M.J. 389 (C.A.A.F. 2020) is notable for two reasons. First, *Finch* involved an Article 66, UCMJ appeal of an evidentiary issue, not a government appeal pursuant to Article 62, UCMJ. 79 M.J. at 391. The issue presented was "Whether the military judge erred in admitting over defense objection the video-recorded interview of AH by CID because it was not a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)". *Id.*

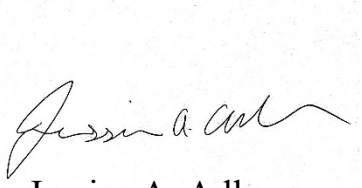
Second, this Court emphasized in *Finch* the military judge's failure to view the videotaped statement at issue in that case before admitting the evidence. *Id.* at 397. "Although we recognize this was a military judge-alone trial and the videotape was quite lengthy, the proper course of action was for the military judge to review the proffered evidence before making an admissibility determination."

In Cadet Hurtado's case, the military judge cited to time hacks in his findings of fact. Nothing in the record indicates he failed to review the proffered evidence—he cited to specific time hacks from that proffered evidence.

The Army Court erred in reversing the military judge. It failed to view the evidence in the light most favorable to Cadet Hurtado, demonstrating it afforded the military judge no deference. Instead of finding error, the Army Court merely disagreed with the military judge's determination Cadet Hurtado clearly invoked. The Army Court also erred in considering Cadet Hurtado's statement after the invocation. Because of these failures, this Court should vacate the Army Court's decision.

Conclusion

WHEREFORE, Appellant respectfully request this Court to vacate the decision of the Army Court and return the case to the Judge Advocate General of the Army for remand to the military judge.



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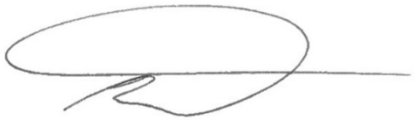

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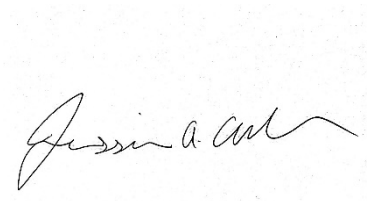
CERTIFICATE OF COMPLIANCE WITH RULE 24 AND RULE 37

1. This brief complies with the type-volume limitation of Rule 24(b) because: this brief contains 1751 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Hurtado, Crim. App. Dkt. No. 20240609, USCA Dkt. No. 25-0212/AR was electronically filed with the Court and Government Appellate Division on September 17, 2025.

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