IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellant v. Cadet (CDT) **JORGE A. HURTADO**, United States Army, Appellee	GOVERNMENT APPEAL AND BRIEF IN SUPPORT PURSUANT TO ARTICLE 62, UCMJ **Docket No. ARMY MISC 20240609** Tried at the United States Military Academy, West Point, New York, on 27 September and 17 October 2024 before a general court-martial, convened by the Superintendent, United States Military Academy, Lieutenant Colonel William C. Ramsey, Military Judge, presiding.

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND THAT APPELLEE UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL.

Statement of the Case

Appellee 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]. (Charge Sheet). On 11 November 2024,[1] the military

[1] On 8 October 2024, appellee, through his counsel, moved to suppress his 23 January 2024 videotaped statement to Special Agent (SA) NL of the United States

judge granted the trial defense counsel's motion to suppress appellee's statement to SA NL. (App. Ex. XXX, p. 4). On 13 November 2024, the United States filed a notice of appeal under Rules for Courts-Martial [RCM] 908.

Statement of Facts

Appellee's charges encompass alleged sexual misconduct against four separate victims: [redacted], [redacted], [redacted], and [redacted], all of whom were fellow Cadets at the United States Military Academy (USMA). (Charge Sheet). Appellee's statement to Army CID agents on 23 January 2023 only encompassed questioning about allegations involving Cadet [redacted]. (App. Ex. VII-B).

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

Army Criminal Investigative Division (CID) on the basis that SA NL allegedly failed to scrupulously honor appellee's invocation of his right to counsel. (App. Ex. VII).[1] The government filed its response on 12 October 2024. (App. Ex. XIV). The trial court held a hearing on appellee's motion on 17 October 2024. (R. at 30).

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

> [SA NL]: Do you understand your rights?
>
> [Appellee]: (Nodded his head in acknowledgement)
>
> [SA NL]: Have you ever requested a lawyer after being read your rights?
>
> [Appellee]: No this is the first time.
>
> [SA NL]: Do you want a lawyer at this time?
>
> [Appellee]: Like, I mean, I would like to speak to a lawyer, but um, yeah.
>
> [SA NL]: Okay so you want a lawyer at this time?
>
> [Appellee]: 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.
>
> [Appellee]: 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?
>
> [Appellee]: 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]: Yeah, 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 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.

[Appellee]: 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 yeah.

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

[Appellee]: 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?

[Appellee]: Yeah.

(App. Ex. VII-B, 00:30:00-00:32:20).

Statement of Statutory Jurisdiction

The United States may file an interlocutory appeal of "[a]n order or ruling [of the military judge] which excludes evidence that is substantial proof of a fact material in the proceeding." UCMJ art. 62(a)(1)(B) (2019). The test is "whether the military judge's ruling directly limited the pool of potential evidence that would be admissible at the court-martial." *United States v. Wuterich*, 67 M.J. 63, 75-76 (C.A.A.F. 2008). Here, the military judge suppressed statements of the

appellee making admissions to charged crimes. (App. Ex. VII, p. 11;[2] App. Ex. VII-B; App. Ex. XXX). These statements implicate Specifications 7, 8, 9, 10, and 11 of Charge I and the Specification of Charge II. (Charge Sheet). By suppressing the contents of appellee's statements to CID, the military judge excluded evidence necessary to prove that appellee sexually assaulted and exposed himself to Cadet BH. (Charge Sheet). Accordingly, this court has jurisdiction over this appeal because the exclusion of appellee's statements prevents the government from introducing "substantial proof" of "fact[s] material in the proceeding." UCMJ art. 62(a)(1)(B).

Standard of Review

"When deciding an appeal under Article 62, [this court] 'may act only with respect to matters of law.'" *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) (quoting UCMJ art. 62). 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.

[2] As appellee conceded, "[d]uring the nearly three hours that [appellee] was subjected to interrogation, [appellee]'s account of events evolved from not understanding what he was there for ([App. Ex. VII-B,] 31:03), to providing an innocent account of one incident ([App. Ex. VII-B,] 52:03), to stating that he might have made the alleged physical contact ([App. Ex. VII-B,] 1:46:53), *and to finally adopting incriminating facts provided to him by members of law enforcement regarding multiple allegations* ([App. Ex. VII-B] 2:32:32, 2:37:23)." (App. Ex. VII, p. 11) (emphasis added). As such, Appellee's own motion to suppress concedes the evidence is substantial proof of facts material in the proceeding.

1992). 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). Under this standard, this court reviews questions of law *de novo* and "will not disturb a military judge's findings of fact unless they are clearly erroneous or unsupported by the record." *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009); *see also Cote*, 72 M.J. at 44; *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000) (citation omitted), *aff'd*, 54 M.J. 464 (C.A.A.F. 2001) ("On questions of fact, [we ask] whether the decision is reasonable; on questions of law, [we ask] whether the decision is correct.").

Law and Argument

"In *Edwards v. Arizona*, 451 U.S. 477 (1981), [the Supreme Court] held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." *Davis v. United States*, 512 U.S. 452, 454 (1994). In *United States v. Davis*, the Supreme Court clarified "how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning." *Id.* "To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry." *Id.* at 458–59.

It is important to acknowledge that "[t]he right to counsel established in [*Miranda v. Arizona*, 384 U.S. 436, 469–73 (1966)] was one of a 'series of recommended procedural safeguards . . . [that] were not themselves rights protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected.'" *Id.* at 457 (internal citations and quotations omitted). This requirement "is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Id.* (internal citations omitted). "The applicability of the 'rigid prophylactic rule' of *Edwards* requires courts to 'determine whether the accused actually invoked his right to counsel.'" *Id.*

When making this determination, the Supreme Court has provided the following guidance: "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, [precedent does] not require the cessation of questioning." *Id.* at 459.

> The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, 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.

Id. at 460.

However, the analysis does not end there. "In considering how a suspect must invoke the right to counsel, [courts] must consider the other side of the *Miranda* equation: the need for effective law enforcement." *Id.* at 461. The right to a *Miranda* warning is a two-sided coin, in which judicial discretion must take into account that police officers will have to "make difficult judgment calls about whether the suspect in fact wants a lawyer . . . with the threat of suppression if they guess wrong." *Id.* at 461. For this reason, "it will often be good police practice for the interviewing officers to clarify whether or not [a suspect] actually wants an attorney." *Id.* "Unless the suspect *actually* requests an attorney, the questioning may continue." *Id.* at 462 (emphasis added).

Here, the military judge erred in three significant ways. First, the military judge failed to reference the "reasonable officer" standard, and his subsequent analysis resulted in an inappropriate quasi de novo review. Second, the military judge's finding that appellee's statement, "Like, I mean, I would like to speak to a lawyer, but um, yeah" was an unequivocal invocation of his right to counsel was clearly erroneous "in light of the circumstances" of the interview. *Davis*, 512 U.S. at 459. Third, the military judge failed to recognize that the questioning officer was acting within the bounds of Supreme Court precedent when she asked clarifying questions. *Id.* at 461.

A. The military judge failed to apply the correct legal standard.

The determination of whether an invocation is unequivocal is an objective inquiry based upon how a reasonable officer would view the comments. *See Thompkins*, 560 U.S. at 381 (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); *see also Coleman v. Singletary*, 30 F.3d 1420, 1424 (11th Cir. 1994) (finding that a suspect must articulate his desire to cut off questioning with sufficient clarity that a "reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent").[3]

The military judge cited to *Davis* and *Herman* in his ruling yet failed to extract the correct standard for analyzing the present issue despite it being clearly

[3] The Court in *Thompkins* further noted, "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" *Id*. at 382 (quoting *Davis*, 512 U.S. at 461). The Court in *United States v. Davis* described the objective inquiry, as applied to the invocation of counsel, as the following: "Although a suspect need not 'speak with the discrimination of an Oxford don,' he 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*, 512 U.S. at 459.

delineated in those cases.[4] (App. Ex. XXX, p. 3–4) (stating appellee "invoked his right to counsel" and appellee's "statement was an unequivocal assertion" without referencing whether that was apparent to a reasonable officer). The military judge's ruling acknowledges the requirement for an "objective inquiry" but his analysis fails to adequately account for the human-factor that the "reasonable police officer" standard provides for. (App. Ex. XXX, p. 3). The military judge's failure to even mention this language in his ruling, calls into question whether he applied the appropriate standard of review. (App. Ex. XXX, p. 3). When reviewing the military judge's ruling in light of this oversight, it is apparent he substituted his own perspective for the perspective of a reasonable law enforcement officer. *Davis* 512 U.S. at 458–59. This resulted in a quasi *de novo* review.

In *Davis*, the Supreme Court emphasized "the need for effective law enforcement." *Davis* 512 U.S. at 461. The Court acknowledged that the *Edwards* rule, was one of judicial creation, not "constitutional command," and therefore "it

[4] "[Appellee] 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. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Davis*, 512 U.S. at 459. "The appropriate analysis is whether an invocation is 'sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney' or to remain silent." *Herman*, 2023 CCA LEXIS 535, at *7.

is [the Court's] obligation to justify its expansion." *Id.* at 460 (quoting *Arizona v. Robertson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting)). The Court was particularly wary of "transform[ing] the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Id.*; *see also Maryland v. Shatzer*, 559 U.S. 98, 106 (2010) ("A judicially crafted rule is 'justified only by reference to its prophylactic purpose,' and applies only where its benefits outweigh its costs."). Yet that is exactly what the military judge's ruling has done in this case. By failing to acknowledge the objective standard through the lens of the "reasonable police officer" the military judge missed half of the analysis of *Davis* and did exactly what the Court warned against.

B. Appellee's alleged invocation was objectively equivocal.

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 v. Illinois*, 469 U.S. 91, 99-100 (1984)) (citations omitted). "The term 'equivocal' means 'having different significations equally appropriate or plausible; capable of double interpretation; ambiguous.'" *United States v. Rittenhouse*, 62 M.J. 509, 511 (Army Ct. Crim. App. 2005) (quoting *Coleman*, 30 F.3d at 1425).

Appellee's statement was objectively equivocal. His statement that he wanted a lawyer began with the word "like" and ended with the phrase "but um . . . yeah." Merriam-Webster defines the word "like" when used as an adverb, as "used interjectionally in informal speech . . . for an apologetic, vague, or unassertive effect (as in "I need to, like, borrow some money"). Merriam-Webster, http://www.merriam-webster.com/dictionary/like (last visited Dec. 19, 2024). The word "but" as a conjunction means "except for the fact." *Id.* The word "um" is "used to indicate hesitation." *Id.* Given the collective ambiguous nature of appellee's statement, it was reasonable for SA NL to clarify—"Okay, so you want a lawyer at this time."[5]

The military judge then erroneously found that SA NL "interjected" without acknowledging appellee's response— I just, I don't … I don't . . . " Again, an equivocation. The military judge's finding—"[g]iven the totality of the circumstances, the interview should have stopped until he was provided with an opportunity to speak with counsel"—failed to account for the purpose of the rule, "the exclusion of compelled confessions." *Shatzer*, 559 U.S. at 111.

[5] *See State v. Howard*, 2014 Ohio App. LEXIS 662, *14 (1st Dis. Ohio Ct. App. Feb. 26, 2014) (finding that the appellant's statement "But it's like – I want a lawyer, but then I know I have to wait and you might talk to [the other suspects] and whoever else you all got" to be ambiguous);

C. Law enforcement did not compel appellee'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." (App. Ex. XXX, p. 3). However, his analysis failed to address that SA NL's subsequent questions served solely to clarify an expressly ambiguous request, not to badger appellee into submission. This is critical, considering it was after this brief clarification that appellee unequivocally stated he wanted to proceed without counsel. This court should correct the military judge's error and recognize the distinction between law enforcement "badgering a suspect" into waiving their rights, versus an officer clarifying an ambiguous request for counsel.

The facts of this case are strikingly similar to the facts of *Davis* where the petitioner said, "Maybe I should talk to a lawyer." *Davis*, 512 U.S. at 455. The interview in *Davis* then proceeded as follows: [We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we 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,

and he said, [‘]No, I'm not asking for a lawyer,’ and then he continued on, and said, ‘No, I don't want a lawyer.’”[6] *Id*.

The Supreme Court reasoned, “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. That is exactly what occurred in appellee’s case: “So if you want a lawyer now, . . . 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.” (App. Ex. VII-B, 00:30:00-00:32:20). As the Supreme Court explained, “[c]larifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, *and* will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect’s statement regarding counsel.” *Id*.

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.”[7] 559 U.S. at 108.

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[6] “After a short break, the agents reminded petitioner of his rights to remain silent and to counsel. The interview then continued for another hour, until petitioner said, ‘I think I want a lawyer before I say anything else.’ At that point, questioning ceased.” *Id.*

[7] The United States references *Shatzer* acknowledging that in that case, the facts are dissimilar, there was a two-and-one-half year break between interrogations, whereas here merely a few moments passed. However, the underlying principles

When this "change of heart" occurs under noncoercive circumstances, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 737 (1991)).

This is especially true in light of the purpose behind the judicially created "prophylactic rule['s]" to protect against compelled confessions. *Davis*, 512 U.S. 458–59. Here, the totality of the circumstances proves that appellee wished to continue to discuss the offense with law enforcement—"Yeah I want to know what I am here for first." (App. Ex.VII-B, 00:30:00-00:32:20). "Voluntary confessions are not merely 'a proper element in law enforcement,' they are an 'unmitigated good,' 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Shatzer*, 559 U.S. at 108 (internal citations omitted).

The military judge missed a critical portion of this analysis—minimizing the chance of suppressing voluntary confessions—when he failed to acknowledge the significance of the SA NL's clarifying questions and the overall voluntary nature of appellant's admissions. SA NL followed the guidance laid out by the Supreme

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that 1) the purpose behind the *Edwards* rule is to protect suspects from being "coerced or badgered" into submission and 2) the overextension of the *Edwards* rule will interfere with critical law enforcement activity are important considerations referenced in *Shatzer* and overlooked by the military judge. *Id.* at 106.

Court when she clarified whether appellant wanted an attorney and informed him what the next steps would be. SA NL did not ignore the statement and continue questioning like the law enforcement officer in *Herman*, nor did she ask a litany of confusing follow-up questions like the law enforcement officer in *Smith v. Illinois*, 469 U.S. 91, 99–100 (1984). Beyond seeking clarification about whether appellee wished to invoke his right to counsel, SA NL went a step further and explained to appellee what he should say if he subsequently wished to invoke his right to remain silent or to speak with an attorney. After receiving that clarification, appellee unequivocally stated he wished to proceed. SA NL proceeded exactly as her Naval counterparts did in *Davis*; just as the Supreme Court endorsed their actions, this court should endorse those of SA NL.

The totality of the circumstances did not suggest badgering or compulsion, but rather legitimate clarifying questions and explanations. The military judge's decision to suppress this statement without expressly acknowledging the reasonable officer standard, the equivocal nature of appellant's words, and without any analysis as to the legitimate needs and concerns of law enforcement was error that warrants reversal.

Conclusion

WHEREFORE, the United States respectfully requests this Honorable Court grant its appeal and set aside the military judge's ruling.

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I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 7th day of January, 2025.

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