IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	Docket No. ARMY 20180407
Sergeant (E-5) **ANTHONY R. HALE,** United States Army, Appellant	Tried at Fort Campbell, Kentucky, on 21 November 2017, 15 Feb, 5 March, 5 April, and 8-10 August 2018 before a general court-martial appointed by Commander, Fort Campbell, Colonel Matthew Calarco, Military Judge, presiding.

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

Assignment of Error I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO ILLEGAL SEARCHES CONDUCTED INSIDE APPELLANT'S HOME.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CLARKSVILLE POLICE.

Assignment of Error III

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CID.

PANEL NO. 4

Assignment of Error IV

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH THE ILLEGAL SEARCH AND SEIZURE OF APPELLANT'S CELL PHONE.

Assignment of Error V

WHETHER APPELLANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY SUFFICIENT.

Assignment of Error VI

WHETHER APPELLANT'S CONVICTION FOR FALSE OFFICIAL STATEMENT IS FACTUALLY SUFFICIENT.

Assignment of Error VII

WHETHER THE DILATORY POST-TRIAL PROCESSING OF APPELLANT'S CASE WARRANTS RELIEF WHERE THE GOVERNMENT TOOK 362 DAYS BETWEEN SENTENCE AND ACTION.

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Statement of the Case

On 8–10 August 2018, an officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of wrongful possession with intent to distribute marijuana, one specification of obstructing justice, and one specification of false official statement, in violation of Articles 107, 112a, and 134 of Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 907, 912a, and 934 (2016).[1] (R. at 689). The panel sentenced appellant to be confined for three months and to be discharged from the service with a bad-conduct discharge. (R. at 774). The convening authority approved the adjudged sentence. (Action).

Statement of Facts

I. Clarksville Police Officers Respond to a "Shots Fired" Call.

On 23 December 2016, at approximately 0109, Officers [redacted] and [redacted] of the Clarksville Police Department (CPD) responded to a call of "shooting already occurred or shots fired" at the Royster Lane apartment complex. (R. at 355). A caller reported seeing a man stumbling near the apartment complex's mailboxes.

[1] Prior to findings, the military judge granted appellant's motion for a finding of not guilty on one specification of wrongful distribution of marijuana and one specification of violating a lawful general regulation, in violation of Articles 112a and 92, UCMJ. (R. at 570, 580, 582). The panel also acquitted appellant of one specification of conspiracy to commit wrongful distribution of marijuana, in violation of Article 81, UCMJ. (R. at 689).

(R. at 338). Upon their arrival at the apartment building, the police officers noticed a vehicle with its driver side door open. (R. at 338). A large trail of blood led the officers from the vehicle to a shell casing and a male body. (R. at 339). Officer [redacted] surmised that the male died because of the apparent gunshot wound. (R. at 339). The police officers quickly cleared the parking lot to ensure no threat remained. (R. at 339). An individual approached the police officers, identified the deceased as Mr. JG, and informed them that Mr. JG lived in Apartment 701. (R. at 340, 341). The police officers then walked the twenty-five feet between Mr. JG's body and the door to Apartment 701, located on the first floor. (R. at 341).

As the police officers approached the door of Apartment 701, Officer [redacted] noticed a "strong" smell of marijuana emanating from the doorway. (R. at 58, 337, 342). At approximately 0130, Officer [redacted] knocked on the door to Apartment 701, announced himself, and waited for "an extended period of time . . . more than it would take a normal person" to answer, before appellant answered the door. (R. at 343). Officer [redacted] also noticed the delay and thus approached an open window on the side of the apartment in order to catch a glimpse of what was happening inside. (R. at 357). While standing outside of the window, Officer [redacted] saw that the apartment lights were on and heard "suspicious" movement. (R. at 357). Officer

[redacted] called out to the apartment's occupants, notified them that he was a police officer, and asked that they come to the door.[2] (R. at 357).

II. Appellant Notices the Police Presence and Disposes of the Marijuana.

Appellant awoke when Mr. JG's girlfriend, Specialist (SPC) MF, entered his room to ask appellant if he knew of Mr. JG's whereabouts. (App. Ex. VIII, p. 29). As appellant rolled over to answer SPC MF, he noticed the flashing police lights coming through his window. (App. Ex. VIII, p. 22). Appellant confirmed the police presence when he looked out his window. (App. Ex. VIII, p. 29). Specialist MF became upset by the apparent crime scene, so appellant escorted her to Mr. JG's room in the apartment appellant and Mr. JG shared. (App. Ex. VIII, p. 22). As appellant went to answer the front door, he entered the living room and noticed marijuana on a table. (App. Ex. VIII, p. 29). "[Appellant] did not want to get in trouble for," the drugs in open view in his apartment, so he quickly snatched the marijuana and disposed of it in the toilet before opening the front door to speak with the police officers.[3] (R. at 375; App. Ex. VIII, p. 22).

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[2] Officer [redacted] testified that he announced his role as a police officer because a shooting had just occurred in the immediate vicinity and he wanted to dispel any potential fear the occupants may have had that "anybody else . . . [was] attempting to get them as well." (R. at 358).

[3] Appellant served as a unit prevention leader (UPL) to assist his unit with detecting the use of illegal drugs such as marijuana. (Pros. Ex. 20).

III. Officers [redacted] and [redacted] Enter Appellant's Apartment.

Once appellant confirmed for Officers [redacted] and [redacted] that Mr. JG, the decedent, lived in the apartment with him, the officers entered the apartment.[4] (R. at 344). Officer [redacted] explained the police presence and notified appellant that due to the strong marijuana smell,[5] Officer [redacted] needed to conduct a "protective sweep of the residence . . . to ensure that no evidence would be destroyed" while the officers conducted their investigation. (R. at 59). Officer [redacted] explained to appellant that they "were not searching the apartment," rather, the police officers would only look in spaces capable of containing a person "because a person would be the [only] way that evidence would be destroyed." (R. at 60). Officer [redacted] testified that he felt it necessary to conduct a protective sweep due to the "fact that there was a suspected homicide . . . and also the odor of marijuana, to protect the evidence . . . ." (R. at 359).

Before conducting the protective sweep, Officer [redacted] asked appellant whether there were any other occupants in the apartment and appellant informed him "there was nobody else in the residence." (R. at 359). However, upon entering the nearest bedroom, Officer [redacted] found SPC MF, whom he described as

[4] Officer [redacted] testified that he immediately noticed the marijuana odor upon entering the apartment. (R. at 358). Specialist MF also testified that there was a marijuana odor in the apartment. (R. at 112).

[5] Appellant's two bedroom, one bathroom apartment consisted of less than 1000 square feet of space. (R. at 395).

awake and "completely dressed, like if she was out at the club."[6] (R. at 360). Once Officer [redacted] found SPC MF—which revealed that appellant had lied about being alone in the apartment—he escorted SPC MF to Officer [redacted] who remained in appellant's living room, and Officer [redacted] quickly resumed his task of looking for anyone else that may be destroying evidence. (R. at 345). During the remainder of the sweep, which took only one minute to complete, Officer [redacted] noticed "some green material that [he] suspected to be marijuana" in the toilet and a bag of suspected marijuana on the living room coffee table. (R. at 345, 347, 361).

When Officer [redacted] returned to the living room, he briefly searched the couch for weapons before asking appellant and SPC MF to take a seat on the couch. (R. at 362). Officer [redacted] explained that "[he] searched the couch area so that [appellant and SPC MF] could have a seat[,] so we don't make them stand outside, because it was kind of cold"—it was 35°F —"and [appellant] wasn't wearing a shirt, plus their roommate was deceased outside." (R. at 362; App. Ex. VIII, pg. 2). While Officer [redacted] left the apartment to coordinate the homicide investigation, Officer [redacted] sat with appellant and SPC MF in the living room, making small talk to occupy them until the detectives arrived. (R. at 364).

[6] A panel member asked Officer [redacted] "was [appellant] asked why he lied [about no one else being in the apartment]?" (R. at 367).

IV. Homicide Detectives Arrive at Appellant's Apartment and Appellant Consents to a Search of His Apartment.

Clarksville Police Department Homicide investigators Sergeants (Sgt.) [redacted] and [redacted] arrived on the scene at approximately 0230–0300.[7] (R. at 79). The lead investigator, Sgt. [redacted] surveyed the crime scene, which encompassed the entire parking lot, and spoke to the other police officers in order to understand what had occurred. (R. at 68, 69). The homicide investigators then entered appellant's apartment, where Sgt. [redacted] informed appellant and SPC MF that MR. JG had died. (R. at 69).

Sergeant [redacted] then asked appellant and SPC MF for information to aid his homicide investigation. (R. at 70). Although Sgt. [redacted] questions were "voluminous," they were limited in scope and focused solely upon eliciting information helpful to the homicide investigation, such as: Mr. JG's conduct, habits, relationships, and his whereabouts that night. (R. at 70, 372). Neither appellant nor SPC MF possessed immediately actionable information, such as the identity of a suspected perpetrator, so Sgt. [redacted] asked if they were willing to accompany him to his office to answer his remaining questions. (R. at 387). Both agreed, and Sgt. [redacted] arranged for another police officer to transport appellant and SPC MF to his office. (R. at 387).

[7] During the investigation, [redacted] was a detective. For consistency, he is referred to as Sgt. [redacted] his title at the time of trial—throughout this brief.

Prior to leaving for his office, Sgt. [redacted] asked appellant and SPC MF for consent to search the apartment, and both consented.[8] (R. at 71, 372, 386, 434). Although Sgt. [redacted] did not document appellant's consent, Sgt. [redacted] testified that he heard appellant provide consent for the search. (R. at 434). Sergeant [redacted] and Agent [redacted] of the Clarksville Police Department searched the apartment and found a shoebox containing marijuana on the coffee table as well as marijuana in the toilet. (R. at 397-399, 404). The shoebox contained approximately three ounce of marijuana divided among several vacuum-sealed bags.[9] (R. at 399).

V. Appellant Provides Information to Aid with the Homicide Investigation.

While en route to the police station, the officers stopped at a nearby convenience store and allowed appellant and SPC MF an unescorted opportunity to purchase any items. (R. at 113). Neither appellant nor SPC MF were handcuffed or otherwise physically restrained during their trip. (R. at 113, 121).

When appellant arrived at the police station, Sgt. [redacted] escorted him into an interview room and explained that it would take Sgt. [redacted] a while to speak with everyone since he was the only person conducting interviews. (App. Ex. VIII, Enclosure 6 at 00:34). Appellant inquired about the order of the interviews, and

[8] Appellant denied providing consent to search his apartment. (R. at 119).
[9] Agent [redacted] testified that vacuum sealing preserves marijuana's moisture and reduces its size, which in turn maximizes drug-dealing profits. (R. at 399).

Sgt. [redacted] shared that he planned to speak with SPC MF first in order to facilitate the next of kin notification process. (App. Ex. VIII, Enclosure 6 at 00:43).

Approximately two-and–a-half hours elapsed before Sgt. [redacted] was again available to speak with appellant; appellant slept in the interim. (R. at 76, 382). The interview itself of appellant lasted only 23 minutes and focused upon information pertinent to the homicide investigation. (App. Ex. XIII, p. 11). Sergeant [redacted] did not provide appellant with a *Miranda* rights warning prior to speaking with him. *See Miranda v. Arizona*, 384 U.S. 436, 439 (1966); (R. at 76, 373). Sergeant [redacted] testified that "based on [his] knowledge and training," which included more than twelve years as a police officer with four-and-a-half years spent investigating homicides "the *Miranda* warning was not applicable . . . because [appellant] wasn't in custody and I wasn't asking accusatory questions." (R. at 67, 76, 369).

As Sgt. [redacted] and appellant discussed the evening's events and other information pertinent to the homicide investigation, appellant admitted to disposing of the marijuana. (R. at 375). Appellant explained that, upon seeing the police, he flushed Mr. JG's marijuana down the toilet to prevent Mr. JG from getting in trouble. [10] (R. at 375–376). At the end of their conversation, Sgt. [redacted]

[10] Appellant also voiced concern that the Army may frown upon his association with a drug dealer such as Mr. JG. (R. at 77).

asked appellant to document any information that could be significant to the homicide investigation and then left the room while appellant wrote his statement. (R. at 374; App. Ex. VIII, Enclosure 6 at 3:00:28). Upon completing his statement, appellant opened the door and stepped out into the hallway to call for Sgt. [redacted][11] (App. Ex. VIII, Enclosure 6 at 3:27:50). Sergeant [redacted] gave appellant his business card and asked that appellant contact him should appellant hear of any information about the homicide from the "streets" or through social media. (App. Ex. VIII, Enclosure 6 at 3:35:46). Appellant then returned to the police station lobby to await a ride back to his apartment. (R. at 78). At no point in that evening did any law enforcement agent handcuff appellant, tell him he was under arrest, tell him he was in trouble, tell him he could not leave, or otherwise treat him as if he was in custody or under arrest.

VI. Criminal Investigation Command Interviews SPC MF and Receives a Search Authorization to Search Appellant's Phone.

Criminal Investigation Command (CID) SGT [redacted] inherited appellant's case file in January 2017 and interviewed appellant regarding the events of 23

[11] Appellant also consented to Sgt. [redacted] making a copy of, and searching, appellant's cellular phone. (App. Ex. VIII, Enclosure 6 at 3:41:06). Sergeant [redacted] repeatedly stressed that appellant retained the choice of whether to provide consent or not. (App. Ex. VIII, Enclosure 6 at 3:40:15).

December 2016 on 17 January 2017.[12] (R. at 84, 534). Sergeant [redacted] prepared for the interview by reading CPD's preliminary report and SPC MF's sworn statement to CID.[13] (R. at 85). Unlike every other officer involved in the CPD investigation, SGT [redacted] focused upon appellant's wrongdoing; thus, SGT [redacted] advised appellant of his Article 31 rights, both verbally and in writing, prior to their interview.[14] (R. at 87, 534; App. Ex. VIII, p. 21). After SGT [redacted] advised him of his rights, appellant agreed to waive his rights and speak with SGT [redacted] (R. at 88; App. Ex. VIII, p. 21).

During the interview,[15] appellant admitted to throwing marijuana in the toilet after seeing police outside of his window "in order to avoid getting in trouble for the marijuana."[16] (R. at 535). Appellant also told SGT [redacted] that he communicated with Mr. JG through his cellular phone. (R. at 103). Appellant implied that Mr. JG sold marijuana, but he denied any personal role in Mr. JG's

[12] During the investigation, [redacted] was a military police investigator. At trial, [redacted] was a CID special agent in training. For consistency, he is referred to as SGT [redacted] throughout this brief.
[13] The record does not indicate which documents were included in the preliminary reports.
[14] The Fort Campbell CID office generally does not record drug offense interviews and did not do so in this case. (App. Ex. VIII, p.4).
[15] The interview spanned eight hours, during which appellant received food and drink, as well as multiple breaks. (R. at 89).
[16] Sergeant [redacted] denied making any statements to appellant concerning, or otherwise intimating his knowledge of, the CPD investigation. (R. at 88).

marijuana distribution. (R. at 535, 536). Specialist MF had previously informed CID, "[Mr. JG] would *call* [*appellant*] to see if he was at the house and would tell [appellant] such and such wants [marijuana] and [the buyer] would go by the house and get it from [appellant]." (App. Ex. VIII, p. 17) (emphasis added).

The discrepancy between appellant's and SPC MF's accounts led SGT [redacted] to seek appellant's consent to search his cellular phone in order to verify his denials of SPC MF's allegations. (R. at 536–537). Appellant refused consent, and thus SGT [redacted] contacted a military magistrate to request a search authorization. (R. at 537). Sergeant [redacted] called the military magistrate, First Lieutenant (1LT) WS, and provided him with a written affidavit in support of his request for a search authorization. (R. at 537; App. Ex. VII, p. 11). The military magistrate subsequently issued a search authorization permitting SGT [redacted] to seize and search appellant's cellular phone. (R. at 95, 538; App. Ex. VII, p. 13). The search of appellant's cellular phone corroborated SPC MF's claims.

Assignment of Error I[17]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO ILLEGAL SEARCHES CONDUCTED INSIDE APPELLANT'S HOME.

Standard of Review

Appellate courts review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (internal citations omitted). "Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. Conclusions of law are reviewed de novo." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). Further, a military judge abuses his discretion when his "findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *Id.* (citations omitted). "In reviewing a ruling on a motion to suppress, [appellate courts] consider the evidence in the light most favorable to the prevailing party." *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000) (citing *Reister*, 44 M.J. 419) (internal quotations omitted)).

[17] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests an opportunity to respond to appellant's additional briefing on the claimed errors.

Additional Facts

Prior to trial, appellant moved to suppress all evidence obtained by the civilian CPD during its search of appellant's apartment, all of appellant's statements to CPD and CID, as well as evidence obtained from CID's search of appellant's cellular phone. (App. Ex. VII, p. 1). The military judge held an Article 39(a) session to hear evidence and argument on appellant's suppression motion. (R. at 52). The military judge, after considering counsel's briefs and attachments, as well as the evidence and arguments presented during the motions hearing, denied appellant's suppression motion in its entirety. (App. Ex. XIII, p. 1, 13).

Specifically, the military judge found as fact that Officer [redacted] did not ask for consent to enter appellant's apartment, because he "had just discovered the body of one of the apartment's occupants only feet from the apartment and then smelled evidence of illegal drug activity within the apartment immediately upon nearing the door way. Officer [redacted] believed that there was a high probability that the homicide and the odor could be linked." (App. Ex. XIII, p. 1). Further, the military judge found that the police officers conducted "a protective sweep to ensure no evidence was destroyed." (App. Ex. XIII, p. 1). The military judge found that the initial sweep did not entail a complete search of appellant's apartment; rather, the police officers "only went to areas where they could see any remaining persons so they could ensure no one was destroying evidence that might

be related to their homicide investigation." (App. Ex. XIII, p.1–2). The military judge concluded that Officer [redacted] had probable cause to search appellant's apartment and that his warrantless entry was nonetheless permissible due to the exigent circumstances exception. (App. Ex. XIII, p. 8).

The military judge found as fact that appellant subsequently consented to a search of his apartment. (App. Ex. XIII, p. 2). Although the military judge found that Sgt. [redacted] did not record appellant's consent on an optional form used by a few CPD detectives, he also found that Sgt. [redacted] witnessed Sgt. [redacted] obtain appellant's consent and documented that consent in his report. (App. Ex. VIII, p. 15). The military judge noted that appellant testified that he did not consent to a search and SPC MF testified that she did not witness CPD officers ask appellant for consent to search. (App. Ex. XIII, p. 2–3). The military judge recognized the discrepant accounts and found that "the balance of the evidence weighs heavily in favor of the version given by SGT [redacted] that appellant indeed consented to the search. (App. Ex. XIII, p. 9). The military judge reasoned that to believe otherwise "would require one to believe that three law enforcement officers, with no apparent motive to act illegally and no immediate pressure to solve the crime, conducted an illegal search and conspired to cover it up." (App. Ex. XIII, p. 9). The military judge also found that appellant freely gave his consent, unaffected by the potentially coercive factors present in the custodial situations envisioned in *Miranda*, *supra*. (App. Ex.

XIII, p. 9). Thus, the military judge concluded that "[t]he subsequent search of appellant's apartment was legal because the [appellant] gave consent. (App. Ex. XIII, p. 9).

Finally, the military judge found that the legally obtained evidence, including "the dead body of an occupant just outside [of] the [apartment] door, an expended casing next to the body, the odor of marijuana emanating from apartment," and SPC MF's forthcoming statement tying appellant to the deceased's marijuana distribution, would have inevitably led to the discovery of the marijuana. (App. Ex. XIII, p. 9–10).

Law and Argument

The Constitution of the United States prohibits "unreasonable searches and seizures." U.S. CONST., amend. IV. "[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Military Rules of Evidence [Mil. R. Evid.] 311–317 implement the Fourth Amendment. *United States v. Hoffmann*, 75 M.J. 120, 123 (C.A.A.F. 2016). Searches conducted pursuant to a valid warrant or search authorization "are presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within 'a few specifically established and well-delineated exceptions.'" *Id*. at 123–24 (quoting *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014) (internal citations omitted). "One well-recognized exception applies when 'the exigencies

of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978). Military Rule of Evidence 315, which governs probable cause searches, permits the admission of evidence obtained absent a search warrant or authorization "when there is a reasonable belief that the delay necessary to obtain a search warrant or authorization would result in the removal, destruction, or concealment of the property or evidence sought." Mil. R. Evid. 315(g).

"The touchstone of any Fourth Amendment inquiry is always reasonableness." *United States v. Cote*, 72 M.J. 41, 45 (C.A.A.F. 2013) (citing *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). Courts evaluate reasonableness in light of the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1966).

I. The Military Judge Did Not Abuse His Discretion When He Denied Appellant's Motion to Suppress the Evidence Seized from Appellant's Apartment.

The CPD lawfully entered appellant's apartment. Therefore, the evidence seized should not be suppressed. "[P]robable cause to search as exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found" in the search location. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). "In dealing

with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *United States v. Hoffmann*, 75 M.J. 120, 125 (C.A.A.F. 2016) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

Military Rule of Evidence 311(a) restates the basic exclusionary evidentiary rule and deems evidence obtained in violation of the rule inadmissible against the accused if three predicate conditions are met. Mil. R. Evid. 311 analysis at A22-19. *See United States v. Owens*, 51 M.J. 204, 210 (C.A.A.F. 1999). Upon an appropriate defense motion or objection, the government must prove by preponderance of evidence that the contested evidence: (1) was obtained legally; (2) is admissible under one of the enumerated exceptions to the rule; or (3) "deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence." Mil. R. Evid. 311(d)(5)(a). As the President promulgated the three alternatives in Rule 311(d)(5)(a) in the disjunctive, the government need only prove any of the three to overcome suppression.

A. CPD Officers [redacted] and [redacted] Lawfully Entered Appellant's Apartment.

Officer [redacted] received a "shots fired" service call about a man seen stumbling around an apartment complex parking lot. (R. at 57). When Officer [redacted] arrived,

he found a trail of blood leading from an open vehicle to Mr. JG's lifeless body. (R. at 57). Once Officer [redacted] and his fellow police officers secured the scene against immediate threats to their personal safety, he immediately began to investigate the suspected homicide. (R. at 57, 339). Soon thereafter, an individual provided Officer [redacted] with a piece of actionable information: the location of the deceased's residence, Apartment 701. (R. at 57). As Officer [redacted] approached the deceased's apartment, Officer [redacted] smelled the "strong odor of raw marijuana" coming from the doorway. (R. at 58).

Officer [redacted] testified, "[t]here is a high probability that [Mr. JG's homicide and the marijuana odor emanating from appellant's apartment] could be linked." (R. at 61). The marijuana odor and the apartment's tenant, lying dead a mere eight yards away, was enough for Officer [redacted] to believe that there was probable cause that evidence of a crime would be located within the apartment.[18] "[A]police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas*, 517 U.S. at 700 (finding a police officer's inference, that a loose car panel may have concealed drugs, reasonable in light of

[18] Appellant's assertion that his delayed response to the police officers knocking at his front door was due to his medicated slumber, (Appellant's Br. 2), is rebutted by appellant's sworn statement that he was already awake and had seen the police presence through his window before the police knocked at his door, (App. Ex. VII, p. 19). Appellant's protracted frolic from his bedroom to the front door of his small, marijuana-scented apartment further supports Officer [redacted] fear of the possibility of imminent evidence destruction.

his extensive experience searching for drugs). Officer [redacted] made a logically supportable linkage between the scent of the marijuana and the slain, drug-dealing occupant. *See Plummer v. States*, 410 S.W.3d 855, 859 (Tex. Crim. App. 2013) ("The nature of the illegal drug trade invites the possibility of violence").

Appellant's "highly questionable" assertion that Officer [redacted] could not have "smell[ed] raw marijuana stored in a vacuum-sealed bag within a freezer bag" through the closed apartment door (Appellant's Br. 10, n. 6) conveniently ignores the fact that appellant destroyed an unknown quantity of unwrapped, and thus more fragrant, marijuana shortly before CPD entered his apartment. (App. Ex. VIII, Enclosure 6 at 2:57). The seven "*burnt* blunts," otherwise known as marijuana cigarettes, collected from appellant's apartment likely contributed to the marijuana odor as well. (App. Ex. VIII, p. 15) (emphasis added). Lastly, both SPC MF—who occupied the apartment with appellant—and Officer [redacted] testified that they also smelled the marijuana odor. (R. at 113, 358). The CPD officers had the requisite probable cause to believe that Apartment 701 contained evidence of a recent crime.

Further, the CPD officers lawfully entered Apartment 701. The evidence supports the military judge's conclusion that exigent circumstances justified CPD's initial entry. (App. Ex. XIII, p. 8). "It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit

police officers to conduct an otherwise permissible search without first obtaining a warrant." *King*, 563 U.S. at 455 (holding that exigent circumstances exist when the police knock on the door and "cause the occupants to attempt to destroy evidence"). The Supreme Court acknowledges, "the exigent-circumstances doctrine significantly limits the situations in which a search warrant would be needed." *Steagald v. United States*, 451 U.S. 204, 221 (1981).

Officer [redacted] testified that his fellow police officers executed a "protective sweep" of appellant's apartment upon entry. (R. at 59). Officer [redacted] characterization of the police action as a "protective sweep" notwithstanding,[19] the evidence clearly indicates that CPD officers entered the apartment and conducted a limited search in order to prevent imminent evidence destruction. Appellant's own actions—destroying drugs in an effort to prohibit law enforcement from seizing them—demonstrate exactly why it was necessary for the officers to ensure that

[19] The facts and circumstances, particularly Mr. JG's bullet-ridden body found mere yards from the apartment, clearly justified a protective sweep of appellant's apartment. *See Maryland v. Buie*, 494 U.S. 325, 337 (1990) (permitting protective sweep of a suspect's home when the officers conducting the search possess a reasonable belief that the home contains individuals who pose a danger to officer safety). However, Officer [redacted] did not testify that he believed that appellant's home contained dangerous individuals, a fact that "confused" the military judge, and the government did not invoke the protective sweep doctrine. (App. Ex. XIII, p. 7). Accordingly, we do not analyze whether the protective sweep doctrine would have been applicable.

nobody else could destroy more evidence.[20] Officer [redacted] informed appellant that CPD officers would only look in places "that a person could be because a person would be the [only] way that evidence would be destroyed." (R. at 60). Furthermore, the short duration of Officer [redacted] one-minute search and the fact that all of the police officers remained close to the couch thereafter indicates that the officers abided by the confines of their limited authority to search under these exigent circumstances. "Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue." *King*, 563 U.S. at 470.

B. CPD Officers Lawfully Seized the Marijuana Found in Appellant's Apartment.

i. Appellant Consented to the Search.

Military Rule of Evidence 314(e)(1) permits the admission of evidence obtained without probable cause if the search is conducted pursuant to lawful consent. Consent must be voluntary to be lawful. Mil. R. Evid. 314(e)(4). "The prosecution must prove consent by clear and convincing evidence." Mil. R. Evid.

[20] Had the officers taken appellant at his false word that nobody else was in the apartment and not conducted the limited search to prohibit additional evidence destruction, SPC MF could have remained in the bedroom destroying or tampering with evidence, just as appellant did.

314(e)(5). Courts determine voluntariness through a totality of circumstances approach that focuses upon six non-exhaustive factors:

> (1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's mental state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights.

United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008). This court "review[s] the evidence in the light most favorable to the prevailing party at trial." *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015) (citing *United States v. Piren*, 74 M.J. 24, 28 (C.A.A.F. 2015).

The first *Wallace* factor, the degree of restriction on liberty, minimally favors appellant. The CPD never placed appellant under arrest, handcuffed him, or otherwise physically restrained him. However, the military judge found that appellant was temporarily restricted to his living room couch. (App. Ex. XIII, p. 2). Officer [redacted] testified that appellant "would not have been allowed to leave," in order to preserve evidence and to prevent appellant from stepping directly into an active crime scene. (R. at 63, 65). Accordingly, the first *Wallace* factor favors appellant.

The second *Wallace* factor—the presence of coercion—weighs heavily in favor of the government. Appellant cites to the "armed guard" and exigent

circumstances search as evidence of coercion or intimidation. (Appellant's Br. 29). Significantly, neither appellant, nor SPC MF testified about any CPD conduct that was subjectively, much less objectively, intimidating or coercive.[21] Moreover, a police officer conducting his legitimate law enforcement duties while carrying his service-issued equipment, without more, is not inherently coercive or intimidating. Finding otherwise necessarily means that any interaction involving an armed police officer is coercive. Whether appellant freely gave his consent to Sgt. [redacted] "would ultimately come down to Appellant's word against those of the [CPD officers], and this is insufficient to find clear factual error on the part of the military judge. '[W]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.'" *Wallace*, 66 M.J. at 13 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

The third *Wallace* factor—appellant's age, knowledge, and experience—also supports the conclusion that appellant freely consented to the search. Courts may infer from the appellant's "age, intelligence, and other factors" whether he was aware of his right to deny consent. *Wallace*, 66 M.J. at 9. At the time of search,

[21] Testimony elicited from CPD officers at trial further demonstrates that the police officers deftly executed their duties while remaining sensitive to the fact that appellant's roommate suffered a violent death mere feet from his doorstep and the officers were concerned about appellant's comfort. Officer [redacted] quickly screened the couch so that appellant could sit in the warmth of his apartment, rather than stand outside shirtless in winter weather within close proximity to his slain roommate's corpse, as the group waited for the detectives' arrival. (R. at 346).

appellant was a twenty-five-year-old noncommissioned officer with a high school degree and seven years of service. (Pros. Ex. 20). Appellant's primary military occupational specialty (PMOS) was 31E or Internment/Resettlement Specialist, otherwise known as a corrections officer. (Pros. Ex. 20). Appellant was previously assigned to the Joint Regional Correctional Facility at Fort Leavenworth. (Pros. Ex. 20). This court can infer that appellant, a law enforcement officer himself, knew his right to withhold consent. *See Olson*, 74 M.J. at 135 (finding that the military judge could infer that a 26-year-old Airman First Class (E-3) with a high school degree and "some knowledge of law enforcement tactics" was aware of her right to refuse to consent to a search); *United States v. Murphy*, 39 M.J. 486, 489 (C.A.A.F. 1994) (finding that appellant's consent to a urinalysis was voluntary given her experience as a law enforcement officer, the lack of threats, orders, and fright or confusion, among other factors). The third *Wallace* factor thus favors the government.

Appellant's mental state at the time, the fourth *Wallace* factor, also favors the government. Appellant was understandably upset by the death of his roommate, but the record does not indicate that appellant had any other mental or psychological issues that could impair his ability to consent. (R. at 79). "However, such anxiety cannot, by itself, serve to undermine consent. If the alternative were true, every defendant accused of a crime would be found to lack

free will." *Wallace*, 66 M.J. at 13 (finding that appellant's mental ability to consent uncompromised despite a criminal accusation, search of his home, and fear of the resulting consequences upon his family relations). Accordingly, the fourth *Wallace* factor also weighs in favor of the government.

As appellant never requested counsel, he did not consult with counsel. As such, the fifth *Wallace* factor slightly favors appellant because he neither requested nor consulted with counsel. *See Wallace*, 66 M.J. at 13 (Baker, J. concurring).

As proven above, CPD officers lawfully entered appellant's apartment and conducted a limited search under exigent circumstances prior to obtaining his consent. Accordingly, there is no coercive effect on appellant's ability to consent and thus the sixth *Wallace* factor weighs in favor of the government. *See Olson*, 74 M.J. at 135 (finding no coercive effect despite noting that Air Force Office of Special Investigation agents should have advised her of under Article 31(b), UCMJ.).

Four of the six *Wallace* factors favor the government. Of the two factors that favor appellant, one—the lack of consultation with counsel—only slightly favors appellant because the police did nothing to interfere with his right to counsel. After considering the totality of the circumstances and reading the evidence in the light most favorable to the government, as required at this posture,

this court should conclude that appellant freely and voluntarily consented to the search of his apartment.

C. The Initial Exigent Circumstances Entry of Appellant's Apartment Did Not Taint Appellant's Consent.

As explained above, CPD officers lawfully executed their duties from their initial entry under exigent circumstances through their consent-based search of appellant's apartment and his eventual police station interview. Thus, evidence obtained by CPD falls squarely outside of Mil. R. Evid. 311's exclusionary ambit. However, assuming arguendo that this court finds that the evidence, when viewed in the light most favorable to the government, did not justify CPD's initial entry, this alleged illegality did not taint appellant's freely given consent to a search of his apartment.

This court employs a three-pronged test, first promulgated by the United States Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) "[t]o determine whether the [appellant's] consent was an independent act of free will, breaking the causal chain between the consent and the constitutional violation." *United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F. 2006). This court considers: "(1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial misconduct." *Id.* at 338–39. None of these three factors is dispositive of attenuating the taint of the original wrongdoing, but rather they are examined in

aggregate to determine the effect of an appellant's consent. *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012) (citing *Brown*, 422 U.S. at 603–04).

i. The Two-Hour Intermission Mitigated the Effects of the Initial Exigent Circumstances Entry.

With respect to the first *Brown* factor, temporal proximity, nearly two hours elapsed between Officer [redacted] initial entry of Apartment 701 and Sgt. [redacted] arrival at appellant's apartment prior to requesting consent. (R. at 338, 380). The CAAF has not defined the minimum duration of time necessary to dissipate an unconstitutional act's taint. *Compare Conklin*, 63 M.J. at 339 (implying that a "less than three hour" period between illegal police conduct and consent favored appellant), and *Dease*, 71 M.J. at 123 (finding that illegal conduct occurring "mere hours" before consent did "not weigh *heavily* in the favor of the government") (emphasis added), *with United States v. Khamsouk*, 57 M.J. 282, 292 (C.A.A.F. 2002) (finding that a 20 minute delay as only "*arguably* tip[ping] in appellant's favor") (emphasis added). This court should find that the two hours appellant spent making small talk with Officer [redacted] while sitting on his living room couch as an attenuating factor.

ii. Sergeant [redacted] Later Arrival was an Intervening Circumstance.

The second *Brown* factor favors the government because several intervening circumstances sever any taint of CPD's earlier search from appellant's voluntary consent. Sergeant [redacted] to whom appellant gave his consent to search, arrived

approximately two hours after Officer [redacted] initial exigent circumstances entry into appellant's apartment. (R. at 79). The fact that Sgt. [redacted] did not participate in the initial allegedly illegal entry is an intervening circumstance. *See United States v. Angevine*, 16 M.J. 519, 520 (A.C.M.R. 1983) (finding that the change of investigators, among others factors, sufficiently attenuated the taint of an earlier illegality).

Further, the initial limited search by the first responding "beat cops" did not contribute to CPD Homicide Detectives' desire to do a full search. In *Conklin*, the CAAF determined that the circumstances were insufficient to alleviate the taint because the special agents "would not have been interested in talking to Appellant but for the information relayed to them as a direct result of the unlawful search that had just taken place." 63 M.J. at 339. By contrast, Sgt. [redacted] interest in speaking with appellant did not stem from the marijuana discovered during Officer [redacted] initial search. Sergeant [redacted] needed to gather information about Mr. JG to determine why "[he] was killed at 1 o'clock in the morning in a parking lot . . . ." (R. at 82). As Mr. JG's roommate, Appellant was uniquely qualified to provide Sgt. [redacted] with information, such as Mr. JG's habits, contacts, and usual whereabouts, all of which were crucial to Sgt. [redacted] homicide investigation. It is difficult to imagine someone, other than Mr. JG's actual murderer, to whom Sgt.

[redacted] would rather speak in those initial hours. Accordingly, the second *Brown* factor weighs in the government's favor.

iii. Officer [redacted] Exigent Circumstances Entry was neither flagrant nor done to Advance an Inappropriate Purpose.

Finally, the third *Brown* factor favors the government because the conduct was not flagrant. Appellant asserts that the evidence gathered through CPD's admittedly benign conduct[22] somehow assumed a malignant nature by virtue of its use at his subsequent prosecution. However, CPD's initial warrantless search was neither flagrant nor conducted for an inappropriate purpose and thus did not affect appellant's subsequent consent.

In *Khamsouk*, the CAAF found that the evidence did not amount to exigent circumstances justifying the special agent's warrantless entry. 57 M.J. at 293. Nonetheless, the CAAF found that appellant's subsequent consent to search was untainted, partly because "[u]nlike the officers in *Brown* and *Dunaway*, there is no evidence in the record that [the SA there] knew he was committing a constitutional violation and notwithstanding that knowledge, intentionally entered unlawfully in order to pursue a quest for evidence 'in the hope that something might turn up.'" *Khamsouk*, 57 M.J. at 293 (quoting *Brown*, 422 U.S. at 605) (internal citations

[22] "Based upon their testimony at trial, it seems that there was not necessarily any bad motive on behalf of the CPD officers involved." (Appellant's Br. 34).

omitted). Additionally, in finding that the SA acted neither flagrantly nor with inappropriate purpose, the *Khamsouk* court cautioned that:

> In the real world of law enforcement, officers are often required to make split-second decisions resulting in choices, which, later subject to the frame by frame magnification of appellate review, do not meet Fourth Amendment muster. Nonetheless, decisions taken in good faith, as that term is used in common vernacular, warrant our careful and measured consideration when we assess the purposefulness and flagrancy of police conduct.

Id.

Much like in *Khamsouk*, the evidence does not support the notion that Officer [redacted] warrantless entry of appellant's apartment "was designed to achieve any investigatory advantage" or that it was "'expedition for evidence' admittedly undertaken in the hope that something might turn up." *Khamsouk*, 57 M.J. at 293. Rather, the military judge correctly found that upon their entry into appellant's apartment, "Officer [redacted] and his fellow officers then did no more than was required to accomplish their stated goal – preserve evidence . . . there is no evidence that they exceeded the scope of what was necessary. To the contrary, the testimony and statements demonstrate considerable restraint . . . ." (App. Ex. XIII, p. 8). Accordingly, this court should find that the third *Brown* factor does not favor appellant because the CPD officers' actions were neither flagrant nor conducted for an inappropriate purpose.

D. CPD Would Have Inevitably Discovered the Marijuana.

Military Rule of Evidence 311(c)(2) permits the admission of "evidence that was obtained as a result of an unlawful search or seizure . . . when the evidence would have been obtained even if such unlawful search or seizure had not been made." The prosecution must prove, by a preponderance of the evidence, "'that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.'" *Hoffmann*, 75 M.J. at 124-25 (quoting *Dease*, 71 M.J. at 122).

The military judge found that immediately prior to their initial search of appellant's apartment, CPD officers "possessed the dead body of an occupant just outside the door, an expended casing next to the body, the odor of marijuana emanating from the apartment . . . ." (App. Ex. XIII, p. 9). As discussed above, these combined factors provided Officer [redacted] with probable cause to believe that appellant's apartment contained evidence of a crime. *See Dease*, 71 M.J. 121–22 (finding the existence of probable cause as a predicate condition necessary to invoke the inevitable discovery exception).

In *United States v. Owens*, the CAAF considered whether the military judge erred in denying a motion to suppress evidence obtained after appellant withdrew,

and then subsequently granted, consent to a search of his vehicle. 51 M.J. 204, 210–11 (C.A.A.F. 1999). The military judge ruled Owen's subsequent consent was "mere acquiescence to the situation, rather than a [sic] voluntary consent" but that "the evidence would have been inevitably discovered, because [the civilian police officer] had probable cause and '*would have obtained a warrant*' and seized the property. *Id.* at 208 (emphasis added). The CAAF agreed with the military judge, stating:

> There is no reasonable likelihood that [the civilian police officer] would have abandoned his efforts to search the automobile at that point. When the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation.

Id. at 210–11.

It is difficult to believe that the CPD officers, similarly armed with probable cause, would simply abandon their investigatory efforts upon appellant's hypothetical denial of their initial entry into his apartment. Rather, it is far more likely that the CPD officers, like their counterparts in *Owens*, would have then sought a search warrant for appellant's shared residence as the next step in their routine homicide investigative procedures and thereby obtain the contested evidence. Thus, the CPD would have inevitably seized the marijuana – assuming that appellant did not continue his evidence-destruction mission while CPD obtained the search warrant.

E. Exclusion of the Evidence would be Inappropriate.

Even if the court finds that CPD unlawfully seized the marijuana, the military judge still did not abuse his discretion by denying the motion because suppression would not further any of the exclusionary rule's goals. "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." *Gates*, 462 U.S. at 254, (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). "[D]eserving of exclusionary treatment are searches and seizures perpetrated in intentional and flagrant disregard of Fourth Amendment principles. But the question of exclusion must be viewed through a different lens when a Fourth Amendment violation occurs because the police have reasonably erred in assessing the facts . . . ." *Gates*, 462 U.S. at 261 n.14). Military courts should exclude evidence only where "exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." Mil. R. Evid. 311(a)(3). Appellant's brief does not argue that the circumstances of his case meet the standard of Rule 311(a)(3). As appellant highlights, CPD officers devoted their efforts to solving Mr. JG's homicide and the presence of contraband drugs was merely an ancillary concern. (Appellant's Br. 12, 27, 28, 30, 34, 37, 38, 49, 54). A military judge's suppression ruling during courts-martial would have at

best a negligible effect upon civilian law enforcement. These deterrent efforts would have been especially futile in this case, as CPD officers had no interest in investigating, much less arresting and charging, appellant for drug possession. (R. at 63, 70, 75, 77).

Accordingly, suppressing the evidence obtained from CPD's search would grant appellant a windfall without any correspondent deterrent effect. As the CAAF noted in *Khamsouk*:

> Unwarranted application of the [exclusionary] rule can result in a disparity between the error committed by the police and the windfall afforded the accused that is contrary to the idea of proportionality that is essential to the concept of justice. Although the rule is thought to deter unlawful police activity . . . if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

57 M.J. at 292 (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)). The military judge's findings of fact were not clearly erroneous, nor were his findings of law based upon an erroneous view of the law. Therefore, this court should find that the military judge did not abuse his discretion when he denied appellant's motion to suppress evidence obtained from his apartment.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CLARKSVILLE POLICE.

Standard of Review

This court reviews a military judge's ruling on suppression motion for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *Monroe*, 52 M.J. at 330). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "The abuse of discretion standard calls 'for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)).

Law and Argument

The Fifth Amendment of the Constitution of the United States "commands that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Miranda v. Arizona*, 384 U.S. 436, 461 (1966) (quoting *Bram v. United States*, 168 U.S. 532, 542 (1897). In *Miranda*, the United States Supreme Court held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any *significant* way and is subjected to questioning,

the privilege against self-incrimination is jeopardized." *Id.* at 478–79) (emphasis added). During civilian custodial interrogations, police administer procedural safeguards, commonly referred to as the *Miranda* warnings, prior to questioning to inform the accused that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id*. "An individual is *only* entitled to a *Miranda* rights advisal if the individual is in custody while interrogated." *United States v. White*, No. ARMY 20170147, 2019 CCA LEXIS 110, at *18 (Army Ct. Crim. App. Mar. 8, 2019) (mem. op) (citing *Miranda*, 384 U.S. at 444) (emphasis added)

I. The Military Judge Did Not Abuse His Discretion When He Denied Appellant's Motion to Suppress His Statements to CPD.

The military judge did not abuse his discretion in denying appellant's suppression motion because his findings of fact were not clearly erroneous, nor were his findings of law based upon an erroneous view of the law. The military judge aptly noted that, "[t]he determinative issue in deciding whether the [appellant]'s statement to [CPD] is admissible is whether the [appellant] was in custody during the interrogation." He ruled that appellant's statements were admissible because "[appellant]'s interview with CPD was not a custodial

interrogation. Officers were not required to read the [appellant] *Miranda* warnings." (App. Ex. XIII, p. 10).

A. Appellant was Never in Police Custody.

Whether a person is in custody is measured by an objective standard. *Stansbury v. California*, 511 U.S. 318, 323 (1994). This court considers "'all of the circumstances surrounding the interrogation' to determine 'how a reasonable person in the position of the [appellant] would gauge the breadth of his or her freedom of action.'" *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009) (quoting *Stansbury*, 511 U.S. 322, 325). "[T]wo inquiries are essential to a custody determination: 'first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" *Id*. (quoting *Thompson v. Keohane*, 516 U.S. 99, 112–13 (1995)). A custody determination is further informed by three factors, including: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred, and (3) the length of the questioning." *Id.* at 438.

i. Appellant Voluntarily Appeared for Questioning to Aid in His Roommate's Homicide Investigation.

The military judge found that "there [was] insufficient evidence to make a distinct finding" of whether appellant appeared voluntarily for questioning. (App.

Ex. XIII, p. 10). The military judge noted that appellant may have felt obligated to accompany the officers to the police station, but no evidence suggested that appellant was so required or that "[anyone] ever suggested there would be consequences for not doing so, such as arrest." (App. Ex. XIII, p. 10). Although appellant was driven to the police station in a police vehicle, he was never handcuffed or physically restrained. (App. Ex. XIII, p. 10). The non-threatening nature of this trip was punctuated by the fact that the officers stopped at a convenience store so appellant could, unescorted, buy tobacco. (R. at 113, 121). The totality of the circumstances suggests that appellant voluntarily appeared for questioning. *See Chatfield*, 67 M.J. 438 (citing the lack of physical restraints and appellant's inability to identify an express order requiring appellant to appear in its finding that appellant voluntarily appeared for questioning despite claims that he "'felt compelled' to go to the station).

ii. The Police Interview Room's Environment was Peaceful and Permissive.

Appellant's testimony at the suppression hearing belies his current claims that the location and atmosphere of the CPD interview room were "highly coercive" (Appellant's Br. 49). Appellant admitted that he was free to move about the room and that he was never handcuffed. (R. at 122, 123). He testified that Sgt. [redacted] was the only person to interview him and that at no point Sgt. [redacted] yelled, stood over him, or employed any other strong-arm tactics. (R. at 123, 124). He further

testified that Sgt. [redacted] never informed appellant that he suspected appellant of committing a crime or that appellant was under arrest. (R. at 123). *See Stansbury* 511 U.S. at 325 (finding that an officer's belief, expressed by word or action, can inform how reasonable person would "perceive his or her freedom to leave.")

Additionally, upon completing his written statement, appellant was able to open the door of his own volition and notify Sgt. [redacted] of his completion. (App. Ex. XIII, p. 4). Thus, this court should conclude that the atmosphere of CPD interview room would not have led a reasonable person to "believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way." Mil. R. Evid. 305(b)(3).

iii. The Actual Interview Lasted Only Twenty-Three Minutes.

Sergeant [redacted] informed appellant upon his arrival to the police station that Sgt. [redacted] was the only person conducting interviews, and thus it would take him a while before he could speak with appellant. (App. Ex. VIII, Enclosure 6 at 00:34). Approximately two-and-a-half hours elapsed between appellant's entrance to the interview room and his interview with Sgt. [redacted] (R. at 76, 382). The interview itself was exceedingly brief and lasted only 23 minutes. (App. Ex. XIII, p. 11). As the military judge noted "The length of the interview does not suggest the accused was in custody as a suspect related to a murder or drug trafficking ring. A reasonable person in the accused's position would not believe they were under

formal arrest or equivalent restraint based on the length or manner of questioning." (App. Ex. XIII, p. 11).

Assuming arguendo that the interview encompassed the entirety of appellant's interaction with CPD officers, the two additional hours appellant spent awaiting Sgt. [redacted] arrival simply did not contribute to an atmosphere of coercion or intimidation. It is of no moment that appellant did not feel free to leave the couch or that Officer [redacted] testified that he would have denied appellant's hypothetical request to leave. (R. at 64, 119–120). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323. The record indicates that Appellant did not attempt to leave or request to do so, nor does it reflect that Officer [redacted] informed appellant that he was not free to leave. (R. at 64). At their worst, the objective circumstances of the alleged interrogation support the conclusion that appellant was subject to making stilted small talk with Officer [redacted] as they sat on his living room couch awaiting Sgt. [redacted] arrival.

Under the totality of the circumstances, "the atmosphere of the interview would have made it transparent to a reasonable person in Appellant's position that he was not subject to 'formal arrest or restraint on freedom of movement of the

degree associated with a formal arrest.'" *Chatfield*, 67 M.J. at 439 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

B. CPD Did Not Unlawfully Induce Appellant's Statement.

Appellant next alleges that his statement to CPD was the product of unlawful inducement in violation of Article 31(d), UCMJ, and therefore the military judge abused his discretion in failing to suppress his statement. (Appellant's Br. 50). Appellant waived this theory of suppression by failing to litigate it at his court-martial. Mil. R. Evid. 304(f)(1).

Even if the court considers the substance of this new argument, it is unavailing under the required plain error standard of review. *See United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Promises simply comprise a part of the totality of circumstances, not the beginning and the end of the test for voluntariness. *United States v. Freeman*, 65 M.J. 451, 455 (C.A.A.F. 2008). As described above, appellant made voluntary statements.

Appellant relies exclusively on this court's memorandum opinion in *United States v. Chatman* to argue that CPD unlawfully induced appellant to make a statement. (Appellant's Br. 51 (citing 2014 CCA LEXIS 353 (Army Ct. Crim. App. 2014) (mem. op.)). In *Chatman*, the investigator made numerous, specific promises of helping Private (PVT) Chatman with the prosecutor and the garrison commander. 2014 CCA LEXIS 353 at *30-31; *see also id.* at *14 (noting that the

military judge made a finding that the investigator promised immunity to PVT Chatman). Here, the only finding that appellant uses for his argument is that Sgt. [redacted] told appellant "nobody's getting arrested *tonight*; nobody's going to jail." (App. Ex. XIII, p. 4) (emphasis added). Unlike the *Chatman* investigator, Sgt. [redacted] kept his word: Appellant was not arrested that night, and neither Sgt. [redacted] nor any of his colleagues ever placed appellant under arrest. Appellant's exclusive reliance on an unpublished, dissimilar case that has never been cited by any court for the proposition that appellant now relies upon does not clearly establish an error. Thus, even if the military judge erred by not sua sponte suppressing the matter, the error was not plain. *United States v. Fisher*, 67 M.J. 617, 620 (Army Ct. Crim. App. 2009) ("an error is 'plain' when it is obvious or clear under current law"). The court should reject this new, meritless argument.

C. Appellant's Voluntary Statements to CPD were untainted by Any Alleged Prior Illegality and Exclusion of the Evidence would be Inappropriate.

Appellant's statement was not the product of any undue pressure or coercion. It was voluntary, and the Fifth Amendment does not compel its suppression. Even if the court found the initial entry into appellant's apartment improper, that entry was so attenuated from his statement as to have no effect. Indeed suppressing the statement would not further the goals of the exclusionary rule. Accordingly, the court should affirm the military judge's decision.

Assignment of Error III

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO CID.

Standard of Review

This court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *Rodriguez*, 60 M.J. at 246.

Law and Argument

Appellant argues that his statement to CID should be suppressed as fruit of a poisonous tree. (Appellant's Br. 56–58). This argument is flawed because the military judge found that CPD's search of appellant's apartment and his statement to CPD were both legal. (App. Ex. XIII, p. 9–11). The military judge concluded that CID legally obtained appellant's statement, thus making the statement admissible. (App. Ex. XIII, p. 11). This court should find that the military judge did not abuse his discretion by denying appellant's motion to suppress his statements to CID as the military judge's findings of fact were not clearly erroneous, and his legal conclusions were not based upon an erroneous view of the law.

The Supreme Court explained that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police," and that evidence should only be excluded when, "granting

establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 487–488 (1963).

I. Nearly a Month Elapsed between CPD's Allegedly Illegal Searches and Appellant's CID Interview.

Sergeant [redacted] did not interview appellant until 17 January 2017, approximately twenty-five days after appellant first spoke to CPD officers. (R. at 84). This nearly month long break more than doubled the length of time that the United States Supreme Court found sufficient to purge any taint in *Wong Sun*. 371 U.S. at 476 n.4 (Laying out the timeline of events, where petitioner was arrested without probable cause on 4 June, arraigned and released on 5 June, gave an oral statement on 9 June, and a written statement on 15 June). The Supreme Court allowed the admission of the statement made eleven days after the illegal arrest of that petitioner because "Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement," thus "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Wong Sun*, 371 U.S. at 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). Here, appellant came to CID for questioning twenty-five days after any alleged illegality by a

completely distinct law enforcement entity, the civilian CPD. This significant delay attenuates any illegality.

II. Intervening Circumstances Further Dissipated the Effects of the Alleged Illegality.

The facts and circumstances of appellant's CID interview clearly constitute intervening circumstances sufficient to attenuate the taint of the earlier alleged illegalities. Appellant—nearly a month after talking to Sgt [redacted] of CPD—provided his statement to a different investigator, in a different location, who worked for a different agency, about an entirely different crime. (R. at 85). In addition, SGT [redacted] advised appellant of his Article 31, UCMJ rights prior to their interview. (App. Ex. VIII, p. 21).[23] Moreover, SGT [redacted] possessed information that Sgt. [redacted] did not: SPC MF's CID statement acknowledged appellant's role in Mr. JG's marijuana distribution schemes. (App. Ex. VIII, p. 17). Additionally, the record does not reflect that SGT [redacted] coordinated with CPD prior to interviewing appellant; rather it seems that SGT [redacted] merely reviewed CPD's reports when the case was "reassigned to [him]." (R. at 84). This case is similar to *Angevine*, where a cleansing statement combined with "the time lapse, change of investigators, change of

[23] SGT [redacted] advised appellant of his Article 31, UCMJ rights, because—unlike his civilian counterpart Sgt. [redacted] SGT [redacted] suspected appellant of criminal misconduct and planned to ask him accusatory questions. (R. at 76). Furthermore, the standards triggering rights advisement in a civilian setting vs. a military environment are distinct.

location, the absence of [offending investigator], and the absence of any *discussions* between [offending investigator] and [subsequent investigator] regarding prior developments" convinced the court that appellant's subsequent confession was not the "'poisoned fruit' of illegally obtained evidence." 16 M.J. at 521. Although SGT [redacted] did not provide appellant with a cleansing statement per se, he did not refer to the CPD investigation during the interview and he did read appellant his Article 31 rights. (R. at 88). Furthermore, appellant spoke with CID twenty-five days after his initial conversation with CPD, whereas the appellant's subsequent conversation in *Angevine* took place only five hours after the initial illegal seizure. 16 M.J. at 520. Appellant's case is readily distinguishable from *Brown*, and this court should find that there were significant intervening circumstances that rendered appellant's CID free from the alleged taint of prior CPD actions.

Assignment of Error IV

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH THE ILLEGAL SEARCH AND SEIZURE OF APPELLANT'S CELL PHONE.

Additional Facts

I. Specialist MF's CID Statement Established the Nexus Linking Appellant's Cellular Phone to Marijuana Distribution.

Sergeant [redacted] prepared for his interview of appellant by reviewing CPD's preliminary reports and SPC MF's CID sworn statement. (R. at 85). The CPD reports indicated that approximately three ounces of marijuana, an amount more consistent with distribution than personal use, were discovered in appellant's apartment. (R. at 400). Specialist MF claimed that Mr. JG called appellant to provide him with instructions to complete drug transactions on Mr. JG's behalf whenever he was not home to conduct the transactions himself. (App. Ex. VIII, p. 17). Specialist MF's admission that she never personally witnessed the transactions is inconsequential because "[a] search authorization may be based upon hearsay evidence in whole or in part." Mil. R. Evid. 315(f)(2). Moreover, the military judge noted that "[n]one of the evidence before the court suggests that SPC [MF]'s statements lack credibility . . . ." (App. Ex. XIII, p. 9).

II. CID Interview of Appellant.

During his interview, appellant admitted that Mr. JG sold marijuana but denied that Mr. JG sold marijuana out of their shared residence or that he assisted Mr. JG with marijuana distribution. (App. Ex. VIII, p. 23). Appellant admitted to destroying the marijuana because "[he] did not want to get in trouble for it." (App. Ex. VIII, p. 22). Appellant also told SGT [redacted] that, "he coordinated with Mr. [JG] frequently [through appellant's] phone." (R. at 106). Appellant's self-serving denial of his role in marijuana distribution conflicted with SPC MF's allegation and thus SGT [redacted] logically sought a search authorization in order to review appellant's cellular phone and confirm whether SPC MF's allegations were true. (R. at 91).

III. SGT [redacted] Investigative Experience.

Sergeant [redacted] investigated approximately 500 drug cases during the course of his three and a half years as a member of Fort Campbell's Drug Suppression Team and testified that cellular phones were used to facilitate drug sales in every case he investigated. (R. at 106, 533).

IV. SGT [redacted] Search Authorization Affidavit.

Sergeant [redacted] testified that he orally briefed the military magistrate prior to drafting his search authorization affidavit. (R. at 91, 94). The first two lines of the written affidavit informed the military magistrate that appellant was a suspected

marijuana distributor and that civilian law enforcement recently caught him with three ounces of marijuana. (App. Ex. VII, p. 11). The final two sentences of the second paragraph established the nexus between appellant's criminal conduct and his cellular phone: "This office has received a sworn statement from a witness who states that [appellant] distributed narcotics. [Appellant] stated he contacts individuals by calling or texting, with his personal cellphone." (App. Ex. VII, p. 11).

Standard of Review

"The task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984). "[T]his determination is based in large part on facts found by the military judge, the review of which [appellate courts] conduct under a 'clearly erroneous' standard." *Leedy*, 65 M.J. at 213. As such, the military judge's findings of fact are not disturbed "unless they are clearly erroneous or unsupported by the record." *Id.*

Law and Argument

In its review of a magistrate's determination of probable cause, a reviewing court applies a "totality-of-the-circumstances analysis." *Gates*, 462 U.S. at 238. As long "as the magistrate had a 'substantial basis for . . . [concluding]' that a

search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Id.* at 236 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). "It follows that where a magistrate had a substantial basis to find probable cause, a military judge would not abuse his discretion in denying a motion to suppress." *United States v. Macomber*, 67 M.J. 214, 219 (C.A.A.F. 2009).

The threshold for determining whether probable cause exists "requires more than bare suspicion, but something less than a preponderance of the evidence." *Leedy*, 65 M.J. at 213. Probable cause to search exists when there is a reasonable belief that the property sought is located in the place to be searched. Mil. R. Evid. 315(f)(2). "A search authorization may be based upon hearsay evidence in whole or in part." Mil. R. Evid. 315(f)(2). In determining whether there is probable cause, the military magistrate will apply a totality-of-the-circumstances test. *United States v. Mix*, 35 M.J. 283, 287 (C.M.A. 1992). A magistrate's determination of probable cause is entitled to "substantial deference." *United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004) (quoting *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996)); *see also United States v. Leon*, 468 U.S. 897, 914 (1984) (explaining that while reasonable minds can differ as to whether a particular affidavit establishes probable cause, a neutral, detached magistrate's determination receives "great deference"). "[I]n order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged

crime and the specific item to be seized." *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). A sufficient nexus exists when the facts and circumstances reveal a fair probability that evidence of a crime will be found in a particular place. *Id*.

I. The Military Magistrate had a Substantial Basis to Find Probable Cause.

Under the totality of the circumstances, the military magistrate had a substantial basis to find probable cause that appellant's cellular phone contained evidence of a crime. The facts, viewed in the light most favorable to the government, *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017), combined to establish a sufficient nexus between appellant's criminal conduct and his cellular phone. Thus, the military judge did not abuse his discretion when he denied appellant's motion to suppress evidence obtained from appellant's cellular phone.

The magistrate had a substantial basis upon which to believe that evidence of drug dealing would be found in appellant's cellular phone. The written search authorization indicated that (1) CPD recovered several ounces of marijuana packaged in a way to maximize profits from appellant's apartment, (2) that "witness interviews revealed that [appellant] was a known marijuana distributor," (3) that appellant admitted to destroying drug-related evidence in an effort to avoid punishment, and (4) that "a sworn statement from a witness . . . states [appellant]

distributed narcotics. [Appellant] stated that he contacts by calling or texting with his personal cell phone." (App. Ex. VII, encl. 1). The natural implication of these two lines, when read in context of the entire affidavit and SGT [redacted] briefing of the magistrate, is that appellant used his phone to facilitate his marijuana distribution. Although SGT [redacted] did not explicitly state the connection, "[t]he authorizing official is free to draw 'reasonable inferences' from the material supplied by those applying for the authority to search." *Gates*, 462 U.S. at 240. Accordingly, SGT [redacted] search affidavit sufficiently alleged a nexus between appellant's criminal conduct and his cellular phone. This alone provides the magistrate with at least probable cause to believe the search of the phone would provide evidence of drug dealing.

Further, in *Ornelas*, the United States Supreme Court held that "a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Id.* at 700. Sergeant [redacted] investigated approximately 500 drug cases during the course of his three and a half years as a member of Fort Campbell's Drug Suppression Team and testified that cellular phones were used to facilitate drug sales in every case he investigated. (R. at 106, 533). Accordingly, SGT [redacted] was entitled to rely upon his own extensive experience, in combination with the marijuana found in appellant's apartment and SPC MF's statement that Mr. JG called appellant to assist him with marijuana distribution, to conclude that

appellant's cellular phone contained evidence of appellant's marijuana distribution activities.

II. The Search and Seizure of Appellant's Cellular Phone was Not Fruit of Poisonous Tree.

As explained above, CPD lawfully entered and searched appellant's apartment under exigent circumstances. Accordingly, SGT [redacted] search of appellant's cellular phone was not fruit of the poisonous tree.

Additionally, discovery of appellant's text messages were inevitable under Mil. R. Evid. 311(c)(2). At the end of his conversation with CPD's Sgt. [redacted] appellant consented to Sgt. [redacted] request to create a digital copy of his phone. (App. Ex. XIII, p. 4). This digital copy would have included the contested text messages and thus the government would have inevitably discovered appellant's text messages through this alternate means.

III. The Contents Of The Phone Would Have Been Inevitably Discovered.

Appellant consented to a search of his phone by Sgt. [redacted] (App. Ex. VIII, Enclosure 6 at 3:41:06). As detailed above, the military judge did not err in suppressing the interview in which appellant consented to the duplication and search of his phone. Thus, even if the magistrate erred by granting the search authorization, a law enforcement agency already possessed all of that evidence. *See Dease*, 71 M.J. at 122.

Assignment of Error V

WHETHER APPELLANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY SUFFICIENT.

Standard of Review

Military appellate courts conduct a de novo review of factual sufficiency. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

This court should affirm the findings and sentence because the evidence is factually sufficient to support the finding of guilty for obstruction of justice.

Article 66(c), UCMJ, confers upon service courts a fact-finding power to "evaluate not only the sufficiency of the evidence but also its weight." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses," this court is convinced of appellant's guilt beyond a reasonable doubt. *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006) (citing *Turner*, 25 M.J. at 325). "In sum, to sustain appellant's conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and

coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005).

While weighing the evidence, a reviewing court must be mindful that it did not personally observe and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt does not require that the evidence be free from all conflict. *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010) (quoting *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006)).

I. The Evidence Was Factually Sufficient to Prove Appellant's Guilt beyond a Reasonable Doubt.

The officer panel convicted appellant of one specification of obstruction of justice. (R. at 689). The specification read as follows:

> In that [appellant], did at or near [location], on or about 23 December 2016, wrongfully endeavor to impede an investigation by [CPD], in the case of himself and [Mr. JG], by attempting to destroy evidence, to wit: marijuana, by flushing it down a toilet, such conduct being of a nature to bring discredit upon the armed forces.

(Charge sheet). The elements of the offense are:

> (1) That the accused wrongfully did a certain act;
> (2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;
> (3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (2016 ed.)[MCM], pt. IV, ¶96.b. Appellant only argues that the government failed to prove the second and third elements beyond a reasonable doubt. (Appellant's Br. 68). Accordingly, the remainder of this analysis focuses upon appellant's knowledge of the impending criminal proceedings and his intent to impede CPD's investigation.

A. Appellant's Reaction to the Police Presence Demonstrate His Awareness of the Impending CPD Investigation.

Appellant knew or should have known that he, Mr. JG, or SPC MF would soon face criminal proceedings. "If an accused acted to destroy evidence in a case of a certain person against whom he had reason to believe that there was or would be criminal proceedings, and with the intent to impede those proceedings, he has obstructed justice within the meaning of Article 134." *United States v. Lennette*, 41 M.J. 488, 490 (C.A.A.F. 1995). Appellant did not destroy the evidence until the police arrived, demonstrating a consciousness that he wanted to prevent the police from gathering the drugs as evidence. This court has previously affirmed cases where appellants flush marijuana when the police arrive. *See United States v. Clayton*, 2009 CCA LEXIS 365 (Army Ct. Crim. App. 18 May 2009) (mem. op.) aff'd without opinion at 28 M.J. 225 (C.A.A.F. 2009); *see also United States v.*

Ridgeway, 13 M.J. 742, 747 (A.C.M.R. 1982) (rejecting the defense assertion one cannot obstruct justice by destroying drugs prior to the initiation of formal proceedings). By his own admission, appellant saw police lights and attempted to flush marijuana down the toilet before the police came to his apartment. To suggest that this action was done for any purpose other than to impede his or his roommate's prosecution is fanciful.

Appellant's accurately cites to the Navy-Marine court's decision in *United States v. Hendricks* for the proposition that "mere concealment of one's misconduct is not obstruction of justice." 2008 CCA LEXIS 305 (N-M Ct. Crim. App. 16 Sep. 16 2008) (mem. op). While both cases involve service members throwing marijuana into toilets, *Hendricks* is inapposite because the cases differ on one dispositive aspect that compels different results: the purpose of the official action. In *Hendricks*, the appellant feared that his unit command team would discover the marijuana he kept in his room during an impending commander's "health and comfort inspection" of the barracks. *Id.* at *2. Hendricks overheard an officer tell another marine that there would be a health and safety inspection, and Hendricks consequently took his marijuana to another marine's barracks and dumped it in the toilet. *Id.* at *2–3.

The nature of the official action in *Hendricks*, an inspection, brings it in line with the CAAF's decision in *United States v. Turner*, 33 M.J. 40 (C.A.A.F. 1991).

In *Turner*, the CAAF examined the different purposes behind inspections and searches, and found that: "[a]n inspection . . . is not a tool for collection of evidence solely for criminal prosecution; rather, such an inspection 'may result in admonitions or adverse administrative action for a servicemember -- rather than in criminal prosecution.'" *Id.* at 41 (quoting *United States v. Bickel*, 30 M.J. 277, 285 (CMA 1990)). The CAAF further noted, "a military inspection, may be conducted without probable cause or individualized suspicion and is not 'an unreasonable intrusion.'" *Id*. (quoting *Bickel*, 30 M.J. at 285). In contrast, the CAAF found that "a search is made with a view toward discovering contraband or other evidence to *be used in the prosecution of a criminal action*. In other words, *it is made in anticipation of prosecution*." *Id.* at 41 (quoting *United States v. Lange*, 15 U.S.C.M.A. 486, 489, 35 C.M.R. 458, 461, (1965)) (emphasis added). "Given [the] dichotomy [between inspections and searches]," the CAAF found that appellant had not obstructed justice because her conduct amounted to impeding an inspection, not a criminal investigation. *Turner*, 33 M.J. at 42-3.

In the present case, appellant was undisputedly subject to a law enforcement search and not a commander's inspection, thus putting this case outside of *Turner's* ambit. Appellant, unlike the *Hendricks* marine, had police pounding on his door with his deceased, drug-dealing roommate lying in the freezing parking lot at the time he destroyed drugs. Although CPD's search was not specifically directed at

discovering appellant's misconduct, neither was it a generalized inspection directed at ensuring the readiness of an entire troop formation or the cleanliness of a housing area, such as those in *Turner* and *Hendricks*, respectively. *Turner*, 33 M.J. at 40; *Hendricks* 2008 CCA LEXIS at *2. Rather, CPD explicitly entered appellant's apartment because a "strong marijuana odor" emanated from his doorway, in combination with other previously discussed factors—most notably, the recent homicide of his roommate—gave the officers probable cause to believe that evidence of a crime would be found therein. (R. at 58, 61).

Unlike in *Turner* and *Hendricks*, appellant had reason to believe that there was, or that there would soon be, a criminal investigation into the drug dealing going on in Apartment 701, and that appellant himself would inevitably be involved as well. Additionally, as appellant looked out the window, he could have and should have known that there was going to be an investigation into his drug-dealing roommate. It was highly likely that appellant knew that CPD would seek to question him, as Mr. JG's roommate, and that "his possession of the [contraband] would be damning evidence against him", thus, "there can be no serious claim that appellant merely was trying to avoid detection or implication; rather, [the evidence] demonstrate[s], his conduct fell squarely within the elements of the military offense of obstructing justice." *Lennette*, 41 M.J. at 490–491.

Specialist MF woke appellant and asked him about Mr. JG's whereabouts, and appellant directed her to look out of his bedroom window to witness what he had already seen. (App. Ex. VIII, p. 22, 29). Specialist MF glimpsed out of the window towards the flashing police lights and then became tearful. (App. Ex. VIII, p. 22, 29). These factors, combined with the police officers announcing themselves at his front door and bedroom window, undoubtedly alerted appellant to the extreme likelihood that CPD officers were "on the scent" or "would inevitably learn information that would lead to a criminal investigation or charges." *Hendricks*, 2008 CCA LEXIS at *6. The fear that the CPD officers would discover the marijuana led appellant to stop and dispose of it before he answered the door. (App. Ex. VIII, p. 22, 29). "When a servicemember obstructs a search, one can clearly state that a criminal investigation is being impeded." *Turner*, 33 M.J. at 42. Thus appellant "had reason to believe there were or would be criminal proceedings pending." MCM, pt. IV, ¶96.b.

B. Appellant Intended to Impede CPD's Investigation by Destroying Evidence.

The CAAF, in *United States v. Athey*, dismissed the appellant's conviction for an obstruction of justice because "[s]omeone who never even foresees that a criminal proceeding may take place cannot intend to obstruct it." 34 M.J. 44, 49 (C.A.A.F. 1992). In contrast, appellant knew that a criminal investigation was, or would soon be, underway and thus, he intended to impede the investigation when

he threw the marijuana into the toilet. He looked out his window to see the flashing police lights and—with police pounding on his door—he destroyed fragrant marijuana. Accordingly, this court should find that the government has proven each element of obstruction of justice, and appellant's guilt, beyond a reasonable doubt.

Assignment of Error VI

WHETHER APPELLANT'S CONVICTION FOR FALSE OFFICIAL STATEMENT IS FACTUALLY SUFFICIENT.

Standard of Review and Law

Military appellate courts conduct a de novo review of factual sufficiency. *Bright*, 66 M.J. at 363; *Washington*, 57 M.J. at 399.

Argument

I. The Evidence Was Factually Sufficient to Prove Appellant's Guilt beyond a Reasonable Doubt.

The officer panel convicted appellant of one specification of false official statement for having falsely denied to SGT [redacted] his involvement with marijuana distribution. (R. at 689). The elements of the offense are:

> (1) That the accused . . . made a certain official statement;
> (2) That the document or statement was false in certain particulars;
> (3) That the accused knew it to be false at the time of signing it or making it; and
> (4) That the false document or statement was made with the intent to deceive.

MCM, pt. IV, ¶31.b. Appellant argues that the government failed to satisfy every element of the offense beyond a reasonable doubt but only provides substantive argument with respect to the first two elements. (Appellant's Br. 71–72). The following analysis addresses each of those elements in turn.

A. Appellant Made a Statement to SGT [redacted] During the Course of His Official Law Enforcement Duties.

During her interview with CID, SPC MF alleged that appellant assisted Mr. JG with marijuana distribution. (App. Ex. VIII, p. 17). Sergeant [redacted] reviewed SPC MF's statement prior to interviewing appellant and concentrated his investigative inquiries towards corroborating or dispelling SPC MF's allegation. (R. at 85, 88, 91). The officer panel astutely determined that appellant indeed made a statement to SGT [redacted] when SGT [redacted] testified that he sought a search authorization "after [*appellant*] *denied* to [SGT [redacted] that *he has never* [sic] *distributed marijuana*." (R. at 536) (emphasis added). Accordingly, the government, through SGT [redacted] admittedly awkward testimony, proved that appellant said, "'I never assisted [Mr. JG] with distributing marijuana at any time,' or *words to that effect*," beyond a reasonable doubt. (Charge Sheet) (emphasis added).

B. Appellant's Statement was Patently False.

Throughout eleven pages of trial transcript, SGT [redacted] explained his thorough analysis of appellant's cellular phone contents, which included reviewing approximately 30,000 text messages. (R. at 538-549). Special Agent [redacted] testified that on 13 December 2016, appellant received a text message from an individual offering to sell "smoke," which he knew from his experience to mean marijuana. (R. at 561). Special Agent [redacted] further testified that appellant provided the individual with Mr. JG's phone number, and appellant further gave Mr. JG the individual's phone number. (R. at 561). These text messages proved that—contrary to his official statement that he never assisted Mr. JG with distributing marijuana—appellant did, in fact, assist Mr. JG with marijuana distribution. Thus, appellant's statement to SGT [redacted] denying his involvement was patently false.

C. Appellant Knew the Statement was False When He Made It.

As mentioned above, appellant coordinated the sale of marijuana through a series of text messages on 13 December 2016. (R. at 561). Appellant knew that his subsequent statement to SGT [redacted] on 17 January 2017—denying ever-assisting Mr. JG with marijuana distribution—was indeed false.

D. Appellant Made the Statement with the Intent to Deceive

Appellant intended to deceive SA [redacted] when appellant denied assisting Mr. JG with marijuana distribution. "'Intent to deceive' means to purposely mislead,

to cheat, to trick another, or to cause another to believe as true that which is false." Dep't of Army Pam. 27-9, Legal Services: Military Judge's Benchbook, para. 3-31-1.d. (10 Sept. 2014) [Benchbook]. "It is not necessary that the false statement be material to the issue inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive . . . ." MCM, pt. IV, ¶31.c.(3). "The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive." MCM, pt. IV, ¶31.c.(4).

Sergeant [redacted] informed appellant via the rights waiver form that he suspected appellant of the wrongful use, possession, introduction, or distribution of a controlled substance; and appellant indicated that he understood the charges of which SGT [redacted] suspected him. (App. Ex. VIII, p. 21). The materiality of appellant's falsehood is readily apparent: SGT [redacted] investigation primarily focused upon whether appellant distributed. (R. at 535). Appellant's motivation to deceive is likewise obvious: Appellant wanted to escape criminal penalty.

Appellant's wistful reading of the evidence aside, the government proved appellant's guilt beyond a reasonable doubt. Accordingly, this Court should find that the evidence was factually sufficient to convict appellant of making a false official statement.

Assignment of Error VII

WHETHER THE DILATORY POST-TRIAL PROCESSING OF APPELLANT'S CASE WARRANTS RELIEF WHERE THE GOVERNMENT TOOK 362 DAYS BETWEEN SENTENCE AND ACTION.

Standard of Review

This court conducts a de novo review of both allegations of post-trial delay and claims of error related to post-trial delay. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011); *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Statement of Additional Facts

The trial adjourned on 10 August 2018. The convening authority took action on 27 August 2019, 382 total days from the time of sentencing. (Action). Appellant requested, received, and used twenty additional days to prepare post-trial matters, reducing the chargeable time to 362 days. (Memorandum for CPT Ellis, Subject: Request for Additional Time to Submit Matters under Rules for Courts-Martial (R.C.M.) 1105 and 1106, United State v. SGT Anthony R. Hale (25 Mar 19)). Appellant demanded speedy post-trial processing on 4 February 2019. (Demand for Speedy Post-Trial Processing).

Law and Argument

Claims of post-trial delay fall in two distinct categories: determining whether appellant suffered a due process violation under the Constitution, and

determining sentence appropriateness under Article 66(c), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006). Service members convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135. Unreasonable delay in post-trial processing is presumed where the convening authority's action is not taken within 120 days of the trial's completion. *Id.* at 142. A delay beyond 120 days, without other factors, triggers the four-factor analysis from *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Moreno*, 63 M.J. at 135. The four factors are: (1) the length of delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.*

Military courts examine prejudice, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Id.* at 138–39. With a meritless substantive appeal, an appellant would serve the same sentence regardless of post-trial delay, undermining an appellant's claim of prejudice. *Id.* at 139.

In this case, the first three *Barker* factors favor appellant. The fourth factor weighs in the government's favor because appellant fails to demonstrate prejudice. This court has found the presumption of unreasonable delay rebutted in similar

circumstances, where the only *Barker* factor favoring the government was lack of prejudice. *See United States v. Ney*, 68 M.J. 613, 616–17 (Army Ct. Crim. App. 2010).

In *Ney*, the delay exceeded the standard by 54 days, and all factors but prejudice weighed against the government, yet the court found that appellant did not establish prejudice and therefore was not deprived of due process. *Id.* Absent a finding of prejudice, this court should "find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Appellant cites no specific facts nor is harm alleged. (Appellant's Br. 75–76). His only claim of prejudice is that he will have been oppressively incarcerated *assuming* that this court sets aside his conviction. (Appellant's Br. 76). Absent a favorable ruling on the assignments of error in this case, appellant has not stated any reason why he has been prejudiced. *See Ney*, 68 M.J. at 617. Therefore, there is no due process violation.

Article 66(c), UCMJ, requires this court to "determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including . . . unreasonable post-trial delay." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In *United States v. Garman*, 59 M.J. 677, 682

(Army Ct. Crim. App. 2003), there was government delay of 248 days. However, because the delays in both *Garman* and *Ney* were not so egregious that it would adversely affect the public's perception of the fairness and integrity of the military justice system, appellants were not entitled to sentence relief in those cases. The factors in this case track those in *Garman* and *Ney*, and therefore this court should find —given the absence of prejudice—appellant has not established entitlement to relief.[24] Therefore, the court should not exercise its authority to grant sentence relief.

[24] The government acknowledges this court's recent opinions providing relief for excessive post-trial processing delays in other cases arising out of Fort Campbell, Kentucky. *See United States v. Diaz*, 2020 CCA LEXIS 154 (Army Ct. Crim. App. 11 May 2020) (summ. disp.) (providing relief for 308-day post-trial processing time); *United States v. Notter*, 2020 CCA LEXIS 150 (Army Ct. Crim. App. 4 May 2020) (mem. op.) (providing relief for 337-day post-trial processing time); *United States v. Ponder*, 2020 CCA LEXIS 38 (Army Ct. Crim. App. 10 Feb. 2020) (summ. disp.) (providing relief for 296-day post-trial processing time); *United States v. Kizzee*, 2019 CCA LEXIS 508 (Army Ct. Crim. App. 12 Dec. 2019) (summ. disp.) (providing relief for 274-day post-trial processing time). Irrespective of the results in those cases, appellant's sentence does not warrant similar relief.

Conclusion

WHEREFORE, the Government respectfully requests that this honorable court affirm the findings and sentence as approved by the convening authority.

[redacted]
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]
JONATHAN S. REINER
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]H. WILLIAMS
LTC, JA
Deputy Chief, Government
Appellate Division

FOR: STEV[redacted]IGHT
COL, JA
Chief, Government Appellate
Division

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to this Honorable Court and to Defense Appellate Division [redacted] on 13 July 2020.

[redacted]
Paralegal Specialist
Government Appellate Division