

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GUSTAVO A. DELAROSA
AVIATION ORDNANCEMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200602335
GENERAL COURT-MARTIAL**

Sentence Adjudged: 16 September 2005.

Military Judge: CAPT Daniel O'Toole, JAGC, USN.

Convening Authority: Commander, Navy Region Mid-Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC,
USN.

For Appellant: Maj Richard Belliss, USMC.

For Appellee: Maj Brian Keller, USMC.

10 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of aggravated assault on his infant son, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was acquitted of murder, maiming, and a second specification of aggravated assault. The members sentenced the appellant to confinement for 3 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.¹

¹ The appellant's motion for oral argument is denied.

The appellant raises two assignments of error. Specifically, the appellant asserts that the military judge erred when he denied a defense motion to suppress the appellant's confession to local civilian police due to a violation of the appellant's right to remain silent. The appellant also avers that the military judge erred when he failed to provide the members with adequate sentencing instructions to guide their consideration of extenuation and mitigation evidence.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

In January 2004, the appellant was a 21-year-old petty officer stationed onboard USS SAIPAN (LHA 2). He lived off-base with his wife and their 5-month-old son, Miguel Delarosa (MD). On the evening of 20 January 2004, civilian paramedics responded to a 911 call from the appellant's wife. They arrived to find the appellant performing CPR on MD, who was unconscious and not breathing. MD was taken to the hospital, where he died on 22 January 2004. Expert medical testimony at trial indicated that MD died from massive brain injury consistent with what has come to be known as "shaken baby syndrome."

The parties agree that MD's death was declared a homicide on 23 January and that the appellant was called in for questioning by Norfolk police that afternoon. When he arrived at the station, the appellant was escorted by Detective M through two locked interior doors and placed in an 8-12-foot interview room. Detective B joined them there. The detectives testified that the door to the interview room was closed but not locked. The appellant was not placed in handcuffs or told that he was under arrest. At this point the accounts testified to by the appellant and by the two Norfolk detectives diverge significantly.

Both detectives testified that the appellant initially blurted out to Detectives M and B that he was aware that MD's death had been ruled a homicide and that he wanted to talk to the police about the death. Detective B acknowledged the appellant's willingness to make a statement but indicated that the appellant would first need to be formally advised of his *Miranda* rights. Detective B began to advise the appellant of his rights using a locally produced form.

The detective testified that his normal process was to have the interviewee read the first right aloud, obtain a verbal acknowledgment from the interviewee that he understood the right, have the interviewee explain in his own words what he thought the right consisted of and then have the interviewee write the word

"yes" or "no" next to the right acknowledging whether he understood that particular right. The detective testified that during this process, the appellant repeatedly interrupted Detective B, stating that he wanted to talk to detectives and by attempting to read ahead to quickly complete the form.

The appellant wrote "YES" next to the first five questions that reflected his various *Miranda* rights and the fact that he understood them all. The sixth question required the interviewee to elect whether or not he wanted to waive his rights and make a statement. Next to this, the appellant wrote, "NO." As the appellant had repeatedly stated verbally that he wanted to make a statement, the detectives testified that they were confused at the apparent disconnect between what the appellant was saying verbally and what he wrote on the form.

Detective B testified that he attempted to clarify the issue by asking the appellant why he had written "NO" after stating verbally that he wanted to make a statement. He testified that the appellant confirmed that he wanted to talk to the detectives about his child's death, but that he wanted a command representative to be present. Detective B told the appellant that he was not entitled to have a command representative present and specifically redirected the appellant's attention to the third question on the form, which reflected the appellant's right to have legal counsel present during the interview. The detective testified that he asked the appellant if he wanted anyone else present. Both detectives testified that the appellant simply reiterated his request for a command representative and never requested a lawyer.

At this point, Detective B testified that he told the appellant that he and Detective M could no longer talk to him due to his answer on the legal rights form. Detective B suggested that the appellant think over what he wanted to do and if he changed his mind he was to knock on the door of the interview room and that someone would respond. The detectives then left the room and closed the door behind them.

Detective M testified that about 35 minutes later he opened the door to the interview room, stuck his head in, and asked if the appellant would be willing to take a polygraph test. The appellant stated that he would. Detective M left to arrange for the test. About two hours later, Detective M again opened the door and asked the appellant if he needed anything. The appellant asked to use the bathroom and Detective M escorted him. At no time did the appellant ever knock on the door of the interview room.

As Detective M was taking the appellant to the bathroom, the appellant asked if he could make a telephone call. Detective M replied that he could, but would have to wait until Detective M was finished with something that he was doing. When the appellant asked what Detective M was doing, the detective said

that the appellant's wife was at the police station and preparing to take a polygraph test. The appellant asked to see his wife and was told that he could after her polygraph test was completed. The appellant then told the detective that he now wanted to talk. Detective M indicated that the appellant would first have to be re-advised of his *Miranda* rights. The appellant stated that he had been confused about the form and wished to waive his rights and take a polygraph test.

The detectives and the appellant returned to the interview room whereupon the appellant was re-advised of his rights using a form identical to the one Detective B had used previously. This time, the appellant answered "yes" to all questions on the form. The appellant subsequently took a polygraph test administered by a third detective, Detective C. Prior to the polygraph test, Detective C again advised the appellant of his *Miranda* rights and obtained the appellant's written responses on yet another rights waiver form. Following the polygraph test, the appellant began to cry and admitted to Detective C that he had shaken MD in an attempt to wake him. At this point, the appellant still denied shaking MD earlier in the evening to stop him from crying.

Following the appellant's incriminating statements, he was escorted back to the interview room and questioned again by Detectives B and M. The appellant agreed to give an audiotape statement, which was later transcribed. The appellant reviewed the transcript of his statement, initialed each page, and signed the last page to certify its accuracy. In his statement, the appellant now acknowledged that he shook MD earlier in the evening of 20 January because he was tired from working a 24-hour shift and MD would not stop crying. The appellant also stated that he later shook MD again when he would not wake up.

During motions prior to entering pleas, the appellant moved to suppress his confession to the detectives, arguing that it had been obtained in violation of his Fifth Amendment right to remain silent. The appellant's chronology of events generally tracked the version provided by the detectives but differed significantly in several respects. Specifically, the appellant asserted that by writing "NO" in response to the question on the first legal rights form, he intended to unambiguously invoke his right to remain silent. The appellant further testified that he also verbally invoked his right to counsel. In this regard, the appellant indicated that after writing "NO" on the rights form, he told the officers that he did not want to talk without a command representative *or a lawyer present*. Record at 263, 266. The appellant asserted that at this point, Detective M said that he wasn't going to give a "f**king lawyer" to a "baby killer."² *Id.* at 266.

² We note that the appellant does not raise denial of his right to an attorney as an assignment of error. We further note that the defense did not argue denial of counsel as a basis to suppress the appellant's statement at trial. Finally, we observe that the videotape of the appellant's confession

The appellant also testified that while Detective M was escorting him to the bathroom, the detective threatened him by saying that his wife was at the police station and one of them was going to jail. *Id.* at 236, 285. The appellant also testified that, although he was given an opportunity to do so, he did not, in fact, review his written confession for accuracy. He explained by stating that he only signed it because he felt he had no choice. *Id.* at 295.

Suppression of Evidence

In his first assignment of error, the appellant asserts that the military judge erred when he denied a defense motion to suppress the appellant's confession to the Norfolk Police Department on the grounds that it was obtained in violation of the appellant's right to remain silent. We disagree.

On appeal, we review a military judge's ruling on a motion to suppress a confession under an abuse of discretion standard. A military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(citations omitted). The military judge's findings of fact will not be overturned unless they are "clearly erroneous or unsupported by the record." *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)(citations omitted). The appellant does not specifically assert any error in the military judge's factual findings. We have also reviewed the exceptionally thorough findings of fact set forth by the military judge in Appellate Exhibits XIX and LXXXIV and concur that they are well supported by the record and not clearly erroneous. We adopt them as our own. We review a military judge's legal determinations, *de novo*. *Owens*, 51 M.J. at 209.

When a service member is interrogated by civilian law enforcement personnel, the member's "entitlement to rights warnings and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations." MILITARY RULE OF EVIDENCE 305(h)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Accordingly, we must look not only to military precedent but to the federal courts to determine whether the military judge properly applied the law to the facts of the appellant's case.

The parties agree that the appellant was properly advised of his *Miranda* rights prior to any substantive questioning about the offense. The Supreme Court has held that once a person has invoked his right to remain silent, the interrogation must cease and the right to remain silent must be "scrupulously honored."

taken after the waiver of rights includes the question, "has anybody... called you a baby killer or murderer yet?" to which the appellant responded, "no." Record at 134.

Michigan v. Mosley, 423 U.S. 96, 103-04 (1975)(quoting *Miranda*, 384 U.S. at 479); *Miranda*, 384 U.S. at 473-74.

An ambiguous or equivocal invocation of the privilege does not require law enforcement personnel to immediately terminate an interrogation. See *Burket v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000); *United States v. Banks*, 78 F.3d 1190, 1197-98 (7th Cir. 1996), *vacated on other grounds*, 519 U.S. 990 (1996); *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995)(quoting *United States v. Thompson*, 866 F.2d 268, 272 (8th Cir. 1989)); *Medina v. Singletary*, 59 F.3d 1095, 1100 (11th Cir. 1995). We agree with the military judge that the appellant's written refusal to waive his right to remain silent was initially ambiguous when viewed in the context of the appellant's repeated verbal assertions that he wanted to talk to police about his son's death. However, once the appellant made clear that his willingness to make a statement was contingent on having a command representative present, the ambiguity was resolved and the police properly ceased questioning the appellant.

The parties also agree that, after having unambiguously invoked his right to remain silent, the appellant was told that if he wanted to reinitiate contact, he should knock on the door.³ It is undisputed that the appellant never did so. The key question before us is whether the police "scrupulously honored" the appellant's right to remain silent when, approximately 35 minutes after he invoked his right to remain silent, they reinitiated contact with the appellant to ask if he was willing to take a polygraph regarding his son's death. In essence, the police were asking if the appellant now wanted to waive his right to remain silent.

This court has not yet ruled on the issue of whether *Mosley* is satisfied when a suspect invokes his right to silence and the police later resume questioning regarding the same crime. Many federal circuits have, however, addressed this very question and concluded that a second interview is not rendered unconstitutional simply because it involved the same crime as previously discussed. *United States v. Andrade*, 135 F.3d 104, 106-07 (1st Cir. 1998); *Hatley v. Lockhart*, 990 F.2d 1070, 1074 (8th Cir. 1993); *United States v. Hsu*, 852 F.2d 407, 410 (9th Cir. 1988); *Jackson v. Dugger*, 837 F.2d 1469, 1471-72 (11th Cir. 1988); *United States v. Smith*, 608 F.2d 1011, 1014-15 (4th Cir. 1979); *Wilson v. Henderson*, 584 F.2d 1185, 1188-89 (2d Cir. 1978).

Mosley envisions an inquiry into all of the relevant facts to determine whether the suspect's rights have been respected.

³ While on appeal, the parties contested whether various doors were locked or unlocked and whether the appellant was technically free to leave the police station; this need not detain us. It is clear from the record that both the police and the appellant perceived this as a custodial interrogation requiring *Miranda* warnings.

Among the factors the Court considered were the amount of time that elapsed between interrogations, the provision of fresh warnings, the scope of the second interrogation, and the zealotness of officers in pursuing questioning after the accused asserted his right to silence. *Mosley*, 423 U.S. at 104-06. We observe that the Court in no way suggested that these factors were exhaustive, nor did it imply that a finding as to one of the enumerated factors -- such as, for example, a finding that only a short period of time had elapsed -- would forestall the more general inquiry into whether, in view of all relevant circumstances, the police "scrupulously honored" the appellant's right to cut off questioning.

Our analysis, therefore, adopts this flexible approach that takes account of all relevant circumstances. We begin by noting that the initial and subsequent interviews of the appellant all related to the death of the appellant's son. As noted above, this does not, *per se*, render the second interrogation unconstitutional. *Grooms v. Keeney*, 826 F.2d 883, 886 (9th Cir. 1987); *United States v. Heldt*, 745 F.2d 1275, 1278 n.5 (9th Cir. 1984)(discussing *United States v. Boyce*, 594 F.2d 1246, 1278 (9th Cir. 1979)).

Similarly, the case law does not suggest that any specific length of time is necessary for a finding that the right to cut off questioning was scrupulously honored. In this regard, we observe that the Court in *Mosley* expressly stated that the holding was not intended to imply some sort of, *per se*, durational minimum passage of time. *Mosley*, 423 U.S. at 106. Moreover, neither *Mosley* nor the most recent circuit court cases have suggested that the period of time between interrogations is the most important factor to be considered. *Mosley* must be read as standing for the proposition that the passage of time, while clearly relevant to the "scrupulously honored" inquiry, is not the only relevant factor or necessarily the most important factor in a particular factual setting. See *United States v. Davis*, 527 F.2d 1110, 1111 (9th Cir. 1975).

It is clear that neither the amount of elapsed time nor the identity of subject matter are of primary importance. Rather, courts have focused primarily on the validity of the second waiver. *Heldt*, 745 F.2d at 1278 n.5; see also *Grooms*, 826 F.2d at 886. Further, federal circuit cases have consistently focused on the actual coercion exerted by police upon a suspect in order to extract information. Although *Miranda* warned of the coerciveness inherent in all custodial interrogations, nothing in that opinion or in the subsequent pronouncements of the Court precludes courts from considering the egregiousness of police conduct in specific cases. See, e.g., *Arizona v. Mauro*, 481 U.S. 520 (1987); *Rhode Island v. Innis*, 446 U.S. 291, 302-03 (1980).

This, in fact, is what the *Mosley* rule implicitly asks courts to do. In *United States v. Olof*, 527 F.2d 752 (9th Cir. 1975), the court held that a suspect's right to cut off

questioning was not scrupulously honored. The court's decision was fundamentally influenced by the psychological pressure brought to bear when the interrogating agent told the suspect "that prison was a 'dark place,' where they 'pumped air' to the prisoners." *Id.* at 753. By contrast, courts have been persuaded that an appellant voluntarily waived his right to silence when assertions by the police consisted of "objective, undistorted presentation[s]" of the evidence against a suspect. The risk of coercion is lessened when information is not directly elicited. *See United States v. Pheaster*, 544 F.2d 353, 366, 368 (9th Cir. 1976) (stressing the "key distinction between questioning the suspect and presenting the evidence available against him"). This is not to say that detached recitations of previously gathered evidence are always free of coercion. It is to say, however, that they tend to be less coercive, and that courts, in conducting factual inquiries into whether the police acted with due respect for suspects' rights, may properly take account of the actual tactics employed in eliciting information -- not just circumstantial factors like the passage of time.

With these considerations in mind, we turn to the case at hand. The appellant has argued that the fact that the amount of elapsed time was as short as 35 minutes, that he felt coerced when detectives informed him that his wife was also being questioned, that he was told to knock on the door when he wanted to reinitiate contact, and that the two interactions related to the same underlying facts bring the second questioning session into conflict with *Mosley*. We agree that these factors are relevant to our *Mosley* inquiry, but they are not dispositive. *See Hsu*, 852 F.2d at 411.

In this regard, we note that, notwithstanding the appellant's assertions at trial, the military judge's findings of fact do not suggest that the Norfolk police used profanity, called the appellant a baby-killer, or otherwise harassed the appellant or exerted pressure on him to revoke his assertion of the right to remain silent. Further, we note that the appellant received two separate rights warnings following his initial invocation of his right to silence. Finally, when the appellant asked for a command representative, the detectives declined to do so but specifically re-referred the appellant to that portion of the rights advisement permitting him to have an attorney present. The appellant did not elect to request an attorney despite the detectives' hint. Based on our review of the record, we find no evidence of ongoing and repeated efforts to wear down the appellant's resistance.

While we have no doubt the appellant felt pressured by the death of his son, the fact that his wife was being interrogated, the fact that police were convinced the appellant's son died from "shaken baby syndrome," and the fact that the police reasonably intended to put the responsible person in jail, we do not find such statements of commonsensical fact constituted undue pressure

beyond that naturally inherent in an interrogation involving the death of a child.⁴

The federal case law cited above universally indicates that there is no requirement that police refrain from re-approaching a suspect after the suspect has invoked his right to remain silent. We join the federal circuits in holding that the constitutionality of a subsequent police interview depends not so much on its subject matter or on the length of time between interviews, but rather on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent. Taking account of all the surrounding circumstances reflected in the record and in the military judge's findings of fact, we conclude that the military judge correctly applied the law to the facts when he determined that the appellant's confession was voluntary and obtained after a knowing, intelligent, and voluntary waiver of his constitutional rights. Accordingly, we hold that the military judge's ruling denying the defense motion to suppress the appellant's confession was not an abuse of discretion.

Conclusion

The appellant's remaining assignment of error is without merit. The findings and approved sentence are affirmed.

Judge KELLY concurs.

COUCH, Judge (concurring in the result):

I agree with the affirmance of the findings and the sentence. I write separately to emphasize why the appellant's confession is admissible when some facts of this case are distinguishable from those in *Michigan v. Mosley*, 423 U.S. 96 (1975).

This court has confronted the issue of whether *Mosley* is satisfied when a suspect invokes his right to silence and the police continue to interrogate him without a break in questioning. See *United States v. Doucet*, 43 M.J. 656 (N.M.Ct.Crim.App. 1995). Our superior court has held that the mere asking for a reinterview of an individual not in custody was not an interrogation so as to offend the *Mosley* "scrupulously honored" requirement. *United States v. Watkins*, 34 M.J. 344, 346-47 (C.M.A. 1992). I concur with the majority that this case, involving a police attempt to reinterview an individual still in

⁴ *Oregon v. Elstad*, 470 U.S. 298, 312 (1985) ("There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given. . . .").

custody about the same subject after he invoked his right to silence, does appear to be a case of first impression before this court.

I am concerned that facts which were of apparent importance to the Supreme Court in *Mosley* are different from the instant case: Mosley's second interrogation occurred after a significant time lapse, was directed solely to a separate offense than the subject of his first interrogation, and was conducted at another location by another interviewer. *Mosley*, 423 U.S. at 97-98, 104-05. By contrast, the appellant was interviewed about the same subject matter by the same detectives in the same location as his first interrogation.

Like the majority, I am convinced that the appellant's answer "no" to paragraph 6 in his first rights advisement was an ambiguous invocation of his right to silence, and that Detective B's question as to why the appellant answered "no" was a permissible attempt on his part to clarify the appellant's decision. The appellant unambiguously invoked his right to silence when he made the presence of a command representative a condition precedent to making a statement. The appellant's assertion of his right to silence was bolstered when the detectives responded that the presence of a command representative would not be allowed. Record at 80. Further, I agree with the majority that the detectives scrupulously honored the appellant's right to silence when they immediately stopped the interview at this juncture.

The difficult question is whether Detective M's question to the appellant about his willingness to take a polygraph test, posed to the appellant 35 minutes after his first rights advisement, is consistent with a scrupulous honoring of the appellant's right to silence given the requirement that "interrogation must cease" under *Miranda*. *Mosley*, 423 U.S. at 101 (citing *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)). One could view the detective's invitation to take a polygraph test as a subterfuge designed to circumvent the appellant's invocation of his constitutional right to silence. See *United States v. Applewhite*, 23 M.J. 196, 199 (C.M.A. 1987). On the other hand, one could view the polygraph invitation as a means to keep the appellant "on ice" while the detectives sought to question his wife separately. Complicating the picture is the detectives' direction to the appellant that he should knock on the door if he changed his mind about waiving his rights, and that the appellant never did, in fact, knock on the door. Record at 32.

These two interpretations of the detectives' conduct perhaps reflect the Supreme Court's reluctance to provide a bright-line test as to when police can reinitiate questioning after a suspect's invocation of their right to silence. Indeed, *Mosley* held that *Miranda* should not be interpreted as permitting a continuation of an interrogation after a momentary cessation, or

as a blanket prohibition against further interrogation at all. *Watkins*, 34 M.J. at 346 (citations omitted).

In this case we must resolve whether the detective's polygraph invitation failed to scrupulously honor the appellant's right to silence to the extent that it renders his ultimate confession involuntary as "the product of compulsion, subtle or otherwise." *Mosley*, 423 U.S. at 100 (quoting *Miranda*, 384 U.S. at 473-74). In my view, *Mosley* does not provide enough guidance for us to completely decide this issue, but *Watkins* provides some assistance:

[P]olice legitimately may inquire whether a suspect has changed his mind about speaking to them. . . . It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision.

34 M.J. at 346-47 (quoting *Edwards v. Arizona*, 451 U.S. 477, 490 (1981)(Powell, J., concurring in the result)).

This "inquiry to determine reconsideration" appears to be exactly what Detective M intended when he asked the appellant if he wanted to take a polygraph test. It is important to note that the detective did not ask a substantive question at this point, but rather inquired whether the appellant would answer questions in the future in the context of a polygraph examination. Thus, at this juncture, I cannot view the detective's polygraph invitation to be tantamount to an interrogation or questioning designed to "elicit an incriminating statement," that would violate the *Mosley* mandate to scrupulously honor the appellant's right to silence. *Id.* at 346 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).¹

Most significantly, it is clear from the record the appellant ultimately decided to waive his right to remain silent after he learned that his wife was at the police station to take a polygraph test of her own. Record at 85. The appellant learned about his wife's involvement with police in response to his own questions to Detective M. *Id.*

Considering the totality of the surrounding circumstances - - "both the characteristics of the accused and the details of the interrogation" - - it is clear that the appellant's ultimate confession, given after a second set of *Miranda* rights, was

¹ The detectives' conduct after the polygraph invitation further demonstrates that they scrupulously honored the appellant's invocation of his right to silence by continually informing him that they could not talk about his son's death with him unless he waived his rights. Record at 85.

voluntary and not the product of police compulsion. *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)(quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Given that the appellant's confession (1) came after a significant period of time since his invocation of silence and (2) was clearly motivated by his wife's presence at the police station, we can find the appellant's right to silence was scrupulously honored, even though the facts of his case differ slightly than those in *Mosley*. Based upon the record, I am convinced that the appellant's decision to waive his rights and give his confession were a result of his own concern about his wife's involvement in the police investigation, and not as a result of Detective M's invitation to take a polygraph test.

The record demonstrates that the appellant was able to exercise his "right to cut off questioning" as guaranteed by *Miranda*, and that the appellant was able to counteract "the coercive pressures of the custodial setting" by invoking his constitutional right to silence. *Mosley*, 423 U.S. at 103-04 (citations omitted). Accordingly, I concur with the majority that the appellant's confession was properly admitted as evidence by the military judge.

For the Court

R.H. TROIDL
Clerk of Court