IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20220248
Staff Sergeant (E-6) **DANIEL D. HERMAN** United States Army	Appellant	Tried at Fort Hood, Texas, on 11 April and 10-14 May 2022, before a general court-martial convened by the Commander, Headquarters, III Corps and Fort Hood, Lieutenant Colonel Scott Z. Hughes, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

On 25 July 2023, appellant, Staff Sergeant Daniel D. Herman filed his initial brief. On 5 October 2023, the government filed its answer brief. This is appellant's reply.

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS AND DERIVATIVE EVIDENCE.

In its brief, the government shrugs off the fact that law enforcement did not scrupulously honor SSG Herman's unambiguous invocation of his right to remain silent. In doing so, the government repeats the military judge's mistakes. The government argues the statement was ambiguous on its face and that it lacked specificity to establish what right, if any, appellant was invoking. (Gov't Br. at

14). Additionally, the government uses the events surrounding the entire interrogation to evaluate whether SSG Herman's right against self-incrimination was violated; and therefore, whether his post-invocation statements were voluntary. (Gov't Br. at 15-19). These are errors inconsistent with Supreme Court and Court of Appeals for the Armed Forces precedent. Finally, the government erroneously attempts to compare this case to *United States v. Robinson*, 77 M.J. 303 (C.A.A.F. 2019) to support its claim of inevitable discovery.

Here, SSG Herman's statement of "Imma have to invoke/evoke on this one," was an unambiguous assertion of his right to remain silent "'sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request . . . to remain silent.'" *United States v. Delarosa*, 67 M.J. 318, 324 (C.A.A.F. 2009) (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994). The statement was made in response to questioning by SA SP. As stated in *Davis v. United States*, "a suspect need not speak with the discrimination of an Oxford don . . ." But, both the military judge and the government appear to require just such precision. A reasonable law enforcement officer hearing "invoke" or "evoke" would understand an individual is invoking a right law enforcement previously provided. Furthermore, any reasonable law enforcement officer would understand

SSG Herman's statement *in response to a question* meant he was invoking his right to remain silent and not answer that question.

Additionally, even if SSG Herman's two statements are read together, he clearly invoked his right to remain silent because his statements indicate both a present desire to do one thing and future intent to do another. Reading the two statements together buttresses the lack of ambiguity as to the right to remain silent: (1) "Imma have to invoke/evoke on this one," i.e., in response to the present question; and (2) "when this is over I'm gonna have to pay somebody, because this right here. No this is not, its definitely not fair," i.e., a future intent to pay someone for some future action. Characterizing as the government does and the military judge did is merely searching for ambiguity where none exists.

United States v. Sager, 36 M.J. 137 (C.M.A. 1992) and *United States v. Gracia*, 2019 CCA LEXIS 461* (Army Ct. Crim. App. 2019), do not support the proposition that SSG Herman's invocation was ambiguous. *Sager* involved an accused who was likely not in custody at the time of his post-polygraph statements. *Sager*, 36 M.J. at 145. More importantly, Sager's challenge was based on conduct. *Id.* He opened a door and threatened to leave the room. *Id.* There, the court found "such conduct can be rationally viewed as constituting no more than a mere ploy on appellant's part to convince the agent of his innocence or sincerity." *Id.*

In *Gracia*, the accused was being interviewed about sexual offenses against a child. *Gracia*, 2019 CCA LEXIS 461 at *4-*5. After being told he was "'not a bad dad,'" Grarcia cried and provided "a faint sounding 'Stop.'" *Id.* at *6. In finding the use of the word "stop" ambiguous, this court found, in that context, "stop" meant Gracia was asking for a moment to collect his thoughts. *Id.* Notably, Gracia never used the word invoke, and he did not say "stop" in response to a specific question.

Here, appellant's invocation is not based on ambiguous actions or words. Appellant did not engage in a ploy to stop questioning. Appellant did not use ambiguous words. Appellant used the word "invoke" or "evoke." This should have been a clear indication appellant wanted to cease questioning.

The government also cites *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) and *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996) to argue that courts must assess "'the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation" when evaluating voluntariness. (Gov't Br. at 11-12). Once again, the government's argument misses the fundamental problem. Neither *Schneckloth* nor *Bubonics* involve a situation where an accused unambiguously invoked the right to remain silent. When that right is invoked:

> [i]f the individual indicates in any manner, at any time prior or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Michigan v. Mosley, 423 U.S. 96, 100 (1975). Given this principle, any post-invocation statement made following the failure to scrupulously honor the right to remain silent is involuntary under both *Mosely* and Mil. R. Evid. 305(c)(4). Had CID scrupulously honored appellant's unambiguous invocation and later re-approached appellant and re-advised him of his rights, then the government's argument would be valid. However, that did not happen here. Despite being confronted with this standard, the government offers nothing in reply.

Finally, the government mistakenly relies on *United States v. Robinson*. Robinson's invocation of his right to counsel was honored. *Robinson*, 77 M.J. at 304. It was after honoring this right that law enforcement requested consent to search Robinson's phone. *Id*. Furthermore, law enforcement did not have a search authorization. After asking and being told what law enforcement was looking for, Robinson made a voluntary choice to provide his phone and passcode even claiming, "'[t]here is nothing [in there], but yeah.'" *Id.* There was no pressure on him to provide testimonial information about his ownership and access to the phone. He was not providing compelled testimony that provided a link in the chain

of evidence. See *Doe v. United States*, 487 U.S. 201, 210-11 n.6 (1988); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Here, appellant's statement consenting to the search was irrelevant because CID already had a search authorization, and in fact, had already seized the phone. This case is more akin to *Mitchell* – a case where law enforcement possessed a valid search authorization. Like *Mitchell*, asking appellant for his passcode was a question likely to elicit an incriminating response.

II. WHETHER THE MILITARY JUDGE APPLIED THE INCORRECT MAXIMUM PUNISHMENT FOR THE ARTICLE 117A SPECIFICATIONS THEREBY VIOLATING THE *EX POST FACTO* CLAUSE.

The government's claim that the ex post facto violation resulted in no prejudice is in error because the military judge considered the possibility of a misapplication of the maximum punishment. Furthermore, though Rule for Courts-Martial 1003(d)(3)'s allows for a bad-conduct discharge, nothing indicates the military judge ever contemplated that rule, and therefore, it appears the bad-conduct discharge was based on nothing other than what the military judge erroneously believed was the authorized maximum punishment.

The military judge knew his ruling on the maximum punishment was dubious. The military judge stated, "My reading of it is, and I may be wrong and I'll let ACCA figure that one out . . . ." (R. at 1132). Appellant was sentenced to

concurrent terms of thirteen months for each specification including the Article 107 violation. (Statement of Trial Results). The military judge's contemplation of this uncertainty affects the entirety of the sentence.

While the government correctly cites what R.C.M. 1003(d)(3) allows, nothing in the record indicates the military judge ever contemplated that rule. Absent anything to indicate the military judge considered that rule, it is fair to assume the military judge believed a bad-conduct discharge was automatically authorized for just one Article 117a specification. Such a belief tainted his deliberation on the sentence and demands a sentence reassessment.

Conclusion

This court should set aside and dismiss with prejudice Specifications 4 and 5 of Charge I and the Specifications of Additional Charge I as well as so much of The Specification of Additional Charge II that relates to statements addressing "Daya Henriquez" and the Text Now application. Furthermore, this court should set aside the sentence and order a sentence rehearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on October 20, 2023.

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