

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Private First Class (E-3)

JOHN K. JARLEGO

United States Army,

Appellant

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20210389

Rehearing tried at Fort Leavenworth,

Kansas on 18 January 2024, 23

February 2024 & 14-15 May 2024,

before a general court-martial

appointed by Commander,

Headquarters, United States Army

Combined Arms Center & Fort

Leavenworth, Colonel J. Harper Cook,

military judge, presiding.

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

Assignments of Error¹

I.

**WHETHER THIS COURT ERRED BY
AUTHORIZING A REHEARING WITHOUT FIRST
DETERMINING WHETHER THE RECORD WAS
LEGALLY AND FACTUALLY SUFFICIENT?**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally requests this court consider the matters enclosed in the Appendix.

II.
WHETHER THE MILITARY JUDGE ERRED BY
NOT SUPPRESSING APPELLANT’S
STATEMENT?

Statement of the Case

On 28 June 2021, a military judge sitting as a general court-martial found appellant, Private First Class John K. Jarlego, guilty of two specifications of rape of a child and one specification of sexual abuse of a child by indecent communication, in violation of Article 120b, Uniform Code of Military Justice [UCMJ]. (R. at 383; Original STR). The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for forty-eight months,² to forfeit all pay and allowances, and to be dishonorably discharged. (R. at 490; Original STR). On 30 June 2021, the convening authority approved the findings and sentence. (Original Action). The military judge entered judgment on 22 November 2021. (Original Judgment of the Court).

On 11 September 2023, this court set aside the findings and sentence and authorized a rehearing. (App. Ex. LXXI, pgs. 5-6).

² The military judge sentenced appellant to be confined for forty-eight months, thirty-six months, and eleven months, respectively, for Specification 1, Specification 2, and Specification 3 of the Charge, all periods of confinement to run concurrently. (Original STR).

On 15 May 2024, a military judge sitting as a general court-martial on rehearing found appellant guilty of the original charge and specifications. (R. at 750; Rehearing STR). The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for forty-two months,³ and to be dishonorably discharged. (R. at 795; Rehearing STR). The convening authority approved the findings and sentence on 5 June 2024, (Action on Rehearing), and the military judge entered judgment on 12 June 2024. (Rehearing Entry of Judgment).

Statement of Facts

In July 2019, El Paso Police Department [EPPD] became aware of a report that ■■■, a girl believed to be eleven, had engaged with sex with adult men. (App. Ex. LXXXVI, p. 2). One man was identified as “John.” (App. Ex. LXXXVI, p. 2). A review of the phone in ■■■’s possession associated “John” with the Snapchat accounts, “jjarlego01” and “justasoldierboy.” (R. at 633; App. Ex. LXXXVI, p. 2). El Paso police contacted law enforcement officials at Fort Bliss for assistance, and they identified appellant as a possible match based on an “alpha roster.” (R. at 654; App. Ex. LXXXVI, p. 3).

³ The military judge sentenced appellant to be confined for forty-two months, twenty-four months, and six months, respectively, for Specification 1, Specification 2, and Specification 3 of the Charge, all periods of confinement to run concurrently. (Rehearing STR).

Brought in for interrogation, appellant admitted he had sex with ■■■, but he believed she was eighteen and that she looked at least sixteen. (Pros. Ex. 19 at 59:00, 66:00, 73:00; App. Ex. LXXXVI, p. 8). Snapchat messages from appellant's phone corroborated appellant's account. (Pros. Ex. 16, p. 2).

The government subsequently charged and tried appellant for the rape of ■■■, a child under twelve years. (Charge Sheet). However, ■■■ never testified, nor did anyone who personally knew ■■■. Instead, the government sought to prove the sex through the Snapchat messages and appellant's statement and to prove ■■■'s age through a "birth verification" form from Texas that purportedly showed the birthdate of ■■■, though the spelling was not identical. (Pros. Ex. 1). This hearsay within hearsay was why this court reversed. (App. Ex. LXXI, p. 5).

On rehearing, the government introduced ■■■'s purported birth certificate, (Pros. Ex. 11), but, otherwise, the evidence remained nearly the identical. (Pros. Exs. 15-19). Like the original trial, ■■■ never testified nor did any witness who personally knew ■■■.

Additional facts are incorporated below.

**I.
WHETHER THIS COURT ERRED BY
AUTHORIZING A REHEARING WITHOUT FIRST
DETERMINING WHETHER THE RECORD WAS
LEGALLY AND FACTUALLY SUFFICIENT?**

Additional Facts

In setting aside appellant’s conviction, this court stated that it “need not address the remaining assigned and specified errors or the matters appellant personally asserts under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); they are moot.” (App. Ex. LXXI, p. 3). Appellant raised legal and factual sufficiency as part of his brief.

Law and Argument

Article 66, UCMJ, *requires* a “bifurcated review” where factual and legal sufficiency claims are conducted first before any other assignments of error. 80 M.J. 664, 667 (N-M. Ct. Crim. App. 2020) (emphasis added). Otherwise, if the court “got the order wrong,” it may “erroneously order a rehearing in a circumstance where a rehearing should have been barred.” *United States v. Conley*, 78 M.J. 747, 751 (A. Ct. Crim. App. 2019); *accord Hoffler v. Bezio*, 736 F.3d 144, 162 (2d Cir. 2103) (discussing the unanimity in federal courts of the rule that sufficiency reviews must be completed first).

This court erred by affirmatively declining to undertake the *required* legal and factual sufficiency review before authorizing a rehearing in appellant’s case.

As such, this court should find it lacked the authority to authorize the rehearing in the absence of a completed statutory review, and the proceeding was void ab initio. Alternatively, this court should conduct the legal and factually sufficiency review of the original trial and find the evidence insufficient. Critically, the only evidence verifying MH's age was a hearsay within hearsay document about a database in Texas no witnesses testified to, while other evidence, to include the Snapchat messages, showed MH as having a different (and lawful) age. These facts more than provide reasonable doubt.

**II.
WHETHER THE MILITARY JUDGE ERRED BY
NOT SUPPRESSING APPELLANT'S
STATEMENT?**

Additional Facts

Special Agent [REDACTED] conducted appellant's interrogation, spending the first thirty minutes in an extensive "rapport building" session while appellant remained unwarned. (App. Ex. LXXXVI). This "rapport building" started with questions that the government *conceded* were improper, (R. at 567), and that tied appellant to [REDACTED]. (Pros. Ex. 19 at 13:25 App. Ex. LXXXVI, pgs. 3, 5).

After twenty minutes, and with appellant still unwarned, Special Agent [REDACTED] began a "pseudo sermon" on the truth, the Army's SHARP, and [REDACTED]'s credibility. (Pros. Ex. 19 at 28:35; App. Ex. LXXIX, LXXXVI, p. 4). Specifically, Special

Agent [REDACTED] criticized SHARP as “counterproductive” since “most of time what actually happened isn’t what was initially reported at all.” (Pros. Ex. 19 at 29:05; App. Ex. LXXXVI, p. 4). He then immediately turned to the facts of this case, telling appellant “six other guys” had been “brought in” and rhetorically asked: “what do you do think is more likely, the six guys—with you seven guys—that I talk to and tell me something or the one person that says something? Who is really being honest?” (Pros. Ex. 19 at 29:27; App. Ex. LXXXVI, p. 4).

Thirty minutes in, Special Agent [REDACTED] finally turned appellant’s attention to the waiver form. After discussing the purpose of the form—but before explaining appellant’s rights—Special Agent [REDACTED] returned to the “other six guys,” and assured appellant, “I really think once we get the facts out there, just like with the other six guys that came in and talked to us, *I think your facts are going to line up with theirs, and I think it’s going to be beneficial.*” (Pros. Ex. 19 at 35:25; App. Ex. LXXXVI, p. 6). By this time, however, Special Agent [REDACTED] had already elicited incriminating responses the government had conceded were improper.

Going over the rights, Special Agent [REDACTED] first counseled appellant to “mark out the word ‘accused’ for me . . . scratch that b---- out[.]” (Pros. Ex. 19 at 36:40; App. Ex. LXXXVI, p. 6). He then explained that a person is a “suspect” whenever “literally someone just says it,” suggesting that whenever there is a complaint there is a “suspect” even when *everyone knows it probably didn’t happen.* (Pros. Ex. 19

at 37:15; App. Ex. LXXXVI, p. 6). Special Agent [REDACTED] further explained the offense as something the agents “ha[d] to put there because of what’s presented to us by, by the girl.” (Pros. Ex. 19 at 38:15; App. Ex. LXXXVI, p. 6). Remarking that he knew it was “crazy to see on paper,” Special Agent [REDACTED] offered to “better explain it” if appellant agreed to talk. (Pros. Ex. 19 at 38:25; App. Ex. LXXXVI, pgs. 6-7).

Shortly after, appellant executed the waiver. He admitted to meeting [REDACTED] and having sex with her, but he believed she was eighteen and looked no younger than sixteen. (Pros. Ex. 19 at 59:00, 66:00, 73:00; App. Ex. LXXXVI, p. 8).

Prior to trial, defense counsel moved to suppress appellant’s statement. (App. Ex. LXXIX). The military judge excluded unwarned statements given the government’s concession. (App. Ex. LXXXVI, p. 9). However, he denied defense’s motion as to the post-rights interrogation. With respect to the advisement, the military judge reasoned:

[T]he rights warning and waiver process cured any concerns over deception and trickery that might have existed before the warnings. *Critically, [Special Agent [REDACTED]] did not employ any deceptive tactics regarding the rights themselves or the accused’s choices in the moment.*

(App. Ex. LXXXVI, p. 11) (emphasis added).

The government admitted appellant’s statement. (Pros. Ex. 19). Aside from this statement, appellant’s Snapchat messages were the only other evidence that linked appellant to this offense.

Law

Before questioning an accused, law enforcement agents must obtain a valid waiver of his rights. Article 31(b), UCMJ; *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (C.M.A. 1967). The failure to do so generally renders any statement involuntary and inadmissible. *See* Mil. R. Evid. 305(c)(1); *Missouri v. Siebert*, 542 U.S. 600, 608 (2004).

There are two “branches” to the waiver analysis. *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F. 2013). First, was the waiver voluntary? *Id.* Second, was the waiver knowing and intelligent? *Id.* These two “branches” are “distinct inquiries.” *Id.*

Voluntariness depends on “the absence of police overreaching.” *Id.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 170 (1986)). The use of trickery, artifice, and subterfuge, though permissible to obtain a *statement* from the accused, is never permissible to obtain the *waiver* of his rights. *United States v. Erie*, 29 M.J. 1008, 112 (A.C.M.R. 1990).

Accordingly, law enforcement agents may not mislead an accused about his status as a suspect. “[W]hen reading a suspect his or her rights, criminal investigators are not authorized, and have no legitimate purpose, to create confusion about any aspect of the rights advice. . . .” *United States v. Campbell*,

76 M.J. 644, 655 (A.F. Ct. Crim. App. 2017). “The rendering of rights advice must be clear, honest, and understandable.” *Id.*

United States v. Patterson, 2024 CCA LEXIS 130, (N-M. Ct. Crim. App. 4 Apr. 2014), is instructive. There, after telling Patterson he was a suspect, the agent explained the difference between a “suspect” and an “accused” by telling Patterson a “suspect” was a person who agents want to speak to because they have knowledge while an “accused” was someone sitting in front of a judge. *Id.* at *5. The agent then clarified that Patterson was not being accused. *Id.* at *5. Finding the waiver to be invalid, the NMCCA stated, “[w]hile an investigator need not use the precision and expertise of an attorney in informing an accused of the nature of the accusation, he may not mislead the person by informing him he is not accused of criminal conduct when the opposite is true.” *Id.* at *13.

United States v. Campbell involved a less explicit misdavisement that was no less cause for “serious concern.” *Campbell*, 76 M.J. at 655. There, prior to advising Campbell of rights, the agent informed him, “there’s a lot of stuff that, ah, ah, doesn’t deal with you directly at all, it deals with, more so, other people.” *Id.* 653-54. The agent also used the term “umbrella catch-all” to explain the rights warning, saying that “*some* of the stuff that I’m going to brief you on doesn’t *necessarily* pertain to you.” *Id.* at 654 (emphasis in original) (alteration omitted). The Air Force Court of Criminal Appeals [AFCCA] framed the test as whether this

conduct “was the functional equivalent of telling [the accused] that, ‘*I’m going to tell you I suspect you of something, but I really don’t.*’” *Id.* at 655 (emphasis in original). While the AFCAA ultimately answered this question in the negative, the court made abundantly clear that it was doing so solely because of “the unique facts of this case, *and this particular accused*,” who was a twenty-five-year-old graduate of the Air Force Academy. *Id.* at 655 (emphasis added).

Other cases show waivers to be invalid where agents communicate to an accused that he will not be “harmed” by a waiver, *see Hart v. Attorney Gen. Of the State of Fla.*, 323 F.3d 884, 894-95 (11th Cir. 2003) (finding waiver invalid where agents told Hart “honesty wouldn’t hurt him”); *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991) (finding waiver invalid where agents informed Beale waiver “would not hurt him”), or where agents communicate statements otherwise inconsistent with the rights protection. *See e.g., United States v. Spinks*, 2016 U.S. Dist. LEXIS 176756, at *15 (N.D. Ga. 28 Sep. 2016) (finding waiver invalid where agents told the accused that unless he agreed to speak, he would “never know” about the information”). Additionally, at least one state supreme court has held that a waiver will be involuntary where agents, prior to advisement, engage in “a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation.” *People v. Honeycutt*, 570 P.2d 1050, 1054-55 (Cal. 1977).

Moreover, a misleading advisement is even more repugnant when it comes on the heels of an unwarned statement. For example, in *People v. Smiley*, Smiley admitted to agents, prior to being warned, that he had been in the same area where the victim was found. 530 P.3d 639, 649 (Colo. 2023). The agents then advised Smiley of rights, telling him they were doing so because they were from “out of town,” which was not only objectively false, but gave the appearance that his advisement was a mere formality. *Id.* The *Smiley* court found the timing “critical.” *Id.* “[B]efore being advised of his rights, Smiley admitted to the detectives that he had been in the area where the victim was found during the time that the victim was killed . . . and such timing strongly indicates that the detectives gave Smiley these false assurances so he would drop his guard and keep talking.” *Id.*

Argument

A. It was error not to suppress appellant’s statements.

The military judge abused his discretion by denying appellant’s suppression motion for the statements made after appellant’s purported waiver. Specifically, the military judge’s conclusion that Special Agent ■ “did not employ any deceptive tactics regarding the rights themselves or the accused’s choices in the moment,” a conclusion *critical* to his analysis, was an erroneous application of the law.

1. The agent misled appellant.

Like *Patterson*, after telling appellant to “cross that b----out” with respect to being “accused,” Special Agent [REDACTED] proceeded to tell appellant that being a “suspect” meant “someone just says it.” But just as a person is not a “suspect” if he has “some kind of knowledge about” the offense, *Patterson*, 2024 CCA LEXIS at *5, he is not a “suspect” simply when “someone says something.” A person is a “suspect” when “considering all facts and circumstances at the time of the interview, the *government interrogator* believes or reasonably should believe that the one interrogated committed an offense.” *United States v. Kendig*, 36 MJ 291, 294 (CMA 1993) (quoting *United States v. Morris*, 13 M.J. 297, 298 (C.M.A.1982)) (emphasis added). The agent could not suggest to appellant that he was not, in the true sense, a suspect when in reality he was. *Patterson*, 2024 CCA LEXIS at *14.

To be sure, appellant’s “advisement” occurred in the context of the agent’s comments about SHARP and “the other six guys” that conveyed the (false) impression that he believed the victim was lying, and when he assured appellant that his statement would align with “the other six guys” and be “beneficial,” Special Agent [REDACTED] was undermining the entire very purpose of the rights. In short, he conveyed, “*I’m going to tell you I suspect you of something, but I really don’t.*” *Campbell*, 76 M.J. at 655.

2. The agent engaged in deceit.

Special Agent ■■■'s advisement was not only misleading, but deliberately deceptive for three reasons. First, he engaged in an extensive (and highly atypical) pre-rights "rapport" building that ingratiated himself with appellant while attacking the victim's credibility. This "softened-up" appellant. *Honeycutt*, 570 P.2d 1050, 1054-55. Next, the rights warning was preceded by unwarned, incriminating statements that violated appellant's right and were left uncleansed. Lastly, immediately preceding the rights advisement, Special Agent ■■■ promised appellant that waiving his rights would be "beneficial" for him, a promise which the agent knew to be false given his already unwarned interrogation of appellant that linked appellant to the offense. *See Beale*, 921 F.2d at 1435; *Smiley*, 530 P.3d at 649.

Under these circumstances, together with the defunct rights advisement that ensued, Special Agent ■■■ was not merely misadvising appellant of his rights; he was subverting them. His "affirmative deceit is a recipe for suppression." *Smiley*, 530 P.3d at 649.

3. The additional considerations of appellant's background.

Unlike the appellant in *Campbell*, who was an officer and graduate of the Air Force Academy, appellant was a nineteen-year-old private from Thailand who spoke English as a second language. Thus, while court *Crawford* was "seriously

concerned” but affirmed because of the *particular facts of that appellant*, this case presents far more egregious conduct and a more susceptible appellant.

In sum, appellant’s waiver was not voluntary nor knowing and intelligent, and his statement should have been suppressed.

B. There was prejudice.

The standard for prejudice turns on whether this error was constitutional. If appellant was in custody at the time of the interrogation, or id the conduct was so egregious, this court asks whether the error was harmless beyond a reasonable doubt. *See United States v. Evans*, 75 M.J. 302, 305 (C.A.A.F. 2016). Otherwise, prejudice is assessed under *United States v. Kohlbek*, where this court weighs: “(1) the strength of the [g]overnment’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” 78 M.J. 326 (C.A.A.F. 2016) (internal quotation marks omitted) (citation omitted).

This court should find that appellant was in custody and apply the harmless beyond a reasonable doubt standard. *See United States v. Miller*, 46 M.J. 80, 84 (C.A.A.F. 1997) (discussing custody as an objective standard as to whether an accused was free to leave). However, even under *Kohlbek*, appellant easily prevails. The government’s case was incredibly weak, and appellant’s statement was absolutely material. *See United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F.

2002) (“[a] voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.”) (citations omitted). The prosecution offered no victim testimony or forensics. This case relied on appellant’s texts and his statement. Without both, the government’s case would have collapsed.

This court should find the error prejudiced appellant and set aside the findings and the sentence.

Conclusion

WHEREFORE, appellant respectfully requests this court set aside his convictions and dismiss this case.


M
Appellate Defense Counsel
Defense Appellate Division


LTC, JA
Deputy Chief
Defense Appellate Division

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, Private First-Class John K. Jarlego, personally requests, through appellate defense counsel, this court consider the following matters:

- 1. All previously raised matters already appended to the record of trial.**
- 2. The findings are legally and factually insufficient.**

The victim did not testify. No one who testified personally knew the victim. There was no forensics. And there was insufficient evidence tying appellant to individual identified on the birth certificate.

Moreover, while mistake of fact is not a *generally* a defense where the child is under the age of twelve, Specification 3 alleges a child under the age of *sixteen*, thereby opening the door to a mistake of fact defense. Because communicating indecent language requires specific intent, this defense need not be reasonable, but only honest. Here, given the Snapchat messages indicating [REDACTED] was sixteen and appellant's statement that he believed she was sixteen, the government did not disprove this defense beyond a reasonable doubt.

- 3. The military judge erred by denying the suppression motion for the cellphone.**

The denial of defense's motion to suppress the cellphone evidence constituted error for two reasons. First, the government conceded there was no probable cause, and the military judge failed to consider whether the affidavit was facially deficient. The good faith requirement does not apply to facially deficient

affidavits, which are those that fail to have some nexus between the crime and the place to be searched. The affidavit's statement that "John" was appellant based on "further database reviews" is insufficient to constitute some nexus. Therefore, the affidavit is facially deficient, and the good faith exception does not apply. Second, the affidavit discusses only Snapchat, but the warrant impermissibly authorizes a search beyond this application, violating the particularity requirement.

4. The birth certificate (Pros. Ex. 11) lacked authentication, was impermissible hearsay, and violated appellant's right to confrontation.

5. The military judge erred by denying the suppression motion for appellant's statements for the reasons preserved at trial.

6. The prison policies which deny appellant visitation from his child violate appellant's First Amendment rights.¹

7. The conduct by confinement facility personnel in failing to timely assist appellant in the parole process has placed appellant's early release date in jeopardy.²

8. The confinement facility is not properly awarding appellant with past work abatement days.³

WHEREFORE, appellant respectfully requests this court grant meaningful relief.

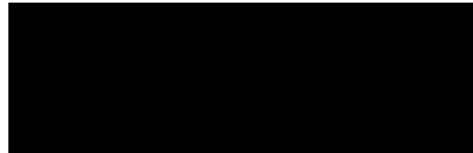
¹ Appellant intends to move to attach documents support this error.

² Appellant intends to move to attach documents support this error.

³ Appellant intends to move to attach documents support this error.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 8 November 2024.



MAJ, JA

Appellate Defense Counsel
Defense Appellate Division