IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellant v. Cadet (CDT) **JORGE A. HURTADO**, United States Army, Appellee	GOVERNMENT REPLY BRIEF IN SUPPORT OF APPEAL 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

The government adopts the Statement of the Case from its 6 January 2025 filing.

Statement of Facts

The government adopts the Statement of the Case from its 6 January 2025 filing. Additionally, the government acknowledges the parties at trial, and the

government in its previous filing, misquoted appellee. The government disagrees with appellee's characterization of SA NL's body language. (Appellee's Br. 3). Additionally, the intonation and pitch in appellee's voice during the alleged invocation indicates he was asking a question. (App. Ex. VII-B, 00:30:00-00:32:20).

Statement of Statutory Jurisdiction

The government adopts the Statement of Statutory Jurisdiction from its 6 January 2025 filing. Appellee concedes this court has jurisdiction. (Appellee's Br. 4).

Standard of Review

The government adopts the Standard of Review from its 6 January 2025 filing.

Law and Argument

Appellee, in his answer, argues that this court (1) can infer the military judge applied the correct legal standard based on the favorable presumption that military judges know and follow the law; (2) that the government is estopped from making certain arguments that were not made before the military judge; and (3) appellee's language was not equivocal based on his idiosyncrasies. The government will address each argument in turn.

A. The military judge's errors and omissions overcome the presumption that he knew and followed the law.

The government acknowledges the high standard it must meet when pursuing relief under Article 62, especially when challenging a military judge's evidentiary ruling. Relying on *United States v. Erickson*, appellee argues that this court should presume the military judge applied the appropriate standard of review to his ruling. 65 M.J. 221, 225 (C.A.A.F. 2007) (Appellee's Br. 8). Here, however, there is sufficient evidence to overcome the presumption that the military judge applied the correct legal standard.

First, the facts of *Erickson* are distinguishable. In *Erickson*, the trial counsel made improper argument during closing statements. *Id.* at 224–25. The military judge did not sua sponte interrupt the closing argument, or specifically state that he would not consider trial counsel's improper argument during his deliberations. *Id.* at 224–25. The CAAF acknowledged that the military judge had no duty to instruct or cure the error considering the case was being tried before him alone. *Id.* at 225. The CAAF found that there was no evidence on the record to rebut the presumption that the military judge did not consider the improper argument. *Id.* The presumption that a military judge would not be swayed by an improper argument is vastly different than the military judge's failure to appropriately state the standard of review in a written ruling.

Here, the military judge suppressed the accused's recorded admissions; as such, the military judge's duty to properly analyze the issue and reduce his findings to writings went beyond a *sua sponte* duty to acknowledge plain error. Furthermore, the ruling itself suggests that the military judge erroneously substituted his judgment for that of the reasonable law enforcement officer.

> The *Edwards* rule . . . requires courts to determine whether the accused actually invoked his right to counsel. *Davis v. United States*, 512 U.S. 452 (1994). This is an objective inquiry, requiring some statement that can reasonably be construed to be an expression of a desire for an attorney's assistance.

(App. Ex. VII, p. 3). Although this is true, the military judge failed to continue his analysis of *Davis*, which goes on to specifically define what an unequivocal invocation is and the lens through which the reviewing court must view the evidence: "[an accused] must articulate his desire to have counsel present *sufficiently clear 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 (emphasis added). The military judge's failure to reference the "reasonable police officer" standard reinforces this point. Even if this court were to assume that he did not misapply the law, his ruling is entitled to minimal deference based on the omission of this critical language.

Second, as appellee aptly points out, the military judge made an erroneous finding of fact when referencing language that differed from the recorded

interview. (Appellee's Br. n.3). Not only did the military judge add the language "I mean," but he omitted the word "like." The government agrees that appellee does not use the term "I mean." However, it does not agree that this strengthens the military judge's ruling.[1] (Appellee's Br. n.3, 10); *see* Merriam-Webster, http://www.merriam-webster.com/dictionary/I_mean (last visited 30 Jan., 2025) (defining the idiom, "I mean," as either being "used to emphasize a statement" or "used when one is unsure of what to say or how to say it"). If the military judge interpreted the idiom, "I mean" as a point of emphasis, rather than an indication of hesitation, then this erroneous finding of fact certainly could have had a material impact on his finding.

Ultimately, the military judge's erroneous finding of fact, his failure to articulate the correct legal standard, and his subsequent failure to perform an analysis of the facts of the instant case within the correct legal standard directly contradicts appellee's claim that "[n]othing indicates the military judge did not know the law[.]" (Appellee's Br. 8). This court should find each of those deficiencies in the military judge's ruling to be "evidence to the contrary."

[1] Appellee claims "[t]he government finds the phrase 'I mean' important to its argument that [appellee]'s invocation was ambiguous." (Appellee's Br. 10). However, the government does not mention the phrase in its analysis, and it is only referenced in the fact section. (Appellant's Br. 3, 12).

Erickson, 65 M.J. at 225. At the very least, this court should afford the military judge's ruling minimal deference.

B. Appellee makes the same error that the military judge made in his ruling by applying the wrong legal standard to his statements.

Appellee argues that his frequent use of the word "like" throughout the interview suggests that his invocation was unambiguous or that this court should not find the meaning of the term persuasive. (Appellee's Br. 10). This argument is without merit. Similar to the military judge's erroneous quasi de novo review, appellee asks this court to analyze his invocation through a subjective lens based on his idiosyncrasies. (Appellee's Br. 10) (arguing "'[l]ike' to [appellee] is similar to another speaker's 'a' or 'um[,]'" and "[t]he word 'like' for [appellee] is a verbal crutch, a filler word"). Appellee's argument, like the military judge, ignores the correct legal framework: the invocation must be "sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney[,]" *not* what the words meant when used by this particular suspect.

C. The government is not estopped from making the arguments in it's brief.

Appellee suggests the government waived or is estopped from referencing the word "like" in its argument because this word was not presented to the trial court. (Appellee's Br. 9–10). However, the government's response to trial

defense counsel's motion to suppress specifically argued that the words appellee used created ambiguity requiring clarification:

> The Accused's statement "I mean, I would like to speak to a lawyer, but, um, yeah" was ambiguous and equivocal, and therefore SA Lucas appropriately asked clarifying questions to determine whether the Accused was actually invoking his right to counsel. The word "but" in this context is a conjugation "used to introduce a phrase or clause contrasting with what has already been mentioned." *But*, Oxford English Dictionary (3rd ed. 2024). The clear implication of the Accused's statement was that while he was considering seeking the advice of an attorney, he was uncertain. SA [NL] appropriately, and in line with the "good practice" endorsed by the Supreme Court, asked clarifying questions before the Accused ultimately decided that he wished to continue with the interview.

(App. Ex. XIV, p. 4–5).

The military judge was presented with the accused's video recording and heard the very argument that the government now makes on appeal—the words appellee used were inherently ambiguous. The parties' mistaken reference to the term "I mean" does not obviate the military judge from his duty to review the evidence and come to an independent determination. Likewise, the misstatement of a single word does not change the preservation of the legal argument and issue analyzed. This is a far cry from what occurred in *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018).

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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CERTIFICATE OF SERVIC*E*, U.S. v. HURTADO (Misc 20240609)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 3rd day of February, 2025.

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