IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
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 February, 5 March, 5 April, and 8-10 August 2018 before a general court-martial appointed by the Commander, Headquarters, Fort Campbell, Lieutenant Colonel Matthew Calarco, Military Judge, presiding.

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

Assignments 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.

II.

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

III.

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

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.

V.

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

VI.

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

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Statement of the Case

An officer panel sitting as a general court-martial convicted Sergeant (SGT) Anthony R. Hale [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 112a, 134, and 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 912a, 934, and 907 (2012), respectfully. (R. at 689). The panel acquitted appellant of one specification of conspiracy to commit wrongful distribution of marijuana in violation of Article 81, UCMJ. (R. at 689).[1] The panel sentenced appellant to be reduced to the grade of E-1, forfeiture of all pay and allowances, 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 sentence as adjudged. (Action).[2]

[1] Prior to findings, the military judge granted a defense motion for a finding of not guilty with regard to 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 571, 582).

[2] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant also requests this Honorable Court consider the issues raised in Appendix A.

Statement of Facts

A. Appellant's Uninvited Guests

In the late evening hours of 22 December 2016, the appellant took his sleeping aid, ZzzQuil, and went to sleep. (R. at 567). However, rather than getting a restful night of sleep, SGT Hale was abruptly awakened around 0130 the following morning when three police officers were banging on his apartment door. (R. at 58, 112). At this time, the only occupants inside the apartment were appellant and Specialist (SPC) [redacted] who was the girlfriend of Joseph [redacted] appellant's roommate. (R. at 59). While walking towards the door, appellant noticed that his roommate had left some marijuana out on the coffee table. (R. at 375-76). He then put the marijuana in the toilet, and went to answer the door. (R. at 375-76).

Upon answering the door, three armed police officers entered the apartment and ordered SPC [redacted] and appellant to sit in the living room, at which point police officers conducted a search of the apartment.[3] (R. at 59-60). Prior to entering, the police did not ask for, nor did they receive, consent from either of the occupants to enter or search inside the apartment. (R. at 59). Officer [redacted] stated that it is common practice whenever they believe there are narcotics in a residence

[3] Officer [redacted] referred to this search as "a protective sweep of the residence, which is to ensure that no evidence would be destroyed in the residence until the investigation is complete." (R. at 59).

to do a "protective sweep to make sure that no evidence gets destroyed." (R. at 59-60). After the initial search is when he would typically ask for consent or apply for a search warrant if needed. (R. at 60). Neither was done in this case.

Officer [redacted] stayed in the living room guarding appellant and SPC [redacted] on the couch while the other officers searched the apartment. (R. at 59-60, 112). Officer [redacted] searched the bathroom, where he "noticed in the toilet that there [was] some green material that [he] suspected to be marijuana." (R. at 360-61). In addition to the marijuana in the toilet, Officer [redacted] found a freezer bag with marijuana inside sitting on the coffee table. (R. at 362-63).

After the initial search of the apartment was complete, Officer [redacted] went outside while the two remaining officers were left to guard SPC [redacted] and appellant on the couch. (R. at 61-63). While not formally under arrest, the appellant and SPC [redacted] were required to stay seated on the couch in order to "restrict movement to make sure that evidence could not be destroyed in the apartment." (R. at 63).

B. The Crime Scene

Prior to entering the appellant's apartment, Officer [redacted] a patrol officer with the Clarksville Police Department (CPD), had responded to a call for service at the parking lot of [redacted] (R. at 56, 337-38). Shortly after his arrival, he discovered a blood trail, a spent shell casing, and the body of [redacted]

[redacted] appellant's roommate, on the ground near the parking lot. (R. at 338-39). Officer [redacted] and his fellow officers first cleared the parking lot to ensure the area was safe. (R. at 339). Upon learning that [redacted] [redacted] lived nearby in apartment 701, the three officers went toward the door of that apartment. (R. at 58). Upon arriving at the door, Officer [redacted] claims he smelled an odor of "raw marijuana" coming from the apartment. (R. at 58). After knocking on the door, appellant answered after what Officer [redacted] claims was "an extended period of time," although he does not know how long it actually took. (R. at 342). After conducting the aforementioned search of appellant's apartment, Officer [redacted] returned to the parking lot to secure the homicide scene. (R. at 61-62, 347).

C. More Uninvited Guests

In the meantime, SGT [redacted] had been assigned as the lead investigator in the [redacted] [redacted] homicide. (R. at 67, 369-70). After receiving the call from his supervisor at approximately 0230, SGT [redacted] went to the parking lot. (R. at 371). He then reviewed the crime scene and entered the apartment to speak with SPC [redacted] and appellant around 0300 or 0330. (R. at 69, 79, 371). During this discussion, SGT [redacted] told them that [redacted] [redacted] was dead. (R. at 69). Appellant looked visibly upset and shaken. (R. at 79). While SGT [redacted] was questioning

[4] At the time of the investigation, [redacted] title was detective. At trial, his duty position had changed to patrol supervisor, and his title was SGT. For consistency, he is referred to as SGT [redacted] throughout this brief.

appellant and SPC [redacted] other officers began searching the apartment. (R. at 70, 372). According to Sergeant [redacted] he received consent from appellant and SPC [redacted] to search the apartment. (R. at 372, 386). While Officer [redacted] testified he smelled "raw marijuana" from outside the apartment building, Sergeant [redacted] in contrast, did not smell any marijuana while he was inside the apartment, even when he could see it close by on the coffee table. (R. at 80-81).

Sergeant [redacted] arrived to assist SGT [redacted] in the investigation. As part of his duties, SGT [redacted] searched appellant's bedroom. (R. at 434). Sergeant [redacted] testified that, near the closet entrance, "there was a black shoebox with a red Air Jordan symbol on it, and there was some green, plant material on top of that box." (R. at 434). He then took photographs and collected it as evidence. (R. at 447-48).

[redacted] was the on-call drug agent that day. (R. at 393). After hearing radio traffic, he contacted SGT [redacted] and went to the apartment to assist. (R. at 393). Upon his arrival, [redacted] went to the living room, where he examined and photographed a brown shoe box on the coffee table. (R. at 396-97). As he approached the shoe box, he saw a vacuum-sealed bag with another baggy inside that appeared to contain two to three ounces of marijuana. (R. at 399, 402). Next, [redacted] went into the bathroom and saw "a green, leafy substance in the toilet bowl." (R. at 404). He then took photos and collected some of the substance as evidence. (R. at 404).

D. The Police Station

While the search of the apartment was ongoing, SGT [redacted] arranged to have SPC [redacted] and appellant brought to the police station for further questioning. (R. at 73, 373). Sergeant [redacted] did not read appellant his *Miranda* rights because he did not think they were applicable. (R. at 76). During the interrogation, appellant answered questions about the homicide, as well as the marijuana that was found inside the apartment. (R. at 77, 375). In response to this questioning, appellant acknowledged that, when he had seen the police, "he had noticed some marijuana out on a table or something like that belonging to the deceased victim, so he didn't want him to get in trouble, so he went ahead and flushed it." (R. at 375-76). At the conclusion of the interrogation, appellant provided a written statement admitting the same. (App. Ex. VIII, encl. 5). Further investigation confirmed that [redacted] was a marijuana dealer, and that "a marijuana sale was a contributing factor in his death." (R. at 376).

E. The CID Investigation

The Fort Campbell Criminal Investigation Command (CID) initiated an investigation and assigned the case to SGT [redacted] a member of the drug suppression team. (R. at 84). On 17 January 2017, appellant was escorted to the CID office. (R. at 87). Sergeant [redacted] brought appellant into the interrogation room and advised him of his rights, which appellant waived. (R. at 87, 534). Appellant admitted to

putting marijuana in the toilet and provided a written sworn statement admitting the same. (R. at 89, 95, 535).

Over the course of the eight-hour interview, SGT [redacted] prepared a request for search authorization of appellant's cell phone. (R. at 91, 564). After receiving search authorization, SGT [redacted] collected appellant's cell phone. (R. at 95, 537). Subsequent to an extraction of the phone, SGT [redacted] reviewed approximately 30,000 text messages, as well as photos. (R. at 96, 548). Sergeant [redacted] would later testify at trial regarding incriminating text messages found on appellant's phone.

F. The Trial

Prior to trial, defense moved to suppress all of the evidence seized from appellant's residence, as well as the evidence derived from the initial search of the residence. (App. Ex. VII). After conducting a hearing under Article 39(a), UCMJ, the military judge denied the defense motion. (App. Ex. XIII).

At trial, the government admitted ten of the photographs [redacted] took at the apartment, which included photos of the marijuana in the toilet and the area of the coffee table where he observed the shoe box with marijuana inside. (Pros. Ex. 11; R. at 410). [redacted] also admitted that he was participating in a homicide investigation and would have done things differently if he was conducting a drug investigation. (R. at 413). Specifically, he would have taken all of the items himself back to the office and removed the marijuana from the baggies so that he

could put the baggies into a fume chamber to try to conduct latent print analysis. (R. at 413).

The government also admitted the package containing the suspected marijuana that was collected by [redacted] at the apartment. (Pros. Ex. 14; R. at 458). Special Agent (SA) [redacted] of the Tennessee Bureau of Investigation identified Pros. Ex. 14 as the package he received and tested, and testified that the plant material in all three bags was marijuana. (R. at 486, 488, 493).

Sergeant [redacted] and SGT [redacted] both testified that appellant admitted to them that he took the marijuana he found on the table and threw it in the toilet to avoid getting in trouble. (R. at 375-76, 535). Sergeant [redacted] also testified about a conversation in the text messages that stood out to him. (R. at 561). "During that conversation, there was an individual texting Sergeant Hale, offering that he had – in this case, he referred to marijuana as 'smoke.' He…was trying to sell smoke. Sergeant Hale referred Mr. [redacted] to this individual and provided the phone numbers for each person to the other – Mr. [redacted] to the individual and the individual's phone number to Mr. [redacted] – essentially referring Mr. [redacted] to the individual who was trying to sell marijuana." (R. at 561).[5]

[5] Additional facts are included as relevant to each assignment of error.

Errors and Argument

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.

Statement of Additional Facts

In its motion to suppress, defense asked that "all evidence seized during the illegal search of SGT Hale's apartment home, to include any and all witness testimony relating to the search, and all evidence derived from that search, including statements made by SGT Hale to CPD and later to CID…be suppressed under the 4th Amendment and MRE 311." (App. Ex. VII, p. 1).

The military judge held an Article 39(a) session on 5 March 2018. (R. at 52). The government's first witness was Officer [redacted] (R. at 55). Officer [redacted] explained that he was on duty on 23 December 2016, and was one of the first responders. (R. at 56). He arrived in response to a call from a woman who reported seeing an individual stumbling in the parking lot. (R. at 57). Upon his arrival, Officer [redacted] "found a vehicle with the driver's side door open and blood right outside the doorway of that vehicle." (R. at 57). He and other officers then followed a blood trail up to where he "located a body in front of the 700-building of [redacted] (R. at 57).

Officer [redacted] further testified that, at some point, an individual pulled up and stated that the deceased lived in apartment 701. (R. at 57). After checking on the deceased, Officer [redacted] went to apartment 701 in order to make contact with the occupants. (R. at 58). Officer BH testified that, while he was standing outside of the doorway of the apartment, "[t]here was a strong odor of raw marijuana coming from…that apartment up the entire building." (R. at 58).[6]

Officer [redacted] knocked on the door and spoke to the appellant after he answered. (R. at 58). While Officer [redacted] could not recall how entry of the apartment was made, he did know that he and his fellow officers "did not ask for consent to enter their apartment." (R. at 58-59). He explained that, "[b]ased on the strong odor of the marijuana coming from the apartment, we explained why we were there, also told them that based on the strong odor of marijuana that we would do a protective sweep of the residence, which is to ensure that no evidence would be destroyed in the residence until the investigation is complete." (R. at 59).

Officer [redacted] stated there were two occupants inside the apartment, who were later identified as the appellant and SPC [redacted] (R. at 59). He stated that, once

[6] The assertion that Officer [redacted] was able to smell raw marijuana stored in a vacuum-sealed bag within a freezer bag on a coffee table in the living room through the closed door of the apartment while standing outside is highly questionable, particularly when considering SGT [redacted] testimony that he did not smell any marijuana even while he was sitting right next to this sealed bag of marijuana in the living room. (See R. at 80-81, 399, 402).

inside, he and his fellow officers "had them sit in the living room and two other officers went and did a security sweep of the residence to make sure…nothing was being destroyed." (R. at 59). Officer [redacted] further testified that these protective sweeps are *common practice*, and that *anytime he smells marijuana or has "some other reason to believe that there are narcotics or something in the residence*, then we do the protective sweep to make sure that no evidence gets destroyed." (R. at 59-60) (emphasis added). After this sweep is done, that is the point at which Officer [redacted] would ask for consent, and then apply for a search warrant if necessary. (R. at 60).

After the so-called protective sweep, Officer [redacted] left two patrol officers inside while he went back to the crime scene. (R. at 61-62). These officers required appellant and SPC [redacted] to stay on the couch and did not allow them to move from that point forward. (R. at 63). Upon questioning by the military judge, Officer [redacted] testified that, if the two occupants had requested to leave, "they would not have been allowed to leave. With the—like I said, when it is frozen, nobody is allowed to come or go." (R. at 64).

The next witness called at the hearing was SGT [redacted] (R. at 67). After receiving the call, SGT [redacted] drove to the scene and spoke with the officers and supervisors in the area. (R. at 68). After assessing the scene, SGT [redacted] entered the apartment and spoke with the occupants. (R. at 69). He informed them that [redacted]

[redacted] was deceased, and then questioned them extensively in order to find out all he could about the victim that could assist in the homicide investigation. (R. at 69-70).

Sergeant [redacted] testified that the appellant gave consent to search the apartment. (R. at 71). He also testified that the department has a form that "several detectives use to document consent," but that form was not used to document appellant's consent in this case. (R. at 71). SGT [redacted] further stated that, if the appellant did not give consent to search the apartment, he would have applied for a search warrant, which he believed he would have been able to obtain. (R. at 72).

On cross-examination, SGT [redacted] admitted that he was a homicide officer who was concerned about investigating a homicide, and that "[t]he procedure would have been vastly different had we been looking for drugs." (R. at 80). In explaining this further, he stated that his intention was to conduct a homicide investigation, wherein they happened to come upon some drugs. (R. at 82) ("The accused was never charged with the drugs from the Clarksville Police Department; it was not a concern of ours.").

Specialist [redacted] also testified at the hearing. (R. at 111). She stated that she was awakened by police at the door of the apartment, who told her that she needed to go into the living room. (R. at 112). She complied with their orders, after which they told her to just sit there while they took her belongings, including

her phone. (R. at 112). Despite her and appellant's requests to find out what was going on, officers simply told them they did not have any information to give at the time, and that they were waiting for the detective. (R. at 112).

Finally, the defense called the appellant, who testified that he did not tell any police officers that they could search his residence on 23 December 2016. (R. at 118). He also stated that, during his time on the couch, and later at the police station, he did not feel like he was free to leave. (R. at 118). With regard to the actions while inside his apartment, appellant testified that the officers would not let him move from the couch. (R. at 121).

Law and Standard of Review

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion. *United States v. Eppes*, 77 M.J. 339, 344 (C.A.A.F. 2018) (citing *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017); *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010); and *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007)). When a military judge's ruling involves a mixed question of fact and law, his fact finding is reviewed under a clearly erroneous standard, while his conclusions of law are reviewed under a de novo standard. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995) (internal citations omitted). Therefore, the court will "reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of

the law." *Eppes*, 77 M.J. at 344 (quoting *United States v. Owens*, 51 M.J. 204, 204 (C.A.A.F. 1999)) (internal quotation marks omitted). In this case, the military judge's decision in denying the motion to suppress evidence seized in appellant's apartment was influenced by an erroneous view of the law.

"The Fourth Amendment provides, 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.'" *Id*. (quoting U.S. Const. amend. IV.). When a search is conducted pursuant to a valid warrant or search authorization, it is presumed to be reasonable. *Id*. (citing *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014)). In contrast, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Kentucky v. King*, 563 U.S. 452, 459 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

While warrantless searches are per se unreasonable, there are some "'specifically established and well-delineated exceptions,' one of which is 'a search that is conducted pursuant to consent.'" *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). Another exception applies when the exigencies of certain situations "make the needs of law enforcement so compelling that a warrantless search is

objectively reasonable." *King*, 563 U.S. at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

Argument

The evidence submitted with the defense motion, along with the testimony elicited during the hearing on 5 March 2018, clearly established that none of the responding officers obtained, or sought to obtain, a search warrant prior to, or after, entering appellant's apartment. While the parties contested the issue of consent with regard to later searches that were conducted by homicide investigators, there is no dispute that Officer [redacted] and the first responding officers did not have consent to conduct their initial entry and search of the apartment. (App. Ex. XIII, p.1; R. at 58-59). Therefore, with regard to the initial entry, the only issue to decide is whether the exigencies of the situation made the needs of law enforcement so compelling that the warrantless entry and search were objectively reasonable. *See King*, 563 U.S. at 460.

A. Officer BH entered the apartment under the guise of a "protective sweep for evidence" exception to the warrant requirement that does not exist.

Officer BH testified that he entered the apartment in order to conduct "a protective sweep of the residence, which is to ensure that no evidence would be destroyed in the residence until the investigation is complete." (R. at 59). The Court of Appeals for the Armed Forces (CAAF) has adopted the Supreme Court's test for protective sweeps as articulated in *Maryland v. Buie*, 494 U.S. 325 (1990).

See United States v. Keefauver, 74 M.J. 230, 235 (C.A.A.F. 2015) (stating "A protective sweep of the home requires specific, articulable facts and rational inferences from those facts supporting two beliefs: (1) that the areas to be swept harbor one or more individuals and (2) that the individual or individuals pose a danger to the agents or others.").

Officer BH's rationale for conducting his sweep of appellant's home is directly parallel to the rationale that CAAF rejected in *Keefauver*. *Id.* In that case, the officer conducting the search "did not testify that he believed at any point that additional individuals were present and dangerous. Rather, in perfect opposition to *Buie's* caution against 'automatic' sweeps, [the agent] stated the sweep was 'standard procedure.'" *Id.* Similarly, Officer BH did not testify as to any belief whatsoever that he thought there were any additional individuals in the apartment, and he certainly did not state any belief that anyone inside the apartment posed any sort of danger to anyone. (R. at 59-60).

Rather than provide any articulable facts to support a protective sweep of the residence, Officer [redacted] stated, "in perfect opposition to *Buie's* caution against 'automatic' sweeps," that this is standard procedure. *See Keefauver*, 74 M.J. at 235; (R. at 60) ("I mean, *that's the policy and practice* we use. *Any time* we are going to freeze a house for any type of suspicion of drugs, we *always* do a protective sweep of the residence.") (emphasis added). As CAAF has clearly

stated, "the presence or suspected presence of drugs without more does not justify a sweep." *Keefauver*, 74 M.J. at 236. Thus, since Officer BH stated that his only basis for conducting this sweep was because it was standard practice whenever he suspected drugs, the military judge erred in his ruling allowing the fruits of the illegal search into evidence. *See id.* ("To suggest, as the military judge did, that the mere presence of drugs justifies a protective sweep of the entire home would effectively eviscerate the exception to the Fourth Amendment contemplated by *Buie*, which was based entirely on the danger to agents.").

While the military judge correctly concluded that there was insufficient evidence to support the warrantless search under the protective sweep doctrine, he incorrectly invoked the exigent circumstances exception in order to salvage the government's case. (App. Ex. XIII, p. 7). As discussed below, Officer [redacted] never even suggested the idea that he believed there were exigent circumstances that made it necessary for him to search the home right at that moment, rather than freezing the scene and seeking a search warrant.

B. There were no exigent circumstances sufficient to justify a warrantless search of appellant's apartment.

1. Destruction of evidence was not imminent.

The military judge's decision in finding sufficient exigent circumstances that would allow Officer [redacted] to enter appellant's home is influenced by an erroneous view of the law. While the military judge cites the appropriate standard, he fails to

apply that standard to the facts of this case. (App. Ex. XIII, p. 8) (citing *Kentucky v. King*, 563 U.S. 452 (2011). Instead of articulating why the destruction of evidence inside appellant's apartment was imminent, the military judge makes a blanket statement that, "[a]s applied to the present case, 'the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search.'" (App. Ex. XIII, p. 8).

Aside from reciting the correct legal standard as "the need 'to prevent the *imminent* destruction of evidence,'" *King* does not provide significant guidance in this case. *Id*. at 460 (quoting *Brigham City*, 547 U.S. at 398) (emphasis added). The primary issue in *King* was whether the exigent circumstances rule applies when police, by doing some type of action like knocking on a suspect's door, essentially create the exigency by doing so. *Id*. at 455. In fact, the Court did not even decide whether exigent circumstances existed in the case, stating that "[a]ny question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand." *Id*. at 470-71.

On remand, the Kentucky Supreme Court ultimately held that "the Commonwealth failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry." *King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012). Significantly, the court noted that, at the suppression hearing, the officer repeatedly referred to "the 'possible' destruction of evidence" and "stated that he

heard people moving inside the apartment, and this was 'the same kind of movements we've heard inside' when other suspects have destroyed evidence." *Id.* Despite this testimony, the court was troubled by the fact that the officer "never articulated the specific sounds he heard which led him to believe that evidence was about to be destroyed." *Id.* "In fact, the sounds as described at the suppression hearing were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door." *Id.*

Officer [redacted] testimony in this case raises those same concerns. For example, Officer [redacted] similarly failed to articulate any reason why the destruction of evidence was imminent, or even probable, as opposed to possible. In fact, Officer [redacted] never testified as to any belief that he actually thought evidence might be destroyed. Instead, he repeatedly stated that, whenever he suspects drugs are present, he conducts a protective sweep as a precautionary measure to prevent any evidence from getting destroyed. (R. at 59-60) ("*Whenever* any residence we go to…if we smell the odor of marijuana or have some other *reason to believe that there are narcotics* or something in the residence, then *we do the protective sweep* to make sure that no evidence gets destroyed.") (emphasis added). Officer [redacted] clarified that even when he has no reason to believe that evidence is being destroyed, like in this case, he would still conduct the search. (R. at 60) ("I mean, *that's the policy and practice we use*. *Any time* we are going to freeze a house for

any type of suspicion of drugs, we *always* do a protective sweep of the residence.") (emphasis added).

In light of the fact that the military judge relied on *King* in reaching his conclusion that exigent circumstances existed in this case, a brief factual comparison is appropriate to provide context and show that, if exigent circumstances did not exist in *King*, they certainly do not exist here.

In *King*, officers were in pursuit of a suspect who had just completed a controlled buy of crack cocaine outside an apartment complex. *Id*. at 455-456. Officers were running through the breezeway when they heard a door shut, and then "detected a very strong odor of *burnt* marijuana." *Id*. at 456 (emphasis added). They were unsure which apartment the suspect had fled to, but since they had smelled marijuana *smoke* coming from the apartment on the left, they approached that apartment. *Id.* (emphasis added). The officers then started banging on the door and announcing they were police. *Id*. Rather than answer the door, the occupants began shuffling around and moving things inside. *Id*. "These noises…led the officers to believe that drug-related evidence was about to be destroyed." *Id*. Ultimately, officers kicked in the door and discovered three people inside, one of whom was *smoking* marijuana. *Id*. at 456-57 (emphasis added).

The facts presented in *King* are significantly different than the facts of this case. Here, Officer [redacted] was not in pursuit of any suspect when he approached appellant's apartment. (R. at 58). Rather, he had just found a deceased body, wherein it appeared that the man had been shot in the parking lot on his way home. (R. at 57-58). Officer [redacted] was heading to the deceased person's apartment to talk to potential witnesses who may be able to assist in the homicide investigation, rather than approaching a known drug dealer who had just committed a felony drug transaction. (R. at 58).

Another significant difference is the fact that, in this case, the responding officer did not smell *burning* marijuana. The smell of burning marijuana obviously indicates that at least some evidence is literally going up in smoke as time goes by. Still, as CAAF has already explained, "the presence or suspected presence of drugs without more does not justify a sweep." *Keefauver*, 74 M.J. at 236; *see also United States v. Acosta*, 11 M.J. 307, 312-13 (C.M.A. 1981) (finding exigent circumstances existed where the government showed more than the mere presence of *burning* marijuana).

CAAF's requirement for more than a general assertion about drugs being present is consistent with recent Supreme Court jurisprudence, where the Court has continued to reject per se rules that allow police to circumvent the warrant requirement simply because evidence is possibly getting stale or disappearing. *See*

Missouri v. McNeely, 569, U.S. 141, 144 (2013) (holding that the natural metabolization of alcohol in the bloodstream does not present a per se exigency justifying nonconsensual blood testing in drunk-driving cases).

The government had a much stronger argument for the warrantless blood-testing conducted in *McNeely* than it had for conducting the warrantless search of appellant's home in this case. The Court acknowledged the science showing that evidence in drunk-driving cases will continue to be less probative as more time passes. *Id.* at 152 ("Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results."). Still, despite this concern regarding the potential loss of evidence, the Court held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 165.

In contrast, Officer [redacted] did not even attempt to make any valid arguments like those presented by the government in *McNeely*. Instead, he simply relied on his argument that (1) he suspected drugs were present, (2) standard practice whenever he suspects drugs is to conduct a search, therefore (3) he went inside appellant's apartment and searched it. (See R. at 60) ("I mean, *that's the policy and practice we use*. *Any time* we are going to freeze a house for any type of

suspicion of drugs, we *always* do a protective sweep of the residence.") (emphasis added).

2. The Supreme Court rejected the "homicide exception" that the military judge improperly relied upon.

The military judge relied on two facts to support the warrantless search of appellant's apartment: (1) "an unsolved murder scene…*outside*," and (2) an "odor of [raw] marijuana" inside the apartment. (App. Ex. XIII, p. 8) (emphasis added). These facts are insufficient to justify the warrantless search. With regard to the marijuana smell, Officer [redacted] did not articulate any type of concern that evidence was being destroyed inside the apartment. (R. at 58-59). He merely wanted to perform a "protective sweep" just in case. (R. at 59).

With regard to his reliance on the fact that there was a murder scene outside the apartment, the military judge appears to invoke the so-called "homicide exception" to the warrant requirement that the Court has previously rejected. *Mincey*, 437 U.S. at 385 ("If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine.") (quoting *Chimel v. California*, 395 U.S. 752, 766 (1969)).

In finding that no exigent circumstances existed, the Supreme Court explained that there was no reason to believe evidence would be lost, destroyed, or

moved during the time it would take to secure a search warrant. *Id*. at 394. The Court noted that a police guard posted at the apartment minimized any possibility of that happening, and that "there [was] no suggestion that a search warrant could not easily and conveniently have been obtained." *Id*. Thus, the Court "declined[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id*. In this case, Officer [redacted] had already secured the actual homicide scene, which was outside in the parking lot, before entering the apartment. (R. at 57-58). He had other officers with him when he entered the apartment, at least one of which was left inside to guard appellant and SPC [redacted] until SGT [redacted] arrived. (R. at 59, 61). Therefore, there was no reason that Officer BH could not have sought a search warrant once the scene was secured.

Finally, it is also worth noting that, in *Mincey*, the apartment at issue was the scene of the homicide, whereas SGT Hale's apartment was merely in proximity to the scene of a homicide. (R. at 65-66) (Officer [redacted] confirmed that the body of [redacted] was in the parking lot). Throughout his testimony, Officer [redacted] never mentioned what, if any, evidence related to the homicide he had probable cause to believe would be found inside appellant's apartment. Thus, the military judge's reliance on the homicide exception is both legally and factually incorrect.

3. The Rule: freeze or seize, and get a warrant.

In his legal analysis, the military judge explains that "the Supreme Court…considered the legality of seizing a residence while in pursuit of an authorization to search, to prevent the removal or destruction of evidence." (App. Ex. XIII, p. 8) (citing *Segura v. United States*, 468 U.S. 796, 809 (1984)). Similarly, the military judge notes that the CAAF has also recognized the ability of law enforcement "to freeze a scene, with either probable cause or exigent circumstances, to procure search authorization." (App. Ex. XIII, p. 8) (citing *United States v. Hoffman*, 75 M.J. 120 (C.A.A.F. 2015) (internal citation omitted). Appellant agrees that, if there really was the smell of marijuana, the responding officers could have escorted appellant and SPC [redacted] outside of the apartment and prevented anyone from entering while they pursued a search authorization. The CPD clearly had the resources to do this, as there were already at least three officers on the scene, two of whom were guarding appellant and SPC [redacted] in the living room for some time. (R. at 61).

However, rather than require law enforcement to comply with the rule, the military judge simply stated his agreement with SGT [redacted] "that the circumstances of the scene provided probable cause upon which authorization to search would have been obtained had it been necessary." (App. Ex. XIII, p. 8). The problem with the military judge's analysis is that he relies on a "we would have been able to get a

warrant anyway" exception that the Supreme Court has consistently rejected. *See, e.g. Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *Chapman v. United States*, 365 U.S. 610 (1961).

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers*…When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 13-14 (emphasis added).

4. While hindsight is always 20/20, it is an improper basis for a warrantless search.

Finally, the military judge applies the benefit of hindsight to his analysis. (App. Ex. XIII, p. 8) ("It is worth pointing out, although unknown to Officer [BH] at the time, his instincts were right on."). In pointing this out, the military judge misses the point of the exclusionary rule and the last seventy years of Fourth Amendment jurisprudence. Obviously, police hunches will often be "right on," but

such justification would necessitate amending the Fourth Amendment to read: "…and no Warrants shall issue, but upon *hunches by law enforcement*, supported by *instincts*." Such a change would eliminate the Fourth Amendment altogether.

In light of the evidence and case law, the military judge's ruling that Officer BH was justified in entering and searching appellant's apartment based on the need to prevent the *imminent* destruction of evidence is clearly influenced by an erroneous view of the law and should be reversed.

C. The military judge's finding that appellant gave SGT [redacted] consent to search his apartment is unsupported by the record and clearly erroneous.

Appellant testified that he did not tell any police officers that they could search his residence on 23 December 2016. (R. at 119). Specialist [redacted] also testified that she did not observe any of the detectives or officers ask appellant for permission to search the apartment. (R. at 113).

In his analysis, the military judge fails to consider two important pieces of evidence that support appellant's and SPC [redacted] version of events. First, the police were not concerned about the drugs at all. (R. at 82) ("The accused was never charged with the drugs from the Clarksville Police Department; it was not a concern of ours.") This is clear from SGT [redacted] testimony. He readily admitted that his department has a form that is used to document consent, but he did not use it in this case. (R. at 71). Second, SGT [redacted] admitted that "[t]he procedure would have been vastly different had we been looking for drugs." (R. at 80). In light of

these facts, it is very likely that the detectives did not obtain verbal consent from appellant, and simply went about their investigation since they were not concerned about anything aside from the dead body outside in the parking lot.

D. Even if appellant did grant consent, it was not freely and voluntarily given under the totality of the circumstances.

"In order [t]o be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances." Mil. R. Evid. 314(e)(4). The military judge did not provide any analysis regarding the voluntariness of appellant's consent to search his apartment, other than a comment as to whether appellant was in custody for *Miranda* purposes at the time consent was requested. (App. Ex. XIII, p. 9). However, custody is not the test for voluntary search purposes. Had the military judge conducted the proper analysis, he would have concluded that the consent was not freely given under the circumstances, as "[m]ere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent." Mil. R. Evid. 314(e)(4).

The CAAF has adopted a six-factor test for determining whether a consent to search was voluntary or whether it was the product of duress. *United States v. Wallace*, 66 M.J. 5, 9 (C.A.A.F. 2008)*; see also Olson*, 74 M.J. at 134-35. When more factors weigh against a finding of voluntary consent, the court should find that there was not a valid consent. *See Wallace,* 66 M.J. at 13-14.

1. The degree to which the suspect's liberty was restricted.

At the time appellant allegedly gave consent to search, he had been forced to sit on his couch in the living room under armed police guard for approximately two hours before SGT [redacted] and SGT [redacted] escorted him into his bedroom. (R. at 59-61; App. Ex. VIII, encl. 2). When asked whether the occupants would have been free to leave if they had asked, Officer [redacted] testified that "they would not have been allowed to leave." (R. at 64). Because appellant's liberty was completely restricted, this factor weighs against a finding of voluntary consent.

2. The presence of coercion or intimidation.

After being restricted to the couch under armed guard for approximately two hours, homicide investigators entered the apartment and spoke with appellant. (R. at 69-70; App. Ex. VIII, encl. 2). After talking with SGT [redacted] appellant was then escorted to his bedroom by both SGT [redacted] and SGT [redacted] where they first requested verbal consent to retrieve appellant's gun from his closet. (App. Ex. VIII, encl. 2). According to SGT [redacted] report, SGT [redacted] obtained verbal consent from appellant to search the residence, and then he and another agent conducted the search. (App. Ex. VIII, encl. 2). Under these circumstances, where armed police officers escort an individual into his bedroom, coercion and intimidation are clearly present, particularly when this event occurs after police have already barged into the home

and ordered appellant to sit on his couch and not move. Thus, this factor also weighs against a finding of voluntary consent.

3. The suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors.

It is clear that appellant was never informed that he had a right to refuse to give consent. However, it may have been reasonable to the officers at the time since they had no plans whatsoever to consider prosecuting appellant for any drug offenses. (R. at 82). This attitude also explains why the officers neglected to use the department's standard form that is often used by detectives to document consent. (R. at 71). Had that form been used, it is likely there would be standard language telling the person their rights to refuse or limit the scope of the search. As SGT [redacted] stated, however, they were concerned about a homicide and "[t]he procedure would have been vastly different had we been looking for drugs." (R. at 80). This factor also weighs against a finding of voluntary consent.

4. The suspect's mental state at the time.

Appellant's mental state could not have been worse at the time he gave consent to search. He had just been awakened in the middle of the night by police, who immediately ordered him to sit on his couch and not move while they searched his apartment. (R. at 58-60). Appellant was not told anything about what had happened until hours later when SGT [redacted] arrived and told him that his roommate had been killed just outside. (R. at 69). Appellant was subsequently

escorted by two detectives to his bedroom where he was asked to consent to a search. At a minimum, appellant was exhausted, emotionally shaken by the situation, and scared. Anyone in these circumstances would have difficulties making rational decisions.

5. The suspect's consultation, or lack thereof, with counsel.

The appellant did not consult with counsel. The record is clear, based on the timeline of events, that appellant was never advised, nor provided an opportunity to consult with counsel.

6. The coercive effects of any prior violations of the suspect's rights.

As noted above, police officers exhibited a high degree of coercion and intimidation from their first encounter with appellant. First, after appellant answered the door, Officer [redacted] and two other officers barged into the apartment without asking for consent. (R. at 58-59). Upon entry, officers immediately began their "protective sweep" for evidence. (R. at 59). At the same time, these armed officers ordered appellant to sit on the couch "[t]o restrict movement." (R. at 63). As noted above, this initial encounter was a clear violation of the appellant's Fourth Amendment rights against unlawful searches and seizures. Police did not have a search warrant, consent, or exigent circumstances sufficient to allow them to enter the apartment without a warrant. *See United States v. Barden*, 9 M.J. 621, 626 (A.C.M.R. 1980) (holding that consent to search, even after advising appellant

of his rights, was involuntary where, at the time of the consent, appellant knew police had searched and discovered marijuana and heroin, he was in custody and restrained, and the advice was not given until after the illegal search).

Since all six factors weigh against a finding of voluntary consent, this court should find there was no valid consent and reverse this case. *See Wallace*, 66 M.J. at 13-14.

E. Even if this court were to find that appellant did voluntarily give SGT [redacted] consent to search, such consent did not purge the taint of the earlier unlawful search conducted by Officer [redacted]

Whenever evidence is derived from an unlawful search or seizure, it is generally considered "fruit of the poisonous tree," and not admissible at trial. *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (quoting *Wong Sun v. United States*, 371, U.S. 471, 488 (1963)). In *Conklin*, the court addressed the question of "whether consent to a subsequent search is the antidote to the poison created by an earlier unlawful search." *Id*. In holding that the appellant's consent did not purge the taint of the earlier unlawful search, the court noted that, "[a]lthough the subsequent consent may be a good treatment for the poison, it is not a panacea." *Id*.

In this case, the first unlawful search occurred shortly after the responding officers barged into appellant's apartment when they found marijuana in the toilet and on the coffee table. (R. at 360-62). Even if the court concludes that

appellant's subsequent consent to SGT [redacted] to search the apartment was voluntary, such "consent to search does not cure all ills." *Id*. at 338.

In *Conklin*, the CAAF adopted a three-prong test derived from the Supreme Court's analysis in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) "'[t]o determine whether the defendant's consent was an independent act of free will, breaking the causal chain between the consent and the constitutional violation.'" *Conklin*, 63 M.J. at 338 (quoting *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002)). These factors include "'(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*.

1. The temporal proximity of the illegal conduct and the consent.

The temporal proximity between the first illegal entry and search by first responders, and the alleged consent to SGT [redacted] was a matter of a few hours. Officer BH arrived at the apartment complex shortly after 0109, and SGT [redacted] arrived at approximately 0247. (R. at 338; App. Ex. VIII, encl. 2).

2. The presence of intervening circumstances.

There were no intervening circumstances. There were certainly not any "intervening circumstances sufficient to remove the taint from the illegal search." *Conklin*, 63 M.J. at 339. From the time he entered the apartment, Officer [redacted] ordered appellant to stay on the couch in the living room. (R. at 59-60). At this

time, he and his fellow officers conducted the "protective sweep for evidence" in which they discovered marijuana in the toilet. (R. at 59-60). Appellant then remained on the couch under armed guard until SGT EE arrived, questioned him, and escorted him into his bedroom with another officer, at which point appellant supposedly consented to a subsequent search. (R. at 372; App. Ex. VIII, encl. 2). Sergeant EE would not have been interested in talking with appellant about the drugs in the toilet "but for the information relayed to [him] as a direct result of the unlawful search that had just taken place." *Conklin*, 63 M.J. at 339.

3. The purpose and the flagrancy of the initial misconduct.

Based on their testimony at trial, it seems there was not necessarily any bad motive on behalf of the CPD officers involved. They had discovered a homicide outside and were concerned with solving that crime. (R. at 82) ("It wasn't our intention at that time to obtain illegal drugs. Our intention was to conduct a homicide investigation and the drugs just happened to be found…The accused was never charged with the drugs from the Clarksville Police Department; it was not a concern of ours."). Still, with regard to the ultimate prosecution of appellant for a drug case, their actions were clearly flagrant, avoidable, and unlawful. (R. at 80) ("The procedure would have been vastly different had we been looking for drugs.").

Under the circumstances of this case, it is clear that, but for the illegal entry, search, and seizure of the appellant, he would not have given consent to search his apartment or his bedroom. He was awakened in the middle of the night, subjected to a nonconsensual entry by police into his home, where he was forced to sit on his couch under guard until homicide investigators escorted him to his room and asked for consent. As the CAAF explained, in cases where "'appellant's consent, albeit voluntary, is determined to have been obtained through exploitation of the illegal entry, it can not be said to be sufficiently attenuated from the taint of that entry.'" *Conklin*, 63 M.J. at 339 (quoting *United States v. Khamsouk*, 57 M.J. 282, 290 (C.A.A.F. 2002)).

Because the initial search inside appellant's apartment was illegal, and the subsequent "consent was not 'an independent act of free will' sufficient to cure the poisonous effects of the unlawful search," any evidence found subsequent to that initial search must be suppressed. *Id*. at 340 (quoting *Hernandez*, 279 F.3d at 307).

F. The military judge committed prejudicial error in ruling that the Government would have satisfied its burden under the inevitable discovery doctrine.

In order for the doctrine of inevitable discovery to apply, "the Government had to demonstrate 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' *in a lawful*

manner." *Wicks*, 73 M.J. at 103 (quoting *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012)) (emphasis added). Put simply, the doctrine "'requires a court to determine, viewing affairs as they existed *at the instant before the unlawful search*, what would have happened had the unlawful search never occurred.'" *United States v. Keefauver*, ARMY 20121026, 2015 CCA LEXIS 553, *8 (Army Ct. Crim. App. 25 Nov. 2015) (mem. op. on further review) [7] (quoting *United States v. Alexander*, 540 F.3d 494, 502 (6th Cir. 2008)) (emphasis added).

While there were multiple illegal searches conducted in appellant's home, the first "illegality occurred" when Officer [redacted] entered the apartment with neither consent, exigent circumstances, nor a search warrant. While the military judge cited the legal standard, he failed to conduct the proper analysis in reaching his conclusion that all of the evidence seized from appellant's apartment would have been inevitably discovered. (App. Ex. XIII, p. 9-10). As the CAAF has noted, "'mere speculation and conjecture' as to the inevitable discovery of the evidence is not sufficient when applying this exception." *Wicks*, 73 M.J. at 103 (quoting *United States v. Maxwell*, 45 M.J. 406, 422 (C.A.A.F. 1996)).

Because the first illegal search happened when Officer BH entered appellant's apartment, the court must consider what police officers knew at that particular time in deciding whether police would have inevitably discovered all of

[7] A copy of this opinion is provided as Appendix B.

the evidence later seized from the apartment. *See Wicks*, 73 M.J. at 103. At the time he arrived at the apartment, Officer [redacted] knew that there was a dead body and a shell casing in the parking lot, and then he supposedly noticed the odor of raw marijuana outside the apartment building. (R. at 57-58).

Officer [redacted] never made any attempt whatsoever to try to obtain a search warrant. Instead, he and other officers conducted their "protective sweep for evidence." (R. at 59). Even after the sweep, Officer [redacted] could have called his superiors to start the process of obtaining a warrant, but he declined to do so. Instead, he left armed police officers to guard appellant and SPC [redacted] until SGT [redacted] arrived. (R. at 61-62). Thus, there was certainly time in which the police could have obtained, or at least started the process of obtaining, a search warrant from a neutral and detached person who would lay out the scope and limitations of any potential search conducted within the apartment.

Similarly, SGT [redacted] after his late arrival, could have begun the process of submitting an affidavit for a search warrant. Once again, no one even considered the idea of seeking a search warrant. Instead, SGT [redacted] and SGT [redacted] escorted appellant to his bedroom where they supposedly convinced him to consent to a search of his apartment. (App. Ex. VIII, encl. 2).

In fairness to SGT [redacted] he was not concerned about the proper procedures and preservation of evidence in building a drug case against appellant. (R. at 82).

Rather, he was investigating a homicide and was not worried about the exclusionary rule applying to marijuana that belonged to the dead man in the parking lot. (R. at 376) (SGT EE testified that Joseph Gordon was a marijuana dealer, and "a marijuana sale was a contributing factor in his death.").

In his ruling on inevitable discovery, the military judge relied on his finding that there was an "odor of marijuana emanating from the apartment, and [law enforcement] would soon possess the statement of SPC [redacted] (App. Ex. XIII, p. 9) (emphasis added). The military judge's reliance on SPC [redacted] future statement is misplaced for two reasons. First, that statement was provided to CID agents on 4 January 2017, twelve days after the illegal search. (See App. Ex. VIII, encl. 3). Second, that statement was only taken as a result of CID opening an investigation into appellant based on the evidence and information provided to them by CPD after the search of appellant's apartment. (See App. Ex. VIII, p. 4). Thus, in "viewing [the] affairs as they existed at the instant before the unlawful search," CID would have never obtained the statement from SPC Freeman. *See Keefauver*, 2015 CCA LEXIS 553, at *8.

Once SPC [redacted] statement is properly removed from the equation, the only evidence forming the basis of probable cause to search appellant's apartment was the odor of raw marijuana that was apparently detected by the trained nose of Officer [redacted] But as this court has previously explained, "[e]ven if the mere smell

of the marijuana then constituted probable cause, the inevitable discovery doctrine 'cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant.'" *Keefauver*, 2015 CCA LEXIS 553, at *8, n. 3 (quoting *Wicks*, 73 M.J. at 103) (emphasis in original). For the same reasons this court found that the inevitable discovery doctrine could not "rescue" the evidence at issue in *Keefauver*, the military judge committed prejudicial error in invoking the doctrine to rescue the government's evidence in this case. *See Keefauver*, 2015 CCA LEXIS 553, at *9. He improperly relied on a future witness statement that was only obtained as a result of the illegal search in the first place.

In order to avoid relying on speculation and conjecture of law enforcement officers reviewing their decisions after the fact, the federal circuits have placed similar requirements on the government to show that police had taken steps toward obtaining a warrant for the inevitable discovery exception to apply. *See, e.g.*, *United States v. Souza*, 223 F.3d 1197, 1203 (10th Cir. 2000) ("While the inevitable discovery exception does not apply in situations where the government's only argument is that it had probable cause for the search, the doctrine may apply where, in addition to the existence of probable cause, the police had taken steps in an attempt to obtain a search warrant."); *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998) ("Such evidence might include proof that, based on independent

evidence available at the time of the illegal search, the police obtained and executed a valid warrant subsequent to that unlawful search or took steps to obtain a warrant prior to the unlawful search.") (internal citations omitted).

In rejecting the approach taken by the military judge in this case, the 9th Circuit warned that "[t]o excuse the failure to obtain a warrant merely because the officers had probable cause and *could* have obtained a warrant would completely obviate the warrant requirement." *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995) (emphasis added); *see also United States v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994) ("[T]o hold that simply because the police *could* have obtained a warrant, it was therefore inevitable that they *would* have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause.") (emphasis added).

The 2d Circuit has similarly held that, in situations:

> in which a claim of inevitable discovery is based on expected issuance of a warrant, the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search is of great importance. First, the extent of completion relates directly to the question of whether a warrant would in fact have issued; ultimate discovery would obviously be more likely if a warrant is actually obtained. Second, it informs the determination of whether the same evidence would have been discovered pursuant to the warrant. If the process of obtaining a search warrant has barely begun, for example, the inevitability of discovery is lessened by the probability, under all the circumstances of the case, that

> the evidence in question would no longer have been at the location of the illegal search when the warrant actually issued.

United States v. Cabassa, 62 F.3d 470, 473 (2d Cir. 1995). In reviewing the facts of the present case through the framework of *Cabassa*, it is clear that the Government could not have shown by a preponderance of the evidence that "government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence' in a lawful manner." *Wicks*, 73 M.J. at 103 (quoting *Dease*, 71 M.J. at 122).

First, the warrant process was never even begun in this case, and was, therefore, never obtained. Despite this glaring issue, the military judge found that, "[i]f the accused had not given consent to search the apartment, SGT [redacted] would have applied for a warrant. Based on his four years as a homicide detective, SGT [redacted] has no doubt he would have gained authorization to search the decedent's residence." (App. Ex. XII, p. 3). The military judge's reliance on SGT [redacted] assurances is misplaced for two reasons. First, this is precisely the type of ruling the Supreme Court determined "would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson*, 333 U.S. at 14. Second, and more importantly, SGT [redacted] speculation about a potential search authorization is irrelevant since he entered the apartment

hours after Officer BH conducted the first illegal search and seizure. *See Keefauver*, 2015 CCA LEXIS 553, at *8-*9.

Finally, it is not at all clear what a neutral and detached magistrate would have authorized regarding the scope of any type of search inside the apartment. Based on the facts known at the time, the only probable cause that existed for any crimes committed inside the apartment was the odor of raw marijuana that Officer BH supposedly smelled upon his arrival. Would a neutral magistrate have authorized a search of the entire apartment? Would it have been limited to a search of the homicide victim's bedroom? The common areas only? These questions should have been answered by a neutral and detached magistrate rather than a detective later guessing as to what he thought would have happened.

While the military judge gives significant weight to the fact that a homicide had occurred outside in the parking lot, there is no evidence to support the proposition that there was probable cause to believe any evidence of the homicide would be located anywhere inside the apartment. (App. Ex. XII, p. 9). Since the dead body and shell casing were both found outside in the parking lot, neither Officer [redacted] nor SGT [redacted] ever provided any testimony as to why they believed there would be probable cause to search the apartment, not to mention appellant's bedroom, for evidence of the homicide. Throughout the trial there was no evidence suggesting that appellant or SPC [redacted] were suspects. Rather than

provide any specificity as to what probable cause he had at the time, SGT EE simply speculated that, since there was a homicide outside, he would have been able to obtain a search warrant for the apartment. (R. at 73). Had the responding officers actually begun the warrant process and completed an affidavit, the government potentially could have had the evidence needed to meet its burden in showing how the evidence seized from appellant's bedroom and common areas would have inevitably been discovered. However, because there is no evidence to support the government in meeting its burden, this court should find that the military judge abused his discretion in failing to apply the exclusionary rule to the illegally obtained evidence in this case.

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

Statement of Additional Facts

While SGT [redacted] began his witness interviews of appellant and SPC [redacted] at the scene initially, he later transitioned to his office "for more of a formal interview setting." (R. at 73). His stated plan was for them to go to his office so they could provide written statements and answer more questions regarding the homicide investigation. (R. at 74). SGT [redacted] testified that appellant and SPC [redacted] were not arrested, although they were driven to the station by law

enforcement officers. (R. at 74). While he does not recall the specific wording or verbiage, SGT [redacted] stated that he "asked if [appellant] would come down and speak with me at my office." (R. at 75).

Upon their arrival at the station, appellant "was placed in an interview room where he sat alone for approximately two hours and forty-three minutes." (App. Ex. XIII, p. 4). When asked whether the appellant was ever informed whether he could come and go from that room, SGT [redacted] through his unresponsive answer, confirms he was not. (R. at 75) ("I'm not sure if we specifically said it because there was never an inference that he was in custody during my interaction with him. He was providing me information in my homicide, he wasn't under investigation.").

After he eventually returned to the interview room with appellant, SGT [redacted] did not read him *Miranda* warnings. (R. at 76). When asked why not, SGT [redacted] testified that he did not believe they were applicable because "he wasn't in custody and I wasn't asking accusatory questions." (R. at 76). However, during that same interview, SGT [redacted] did question appellant about drugs that were found in the apartment. (R. at 77) ("I may have indicated to him the importance of the homicide investigation relative to the drugs, and the drugs were of a minimal importance compared to the homicide investigation at that time"). After conducting a face to face interview, SGT [redacted] asked appellant to write a statement

about what they had discussed. (R. at 77). In this written statement, appellant admitted that, upon seeing the flashing lights and police at his door, he noticed his roommate had left some "weed" on the table, so he put it in the toilet before answering the door. (App. Ex. VIII, encl. 5).

Appellant testified that he did not feel like he was free to leave at any time, from the time he was ordered to sit on his couch under guard up until he was released by SGT [redacted] (R. at 119). On cross-examination, when asked whether he was told or asked to go downtown, appellant responded that "[t]he police officer said, 'I need you to come downtown, like come to the police station for questioning.' So in my head it wasn't a request to come down, like, it was more a demand to come." (R. at 121).

Law and Standard of Review

"A military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion." *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009) (citing *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003)). A military judge's findings of fact will not be disturbed "unless they are clearly erroneous or unsupported by the record." *Id.* (citing *Leedy*, 65 M.J. at 213). In considering a military judge's conclusions of law, the court will conduct a de novo review. *Id.*

"The Fifth Amendment provides that 'no person shall be compelled in any criminal case to be a witness against himself.'" *Id.* (quoting U.S. Const. amend. V.). In *Miranda v. Arizona*, "the Supreme Court held that 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'" *Chatfield*, 67 M.J. at 437 (quoting *Miranda*, 384 U.S. 436, 444 (1966)). In clarifying what these safeguards include, the Court established a requirement that, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

Argument

A. Appellant was subject to custodial interrogation and was therefore entitled to procedural safeguards to secure his privilege against self-incrimination.

Custodial interrogation is defined as "questioning that takes place while the accused or suspect is in custody, *could reasonably 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) (emphasis added). In considering all of the circumstances surrounding an interrogation, the CAAF has followed the Supreme Court's guidance in conducting two inquiries in making 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.'" *Chatfield*, 67 M.J. at 437 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

"The Supreme Court has looked to several factors when determining whether a person has been restrained, 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 (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

1. Appellant did not appear for questioning voluntarily.

The military judge erred in his analysis of the custody issue by focusing solely on the questioning that occurred in the police station, rather than the entirety of the interrogation conducted by SGT [redacted] which spanned several hours since the questioning began the moment SGT [redacted] entered the apartment somewhere around 0235, and did not end until 0823 when appellant completed his written statement. (R. at 69-70, 371; App. Ex. VIII, encl. 5). As previously noted, Officer [redacted] and two other officers entered the apartment in the early morning hours and ordered appellant and SPC [redacted] to sit on the couch under armed police guard until SGT [redacted] arrived. (R. at 64) ("At the time, they were needed for the investigation. I

told them that Detective [redacted] would be there soon because he was the homicide investigator and he would talk to them about the investigation.").

Once SGT [redacted] did arrive at the apartment, neither he nor anyone else advised appellant that he was then free to leave. Instead, SGT [redacted] began asking appellant questions immediately, and continued this questioning for an extensive period of time. (R. at 70). When asked what information he sought from appellant, SGT [redacted] did not recall specifically but stated "it was voluminous." (R. at 70). During this period of questioning, SGT [redacted] also escorted appellant to his room with at least one other officer and supposedly convinced appellant to agree to let them conduct a search. (App. Ex. VIII, encl. 2).

After the questioning at the apartment was complete, SGT [redacted] arranged for law enforcement officers to drive appellant and SPC [redacted] to the police station for further interviews and written statements. (R. at 74). Appellant was not given the option, but was told he needed to come downtown, so he complied. (R. at 121). The appellant and SPC [redacted] were then escorted to the police car and driven to the station. (App. Ex. XIII, p. 3). Upon arriving at the police station, appellant "was placed in an interview room where he sat alone for approximately 2 hours and 43 minutes." (App. Ex. XIII, p. 4). In light of the totality of the circumstances, it is clear that appellant did not appear voluntarily for questioning at either his apartment or the police station.

2. The location and atmosphere of the place in which questioning occurred was highly coercive.

Appellant had been restrained by armed police in his apartment on his couch from the time Officer [redacted] entered up until the time SGT [redacted] arrived and began questioning him. The next location where questioning occurred was an interrogation room at the Clarksville police station. (R. at 75).

While SGT [redacted] is adamant that the appellant was not a suspect, he was clearly on notice that appellant was concerned about his connection with the marijuana found in the apartment. (App. Ex. XIII, p. 4) ("At one point during the interview the accused expresses concern that he may get kicked out of the Army."). Instead of reading him his rights for drug possession, SGT [redacted] assured him he was not interested in the drugs, and convinced him to write out a confession to throwing the drugs in the toilet. (R. at 77; App. Ex. VIII, encl. 5). In reality, he probably said this because the police had no interest in prosecuting appellant for drugs. However, it is fundamentally unfair to allow the police to obtain incriminating statements in clear violation of *Miranda*, and then pass them on to army investigators for use at trial.

3. The length of the questioning was extensive.

It is unclear from the record how long SGT [redacted] spent questioning the appellant, since the questioning started in the living room of the apartment, followed by a break in questioning while appellant travelled to the station, which

was then followed by the 2 hours and 43 minutes that appellant spent in the interview room prior to SGT [redacted] return. However, it is clear that the questioning lasted over the course of several hours. The military judge incorrectly found that appellant was questioned for approximately 23 minutes, as this number fails to include the questioning at the apartment, which SGT [redacted] characterized as "voluminous." (App. Ex. XIII, p. 4; R. at 70).

In light of the fact that appellant did not appear for questioning voluntarily, along with the evidence showing a significantly coercive location and environment for this questioning, this court should find that appellant's interview with SGT [redacted] was a custodial interrogation requiring the procedural safeguards embedded in the *Miranda* warnings.

B. Appellant's incriminating statements made to SGT [redacted] were involuntary and improperly admitted since they were unlawfully induced by promises that appellant would not be arrested.

During the course of the interview at the police station, SGT [redacted] unlawfully induced and influenced appellant into providing incriminating statements, wherein he admitted to putting the marijuana in the toilet. Prior to making his written statement, appellant had expressed concerns about his military career based on the drug issues. (App. Ex. XIII, p. 4). Rather than stop the interview and read appellant *Miranda* warnings for possession of drugs or obstruction of evidence,

SGT [redacted] simply continued the interview after telling him, "nobody's getting arrested tonight; nobody's going to jail." (App. Ex. XIII, p. 4).

Under Article 31(d), "[n]o statement obtained from any person in violation of this article, *or through the use of* coercion, unlawful influence, or *unlawful inducement* may be received in evidence against him in a trial by court-martial." UCMJ (emphasis added). In promising appellant that he would not be getting arrested, SGT [redacted] made the type of limited promise of immunity that this court rejected in *United States v. Chatman*, ARMY 20120494, 2014 CCA LEXIS 353 (Army Ct. Crim. App. 11 Jun. 2014) (mem. op.).[8] In that case, a military police investigator, *after properly advising him of his Article 31 rights*, made several statements to appellant, advising him that he had "influence with the prosecutor" and "discussed how appellant would not be charged for possessing stolen property." *Id*. at *5, *21-22 (emphasis added). In reviewing the totality of the circumstances in that case, this court found that the investigator's statements "constitute[d] unlawful inducement or unlawful influence resulting in an involuntary confession under Mil. R. Evid. 304(c)(3) and one obtained in violation of Article 31(d), UCMJ." *Id*. at *31-32.

As alluded to above, the main distinction between *Chatman* and this case is that, here, the interrogating officer did not provide rights warnings prior to

[8] A copy of this opinion is provided as Appendix C.

inducing the confession. (R. at 76) ("[B]ased on my knowledge training experience, the *Miranda* warning was not applicable."). SGT [redacted] merely continued his line of questioning that had begun hours earlier at the apartment. However, when appellant began expressing concerns about his career, SGT [redacted] pushed him to continue talking, assuring him that he had nothing to worry about because he was not going to be arrested or go to jail. (App. Ex. XIII, p. 4). Under the totality of the circumstances, this court should find that the military judge abused his discretion in failing to suppress this statement under Article 31(d) as the result of coercion and unlawful inducement.

C. Even if the court found appellant's statements to SGT [redacted] were voluntary, they should still be suppressed as the fruits of the illegal searches of the apartment.

Confessions that are "derivative of an illegal search or seizure in violation of the Fourth Amendment are generally inadmissible." *United States v. Spiess*, 71 M.J. 636, 641 (Army Ct. Crim. App. 2012). The exception to the general rule depends on whether "the government can establish the prior violation is sufficiently distinguishable from the later confession, so as to purge any taint from the illegality." *Id*. (citing *Brown*, 422 U.S. 590). In determining whether the government has met its burden in this regard, this court analyzes the three *Brown* factors that were articulated by CAAF in *Conklin*. *Id.* (citing *Conklin*, 63 M.J. at 338) ("The three factors are: 'temporal proximity of the unlawful police activity

and the subsequent confession, the presence of intervening circumstances, and, the purpose and flagrancy of the official misconduct.'").

1. The temporal proximity of the unlawful police activity and the subsequent confession.

The temporal proximity between the unlawful police activity and subsequent confession is minimal at best. As previously noted, the first illegal entry and search of the apartment occurred when Officer [redacted] arrived and ordered appellant to remain on the couch while officers conducted their "protective sweep for evidence." (R. at 59-60). The second stage of unlawful police activity occurred after SGT [redacted] and SGT [redacted] arrived and began questioning appellant and conducting more searches. Based on the timeline, the unlawful police activity was ongoing from the moment Officer [redacted] entered the apartment.

2. The presence of intervening circumstances.

There were no intervening circumstances. From the time he entered the apartment, Officer [redacted] had required appellant to stay on the couch in the living room. (R. at 59-60). At this time, he and his fellow officers conducted the "protective sweep for evidence" in which they discovered marijuana in the toilet. (R. at 360-61). Appellant then sat on the couch under armed guard until SGT [redacted] arrived and began questioning him. SGT [redacted] would not have been interested in talking with appellant about drugs in the toilet "but for the information relayed to [him] as a direct result of the unlawful search[es] that had just taken place."

Conklin, 63 M.J. at 339. Furthermore, at no point was appellant ever advised of his *Miranda* rights either before or during questioning.

3. The purpose and flagrancy of the official misconduct.

As mentioned previously, it appears there was not necessarily ill intent on behalf of the CPD officers involved. They had discovered a dead body outside and were only concerned with solving that crime. (R. at 82) ("The accused was never charged with the drugs from the Clarksville Police Department; it was not a concern of ours."). Still, with regard to the ultimate prosecution of appellant for a drug case, their actions were clearly flagrant, avoidable, and unlawful. As SGT [redacted] succinctly explained, "[t]he procedure would have been vastly different had we been looking for drugs." (R. at 80; see also R. at 82) ("We have specialized drug agents…that are very familiar with the Fourth Amendment and evidence requirements, and the necessity for consent, or search warrant, or the legality in obtaining illegal drugs. It wasn't our intention at that time to obtain illegal drugs. Our intention was to conduct a homicide investigation and the drugs just happened to be found during that investigation").

Because both the initial and subsequent searches inside appellant's apartment were illegal, and there were no other independent means leading to the interview questions posed by SGT [redacted] about appellant's connection with the drugs, appellant's statements must be suppressed as the fruits of the poisonous tree.

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

Statement of Additional Facts

On 24 December 2016, Sergeant [redacted] of the CPD contacted the Fort Campbell CID office and informed them of the investigation that took place at appellant's residence. (App. Ex. VIII, p. 4). Once CID initiated its own investigation, the case was assigned to SGT [redacted] (R. at 84). SGT [redacted] reviewed the CPD report and statements related to the investigation in preparation for his interview with appellant. (R. at 85). On 17 January 2017, appellant was escorted to the CID office. (R. at 87). SGT [redacted] then brought appellant into the interrogation room and advised him of his rights, which appellant waived. (R. at 87). During the interrogation, appellant admitted putting marijuana in the toilet in his apartment. (R. at 89). At the conclusion of the interrogation, appellant provided a written statement admitting the same. (R. at 95).

Law and Standard of Review

The law and standard of review are the same as identified in the second assignment of error above.

Argument

Appellant's statements to SGT [redacted] were inadmissible at trial as they were "derivative of an illegal search or seizure in violation of the Fourth Amendment." *Spiess*, 71 M.J. at 641. At this point, the fruit is even more poisonous since it now stems from, not only the illegal searches of appellant's apartment, but also from the unlawful confession that appellant provided to SGT [redacted]

But for the first illegal search conducted by Officer [redacted] appellant would not have been subjected to the second illegal search conducted in the apartment. Without the combined effect of the illegal searches in the apartment, SGT [redacted] would not have obtained the coerced confession from appellant. Finally, if SGT [redacted] had not obtained the coerced confession from appellant regarding the marijuana in the toilet, SGT [redacted] would have had no reason to ask appellant about it, and would not have obtained any incriminating statements from him.

Based on the number of constitutional violations committed by CPD officers, the government cannot meet its burden of establishing that the prior constitutional violations are "sufficiently distinguishable from [this] later confession, so as to purge any taint from the illegality." *See Spiess*, 71 M.J. at 641 (citing *Brown*, 422 U.S. 590). While appellant was advised of his rights, that advice was insufficient to remove the taint of the prior illegal searches and confessions.

The Supreme Court addressed this situation in *Brown*, where it found that the petitioner had first been subjected to an illegal arrest. 422 U.S. at 604. After the arrest, Brown was properly advised of his *Miranda* warnings and made two inculpatory statements. *Id*. at 591-92. His first statement occurred within two hours of his arrest, and the Court found there were no intervening circumstances. *Id*. at 604. Subsequently, the Court found that the second statement he provided later "was clearly the result and the fruit of the first." *Id*. at 605. In finding that *Miranda* warnings, by themselves, do not always purge the taint of an illegal arrest, the Court explains: "The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers…with his anticipation of leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination." *Id*. at 605 n.12 (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963)).

Here, appellant faced a similar situation. Having been subjected to an illegal search of his apartment, he willingly cooperated with SGT [redacted] in answering his questions, based in part on SGT [redacted] assurances that he only cared about the homicide and that appellant would not be arrested. By the time he ends up at CID and is finally advised of his rights for the first time, the fact that appellant had already given a confession to SGT [redacted] which he likely believed would be admissible, "bolstered the pressures for him to give the second [to SGT [redacted] or at

least vitiated any incentive on his part to avoid self-incrimination." *Id.* "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, [, search, or interrogation,] regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted." *Id*. at 602 (citing *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969)).

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.

Statement of Additional Facts

On 4 January 2017, SPC [redacted] provided a sworn statement to Investigator [redacted] at the Fort Campbell CID office. (App. Ex. VIII, encl. 3). In her written statement, SPC [redacted] stated, "As far as deals being made *I have never fiscally* [sic] *seen it done* but whenever [redacted] ([redacted] [redacted] wasn't home and Hollywood was home he would tell him someone is coming to the house and let him know what they needed." (App. Ex. VIII, encl. 3) (emphasis added). Specialist [redacted] also indicated that "Hollywood" is appellant. (App. Ex. VIII, encl. 3). When asked how "[redacted] would relay to "Hollywood" that someone was coming to buy drugs, SPC [redacted] stated, "He would call Hollywood to see if he

was at the house and would tell 'Hollywood' such and such wants this and they would go by the house and get it from Hollywood." (App. Ex. VIII, encl. 3).

The case was then assigned to SGT [redacted] (R. at 84). SGT [redacted] reviewed SPC [redacted] statement in preparation for his interview of appellant. (R. at 84). On 17 January 2017, SGT [redacted] obtained a sworn statement from appellant, consisting of a handwritten narrative followed by several pages of typed questions and answers. (App. Ex. VIII, encl. 4). Over the course of the interview, SGT [redacted] prepared a request for search authorization of appellant's cell phone. (R. at 91).

In preparing his request for search authorization, SGT [redacted] completed a standardized affidavit on a DA Form 3744. (App. Ex. VII, encl. 1). Under Block 1 of the form, SGT [redacted] wrote: "On 23 Dec 16, CPD located approximately 3 oz of suspected Marijuana in SGT Hale's residence. Witness interviews revealed SGT Hale was a known Marijuana distributor." (App. Ex. VII, encl. 1).

Under the second block of the affidavit, SGT [redacted] wrote: "This office has received a sworn statement from a witness who states SGT Hale distributed narcotics. SGT Hale stated he contacts individuals by calling or texting, with his personal cellphone." (App. Ex. VII, encl. 1). Appellant testified that he never discussed using his phone with SGT ZR. (R. at 119). There is also no mention of appellant using his phone in his written sworn statement. When confronted on this point, SGT ZR testified that this information "would be one that we talked about

verbally during the interview." (R. at 107). Despite this event having occurred 15 months prior, SGT [redacted] explained that he recalls it from memory, as it "would have been a documentation error on [his] part." (R. at 107).

In the next paragraph of the affidavit, SGT [redacted] explained how individuals involved with drugs sometimes use cellular phones:

> In previous instances where cellular telephone data was collected it has been determined that individuals who sell or purchase illicit controlled substances often take photographs of the drugs or money they are using to conduct their purchases with. It has also been identified that many individuals who conduct purchases via cellular telephone utilize various social media and security apps in an attempt to avoid detection. *Individuals who sell or purchase illicit controlled substances via cellular telephone frequently delete records of any transactions from call logs, text messaging and remove names from contact logs.*

(App. Ex. VII, encl. 1) (emphasis added).

In the final paragraph, SGT [redacted] provided his credentials and general law enforcement training. (App. Ex. VII, encl. 1). After swearing to the affidavit, SGT [redacted] received authorization from First Lieutenant (1LT) [redacted] who was apparently nominated to serve as a military magistrate in his first duty assignment, to search a particular iPhone belonging to appellant. (App. Ex. VII, encl. 1). Specifically, 1LT [redacted] approved a broad search of "the Cellular phone belonging to SGT Hale for

call log, contacts, text messages, pictures, images, instant messages, chat logs, and app data to include deleted files regarding the use possession and distribution of illegal substances." (App. Ex. VII, encl. 1).

After receiving the search authorization, SGT [redacted] coordinated to have a unit representative bring appellant's cell phone to him. (R. at 95). Subsequent to an extraction of the phone, SGT [redacted] reviewed approximately 30,000 text messages, as well as photos. (R. at 96). At trial, SGT [redacted] testified about a conversation that stood out to him:

> During that conversation, there was an individual texting Sergeant Hale, offering that he had – in this case, he referred to marijuana as "smoke." He had – he was trying to sell smoke. Sergeant Hale referred Mr. [redacted] to this individual and provided the phone numbers for each person to the other – Mr. [redacted] to the individual and the individual's phone number to Mr. [redacted] – essentially referring Mr. [redacted] to the individual who was trying to sell marijuana.

(R. at 561).

Law and Standard of Review

"A military judge's decision to find probable cause existed to support a search authorization as well as to admit or exclude evidence is reviewed for an abuse of discretion." *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (citing *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) and *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001)). "'An abuse of discretion

occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law.'" *Id.* (quoting *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)). However, "the legal question of sufficiency for finding probable cause [is reviewed] de novo using a totality of the circumstances test." *Leedy*, 65 M.J. at 212 (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

Ultimately, the court must decide "whether [the] military 'magistrate had a substantial basis for concluding that probable cause existed.'" *Nieto*, 76 M.J. at 105 (quoting *United States v. Rogers*, 67 M.J. 162, 164-65 (C.A.A.F. 2009)). In this case, the military judge's decision in denying the motion to suppress the fruits of the evidence seized from appellant's cell phone was influenced by an erroneous view of the law, as there was no substantial basis for concluding that there was probable cause to seize and search appellant's cell phone.

A. There was no particularized nexus linking Appellant's misconduct to his cell phone.

While appellant disputes the truthfulness of SGT [redacted] statements in his affidavit, particularly with regard to the assertion that "[w]itness interviews revealed SGT Hale was a Marijuana distributor," the affidavit lacks any substantial basis to support probable cause on its face, even if those inaccurate assertions were true. Taken in the light most favorable to the government, the basis for probable cause provided in SGT [redacted] affidavit comes down to the following factual

assertions: (1) marijuana was located in appellant's residence on 23 December 2016; (2) appellant was awakened by police outside his residence on 23 December 2016 and noticed marijuana on the coffee table, which he placed in the toilet; (3) an unnamed witness says appellant distributed narcotics at some unknown date, time, or frequency; and (4) appellant sometimes calls or texts people with his cell phone. (App. Ex. VII, encl. 1).

The one thing that is lacking is any connection between the allegation of marijuana distribution and the appellant's cell phone. There is no mention of any information that suggests appellant ever used his cell phone to possess or distribute marijuana. (App. Ex. VII, encl. 1). In his findings of fact and conclusions of law, the military judge notes that, "[i]n her statement, SPC [redacted] also said that Mr. [redacted] would call the accused to arrange for the accused to distribute marijuana for him." (App. Ex. XIII, p. 12). While this may be true, it was not presented to the magistrate. (App. Ex. VII, encl. 1). Thus, since the magistrate did not have this information, he did not have any basis to conclude probable cause existed to search for any information on the cell phone. *See United States v. Morales*, 77 M.J. 567, 573 (Army Ct. Crim. App. 2017) ("Although evidence supporting probable cause to search for photographs existed, it was not presented to the magistrate.").

Even if the magistrate had that information, upon which the military judge placed great weight in his ruling, the statement from SPC [redacted] could have only provided, at most, probable cause to search for call logs. (App. Ex. VIII, encl. 3) ("He would *call* Hollywood to see if he was at the house and would tell 'Hollywood' such and such wants this and they would go by the house and get it from Hollywood.") (emphasis added). However, because this information was not provided to the military magistrate, the military judge erred in relying on SPC [redacted] statement in his review of the magistrate's probable cause determination. *See Morales*, 77 M.J. at 574 ("The military magistrate based his probable cause determination solely on the four corners of the paperwork presented to him; thus, our review is limited to this same paperwork.").

B. The military magistrate relied solely on the type of generalized law enforcement profile information rejected by the CAAF in *United States v. Nieto*.

Because SGT [redacted] offered no evidence in his affidavit that could serve as a substantial basis to conclude there was probable cause to search appellant's cell phone, it is clear that the magistrate relied on the last two paragraphs of the DA Form 3744. (App. Ex. VII, encl. 1). Sergeant [redacted] assertions can be summarized as follows: (1) people who buy or sell drugs often use their phones to take pictures and use social media on their phones, and (2) he is an investigator with

approximately two years of experience and some general training in drug investigations. (App. Ex. VII, encl. 1).

Interestingly, SGT [redacted] also notes that "individuals who sell or purchase illicit controlled substances via cellular telephone frequently delete records of any transactions from call logs, text messaging and remove names from contact logs." (App. Ex. VII, encl. 1). Based on this concession, it is not clear why SGT [redacted] fails to provide any information as to why he believes appellant would not have similarly deleted any information from his cell phone by this time, knowing that he was under investigation. In all likelihood, 1LT [redacted] was not asking these questions since he signed the search authorization without even inquiring as to why there was no information linking appellant's suspected crimes to his cell phone in the first place.

As the CAAF explained in *Nieto*, while an investigator's experience can be useful in establishing a nexus, "a law enforcement officer's generalized profile about how people normally act in certain circumstances does not, standing alone, provide a substantial basis to find probable cause to search and seize an item in a particular case; there must be some additional showing that the accused fit that profile or that the accused engaged in such conduct." 76 M.J. at 106. Because there were no articulable facts linking appellant's alleged drug activity with his cell phone, the magistrate was left to rely solely on SGT [redacted] general notion that

people who purchase or sell drugs use their cell phones to do so. Were this Court to uphold such a practice, the new legal standard would be that, if someone is suspected of a crime, and they also have a cell phone, then probable cause exists to search the phone. That standard was rejected in *Nieto* and should be rejected in this case. *See id*. at 108.

C. Even if the court found probable cause existed, the evidence derived from the search of the cell phone should have been suppressed as the fruits of the numerous poisonous trees in this case.

As discussed extensively in the previous assignments of error, it is once again clear, that, but for the illegal entry and search of appellant's apartment, SGT [redacted] would never have interviewed appellant, nor would he have had any reason to search appellant's cell phone. Because all of the subsequent evidence "was 'obtained through exploitation of the illegal search, it can not be said to be sufficiently attenuated from the taint of that search.'" *Conklin*, 63 M.J. at 340.

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

Statement of Additional Facts

Officer [redacted] testified on cross-examination that he did not enter appellant's apartment to investigate appellant for marijuana, and that he was never investigating appellant for marijuana. (R. at 350). Furthermore, SGT [redacted] testified that he believed the drugs belonged to Mr. [redacted] (R. at 385).

Law and Standard of Review

Pursuant to Article 66(c), UCMJ, this court is required "to conduct a de novo review of [the] legal and factual sufficiency of the case." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the members of this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In order to find appellant guilty of obstructing justice, the government was required to prove each of the following elements beyond a reasonable doubt: "[(1)] That at or near Clarksville, Tennessee, on or about 23 December 2016, the accused wrongfully did a certain act, that is, he flushed marijuana down a toilet; [(2)] That the accused did so in the case of himself 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 impede* the due administration of justice; and [(4)] That under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces." (R. at 630); *see also Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV ¶ 96 (emphasis added).

Argument

While there is certainly no doubt that appellant put marijuana in the toilet of his apartment on 23 December 2016, the government failed to prove any of the remaining elements of this offense. Specifically, the government elicited no evidence to suggest that appellant had any reason to believe there were or would be any criminal proceedings pending against him, nor that he placed the marijuana in the toilet with the intent to impede the due administration of justice.

The courts have consistently held that "mere concealment of one's misconduct is not obstruction of justice." *United States v. Hendricks*, NMCCA 200701009, 2008 CCA LEXIS 305, at *4-5 (N.M. Ct. Crim. App. 2008) (opinion of the court)[9] (citing *United States v. Lennette*, 41 M.J. 488, 490 (C.A.A.F. 1995); *United States v. Finsel*, 36 M.J. 441, 443 (C.M.A. 1993); and *United States v. Turner*, 33 M.J. 40, 42 (C.M.A. 1991)). In this case, all of the evidence presented at trial shows that appellant was awakened in the middle of the night by police and noticed marijuana on his coffee table, which he quickly dumped in the toilet before answering the door. While he may have attempted to conceal his roommate's crime of possession of marijuana, the case law is clear that "the mere attempt to conceal a crime without more does not amount to an obstruction of justice as the gravamen of the offense requires an act which tends to 'influence, impede, or

[9] A copy of this opinion is provided as Appendix D.

otherwise obstruct…official action.'" *United States v. Asfeld*, 30 M.J. 917, 926 (A.C.M.R. 1990) (quoting *United States v. Gray*, 28 M.J. 858, 861 (A.C.M.R. 1989)).

In *Hendricks*, the appellant, a marine living in the barracks, heard that there would be a room inspection the following day. 2008 CCA LEXIS 305, at *2. "Fearing the inspectors would discover the marijuana in his room, the appellant took the marijuana to another Marine's room and flushed it down the toilet. Some of the marijuana, however, was left on the toilet bowl rim, ultimately leading authorities to discover what the appellant had done." *Id.* at *2-*3. In setting aside the appellant's guilty plea, the court noted,

> the appellant's mere realization that his misconduct, if revealed, might result in criminal prosecution is not reason to believe there *would be* criminal proceedings pending. Further, while the appellant said he flushed the drugs "to impede an investigation," in context, he meant that he flushed the drugs *to impede their detection, and thereby avoid an investigation*.

Id. at *13 (emphasis in original) (citing *Turner*, 33 M.J. at 41).

The CAAF has similarly distinguished between those cases where a servicemember is obstructing a criminal investigation versus those instances where they are merely seeking to avoid detection. *See Turner*, 33 M.J. at 41 (holding that "presentation of a false urine sample during a unit urinalysis inspection does not constitute obstructing justice."). In *Turner*, the CAAF noted that, at the time of the

inspection, the appellant "was not a suspect in any crime or part of any criminal investigation…[she] merely sought to preclude discovery of her recent drug use; such action does not support an obstruction-of-justice charge. *Id.* at 43 (internal citations omitted).

In the instant case, the obstruction of justice charge is similarly insufficient, as the evidence admitted at trial merely proves that the appellant, prior to answering his door for police, who have not yet announced why they are even there, decided that it would be better to place his roommate's marijuana in the toilet rather than leave it out in plain view on the coffee table. This case clearly falls in the "mere concealment" line of cases and should be overturned for the same reasons.

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

Law and Standard of Review

The standard of review is the same as identified in the fifth assignment of error above. In order to convict someone for a violation of Article 107, the Government must prove beyond a reasonable doubt (1) that the accused made a certain official statement; (2) that the statement was false; (3) that the accused knew it was false at the time he made it; and (4) that the false statement was made with the intent to deceive. *MCM*, pt. IV, ¶ 31.b.

Argument

Appellant was charged with providing a false official statement to SGT [redacted] by stating, "'I never assisted [redacted] with distributing marijuana at any time,' or words to that effect, which statement was false in that Sergeant Anthony R. Hale had previously assisted [redacted] with distributing marijuana, and was then known by the said Sergeant Anthony R. Hale to be so false." (Charge Sheet).

In this case, the government failed to prove any of the elements beyond a reasonable doubt. *MCM*, pt. IV, ¶ 31.b. Beginning with the first element, the government never elicited any testimony from SGT [redacted] stating that appellant ever uttered the charged words, nor anything resembling "words to that effect." (See R. at 532-566). The closest the government came to even mentioning this idea was when trial counsel asked SGT [redacted] whether appellant had told him anything about his roommate. (R. at 536). SGT [redacted] responded, "Very little. He did state that from time to time there would be marijuana in his residence, people would consume marijuana and tobacco in his residence, and he would ask people not to. Otherwise, he did not say much during the interview." (R. at 536).

Trial counsel followed up with a question as to whether appellant had said anything about his roommate selling marijuana, to which SGT [redacted] replied, "Not specifically acknowledging that he distributed marijuana. He would hint at it, but

he never stated, 'He is a drug dealer,' no." (R. at 536). Nowhere in this exchange, nor anywhere else in SGT [redacted] testimony, does he ever testify that he ever asked appellant whether he assisted [redacted] [redacted] with marijuana distribution, nor does he testify that appellant ever denied doing so. (R. at 532-566).

Even if the court were to somehow find that appellant's response to SGT [redacted] constituted "words to that effect," the remaining elements were still not satisfied beyond a reasonable doubt. As the military judge recognized when he granted the defense motion for a finding of not guilty to Specification 2 of Charge I for wrongful distribution of marijuana, "the Court simply cannot find that…even under that very low standard, that the government put on evidence that the accused actually distributed some amount of marijuana." (R. at 582). There is no evidence in the record showing that any marijuana ever changed hands with any involvement or "assistance" from appellant. Because the government failed to prove the second element of the offense, it follows that the remaining elements could not have been proven. Accordingly, the charge and specification should be reversed.

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

Statement of Additional Facts

Appellant's sentence was announced on 10 August 2018. (Prom. Order). Appellant requested speedy post-trial processing on 4 February 2019. (Demand for Speedy Post-Trial Processing). Defense requested a twenty-day extension to submit matters on 8 March 2019. (Post Trial Submissions Request for Extension). The convening authority took initial action on 27 August 2019. (Action).

Law and Argument

The CAAF has recognized that a convicted service member has a due process right to timely post-trial review of court-martial convictions. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law that is reviewed de novo. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135).

The convening authority's failure to take action within 120 days of the completion of trial creates a rebuttable presumption of unreasonable delay and triggers the four-factor analysis under *Barker v. Wingo*, 407 U.S. 514 (1972). *Moreno*, 63 M.J. at 142. These four factors are: (1) the length of the delay; (2) the

reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*.

However, even if this court does not find a due process violation, it can still grant relief under Article 66(c), UCMJ. In analyzing post-trial delay, the CAAF has explained that "appellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The Courts of Criminal Appeals have authority under Article 66(c) . . . to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

This court has held that intervention is necessary where "the convening authority fails to grant relief in his action or the staff judge advocate fails to document an acceptable explanation for the untimely post-trial processing." *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001). This court has also noted how "recent amendments to Article 60 have dramatically altered the convening authority's ability to grant clemency" and "[d]elay that may have been tolerable when it at least served to inform the convening authority's broad clemency powers becomes less tolerable when that authority is substantially diminished." *United States v. Banks*, 75 M.J. 746, 750 (Army Ct. Crim. App. 2016). Both rationales apply to the circumstances of appellant's case.

A. The length of the delay was unreasonable.

Excluding the twenty-day extension requested by defense, this case involves a delay of 362 days from the announcement of sentence to convening authority action. This length of delay, which is more than triple the *Moreno* standard, is unreasonable on its face, and therefore triggers the full *Barker* analysis. *See Arriaga*, 70 M.J. at 56.

B. The Staff Judge Advocate provided no reasons for the delay.

Defense counsel requested a post-trial hearing in order to document the reasons for the government's dilatory post-trial processing. (R.C.M. 1105 matters). While acknowledging that the post-trial processing time exceeded the *Moreno* standard by 242 days, the Staff Judge Advocate, without explaining any reasons for the delay, did not feel that appellant's due process rights were violated and, therefore, did not recommend any relief. (Addendum).

C. Appellant asserted his right to speedy post-trial processing.

Sergeant Hale, through his trial defense counsel, made a request for speedy post-trial processing on 4 February 2019. (Demand for Speedy Post-Trial Processing).

D. Appellant was prejudiced.

The CAAF is "most sensitive to this final factor that relates to any prejudice either personally to Appellant or the presentation of his case that arises from the

excessive post-trial delay." *United States v. Dearing*, 63 M.J. 478, 487 (C.A.A.F. 2006). As appellant's appeal is meritorious as to at least six additional assignments of error that should lead to reversal of all charges and specifications, this court should find that "he has served oppressive incarceration during the appeal period." *Id.* While appellant acknowledges that this error will be moot should he receive appropriate relief on the other assignments of error, he still requests this court hold that appellant was denied his due process right to speedy post-trial review and appeal.

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court grant the relief requested.

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, Sergeant (SGT) Anthony R. Hale, through appellate defense counsel, personally requests this court consider the following matters:

1. The military judge abused his discretion by allowing the government to make a major change to The Specification of Charge II over the objection of the accused on the morning of trial.

The Specification of Charge II, as referred to the court-martial on 9 November 2017, read as follows: "In that Sergeant Anthony R. Hale, U.S. Army, did, at or near Clarksville, Tennessee, between on or about 1 December 2016 and on or about 23 December 2016, conspire with [redacted] to commit an offense under the Uniform Code of Military Justice, to wit: wrongful distribution of marijuana, and in order to effect the object of the conspiracy the said Sergeant Anthony R. Hale did give [redacted] a phone number." (Charge Sheet) (emphasis added).

On 8 August 2018, the morning of trial, nine months after referral, and following a motions hearing in which the military judge stated he would allow no further motions from the government, the military judge allowed the government to make a major change over a defense objection, thereby allowing the government to change the identity of the person appellant was accused of conspiring with. (R. at 212-229). This major change denied appellant a defense to this charge and specification, in that he did not conspire with Joseph Roberts.

Although the panel acquitted appellant of this charge and specification, he was still substantially prejudiced by the military judge in allowing the government to make this major change. As a result of this major change, the government was allowed to present a new theory in its case-in-chief, and was then allowed to present argument to the panel, when this specification would have resulted in a successful motion for a finding of not guilty after the government rested, but for the military judge allowing the major change on the morning of trial. While appellant was acquitted, the simple fact that this improper charge and specification went back to the panel still prejudiced appellant, as it is impossible to know what compromises the members made in reaching their ultimate findings in this case.

2. The inappropriate comments made by the trial counsel throughout the course of the trial prejudiced appellant at both the findings and presentencing stages.

During opening statements, the trial counsel suggested that the defense had something to prove in this case. (R. at 333) ("Members of the panel, the defense is under no obligation whatever to offer evidence, but if they were to offer any witness testimony…"). In response, the military judge gave a curative instruction to the members and warned the trial counsel not to do that again. (R. at 334). In closing, trial counsel referred to the third party individual with whom appellant provided his roommate's phone number as a "known marijuana dealer," which

defense objected to on the basis that there were no facts in evidence to support this assertion. (R. at 640-41).

Once again, during the sentencing argument the trial counsel made inappropriate comments about the seriousness of the crime of possession of marijuana by attempting to link appellant to the death of appellant's roommate. (R. at 750). ("Well, as you heard, it ended a man's life. Possession with intent to distribute ended a man's life. A man died trying to sell marijuana in this community. And for anyone that may have a doubt, I cannot emphasize enough that this is something that should be treated seriously."). While the military judge instructed the panel to disregard this comment, there is no way to ensure that this inappropriate comment, or the other improper comments made throughout the trial, did not prejudice the appellant. *See, e.g., Johnson v. Superintendent Fayette State Corr. Inst.*, 2020 U.S. App. LEXIS 3793, *1 (3d Cir. 2020) ("Although we generally rely on jurors to follow a court's instructions, we cannot expect the superhuman from them. Under certain circumstances, jurors cannot practically be expected to follow instructions, no matter how clear or explicit.").

3. The military judge abused his discretion when he denied the defense request for an expert investigator.

Prior to trial, defense submitted a motion to compel an expert consultant to serve in the role as a defense investigator. (App. Ex. V). In its motion, defense counsel explained that there were numerous potential witnesses that needed to be

found, investigated, and interviewed. (App. Ex. V, p. 4-5). When defense counsel asked military law enforcement to assist them, CID refused to follow any leads involving civilian witnesses. (App. Ex. V, p. 5). Despite the refusal of CID to use its resources to assist the defense in its investigation, the military judge denied the motion, in part because he found that "government investigators are accessible to the defense for the immediate case against the accused." (App. Ex. XII, p. 3). In denying this expert assistance, appellant was denied a fair trial. Had the motion been granted, an investigator could have uncovered evidence favorable to appellant, such as individuals who were aware of Mr. [redacted] drug business who could have testified that appellant was not involved in the use or distribution of any narcotics.

4. The military judge abused his discretion when he overruled a defense objection to improper government argument.

During the government's closing argument, the trial counsel stated that the CID investigator examined the text messages, "and those text messages showed that on 13 December 2016, a third party marijuana dealer texted the accused and said he was in town, he had some smoke…The accused then forwarded this third party dealer's number to his roommate…and he provided [redacted] [redacted] number back to this first dealer." (R. at 640-41). Defense counsel objected on the basis of facts not in evidence, stating there was never any evidence that this third party individual was a marijuana dealer. (R. at 641). In overruling the objection, the

military judge stated that the defense proffer was not a basis for objection. (R. at 641). In overruling the defense objection, the military judge was implicitly telling the panel that what the trial counsel stated was accurate, which further prejudiced the appellant.

5. The trial counsel improperly called a witness to simply prejudice the appellant, knowing the witness was going to invoke her Fifth Amendment rights on the stand in front of the panel.

During the government case-in-chief, the trial counsel called SPC [redacted] as a witness. (R. at 501). After asking a few foundational questions, trial counsel asked the witness if she knew appellant personally. (R. at 503). In response, the witness stated, "I'm invoking my Fifth Amendment rights, sir." (R. at 503). The military judge then sent the members into the deliberation room in order to discuss this incident outside of their presence. (R. at 503).

Next, the military judge stated, "Trial Counsel, please tell me you didn't know that was going to happen." (R. at 504). In response, the trial counsel stated, "Yes, Your Honor. We were aware that Specialist [redacted] would…invoke her Fifth Amendment right to certain questions but not all questions." (R. at 504). The military judge then instructed the trial counsel to read Military Rule of Evidence 512(b). (R. at 504). This rule states that, "[i]n a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the

members." Mil. R. Evid. 512(b). Thus, the trial counsel conducted this stunt, knowing full well that the witness would invoke her rights in front of the panel, in order to prejudice the appellant. As the military judge noted, "the reason that we have this rule is you've rung a bell that can't be un-rung. I can instruct on it…But now it's up to the panel members to decide, despite my instruction…not to consider that for any purpose. (R. at 505). *See Johnson*, 2020 U.S. App. LEXIS 3793, *1.

Because the trial counsel knew in advance that the witness was going to invoke her rights under the Fifth Amendment, the appropriate course of action, aside from notifying the military judge ahead of time, would have been to dismiss the specification, since the government knew that it would not be able to admit any evidence to support that allegation at trial. Thus, the government had no good faith basis in which to proceed to trial on this specification. Instead of dismissing the specification, the trial counsel paraded a witness up to the stand in front of the panel to simply smear the appellant and make him look like a bad soldier. Had the government actually been serious about trying to prove the appellant was guilty of Charge V and its specification, they would have granted this witness, a soldier subject to the orders of her superiors, testimonial immunity. Clearly, the intention was never to prove this allegation, but to show the panel that the appellant is a generally bad person.

6. The military judge abused his discretion when he denied a defense requested instruction explaining the legal differences between mere concealment of a crime and the intent to obstruct criminal proceedings.

Prior to findings, defense counsel requested a special instruction pursuant to Rule for Court-Martial 920(c) asking the military judge to include additional language to one of the standard instructions pertaining to the obstruction of justice charge.[1] (R. at 618; App. Ex. XXXII). Specifically, defense requested additional language based on case law that explains the requirement of specific intent to obstruct criminal proceedings, as well as the distinction between mere concealment and obstruction of justice. (See App. Ex. XXXII).

Defense counsel explained that the issue was raised by the evidence and supported by the testimony of the CPD officers who testified that they were never investigating appellant, as well as the fact that there was little to no evidence indicating that appellant had any reason to think anyone was investigating him. (R. at 618).

[1] The requested instruction would have read: "It is not necessary that charges be pending or even that an investigation be underway. The government must, however, prove beyond a reasonable doubt that the accused had reason to believe there were or would be criminal proceedings against himself or that some law enforcement official of the military would be investigating the accused's actions *and that the accused specifically intended to obstruct those potential criminal proceedings. A person must foresee a criminal proceeding before intending to obstruct it. Mere concealment of a person's misconduct is not obstruction of justice, even with the realization that the person's misconduct, if revealed, might result in criminal prosecution.*" (emphasis in proposed additional language).

"Instructions given by a military judge must be sufficient to provide necessary guideposts for an informed deliberation on the guilt or innocence of the accused." *United States v. Killion*, 75 M.J. 209, 210 (C.A.A.F. 2016) (citing *United States v. Dearing*, 63 M.J. 478, 479 (C.A.A.F. 2006), and Rule for Courts-Martial 920(e)(1), (7) (internal citations and quotation marks omitted). "Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process." *Killion*, 75 M.J. at 213 (quoting *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006)).

A military judge's refusal to give a defense-requested instruction is reviewed for an abuse of discretion. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993). "The test to determine if denial of a requested instruction constitutes error is whether (1) the charge is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'" *Id.* (quoting *United States v. Winborn*, 34 CMR 57, 62 (C.M.A. 1963)).

First, the requested instruction was an entirely correct statement of the law that defense counsel specifically cited underneath its proposed modification to the

instruction.[2] (App. Ex. XXXII). Second, the issues of mere concealment and specific intent were not adequately addressed in the standard instructions provided by the military judge. The issue of mere concealment of a crime was raised throughout the trial, through the testimony of SGT EE and SGT ZR, as the appellant provided verbal and written statements to both of them explaining when and why he put the marijuana in the toilet. Based on the unique facts of this case, the defense explained why the panel needed a narrowly tailored instruction to properly inform the members of the significant difference between the mere concealment of a crime and obstruction of justice. (R. at 618-21).

Finally, the issue of mere concealment was such a vital point in the case that the failure to give the requested instruction seriously impaired the appellant's ability to effectively present his defense. Had the military judge instructed the panel as requested, the appellant would have properly been acquitted of the charge.

7. The errors raised above created a cumulative error that denied appellant a fair trial.

Even assuming none of the issues raised in paragraphs 1-6 above warrant setting aside the findings independently on their own, the cumulative error doctrine can allow for setting aside findings if a "combination necessitates the disapproval"

[2] See the Argument section for the fifth assignment of error in appellant's brief, which provides a detailed explanation of the case law distinction between mere concealment versus the specific intent to obstruct potential criminal proceedings for a conviction of obstruction of justice.

of those said findings. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)). Under this doctrine, this court reviews the "cumulative effect of all plain errors and preserved errors [] de novo" and will reverse if the errors "denied the appellant a fair trial." *Pope*, 69 M.J. at 335. In the present case, the government misconduct led to the military judge admonishing the government on multiple occasions. Between changing the charge sheet, smuggling in improper evidence, improper argument, burden shifting, smearing the appellant, and more, there is no possible scenario in which the appellant received a fair trial.

Courts are "less likely to find cumulative error 'where evidentiary errors are followed by curative instructions' or when a record contains overwhelming evidence of a defendant's guilt. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (quoting *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993)). There are neither sufficient curative instructions nor is there overwhelming evidence of the appellant's guilt in this case. This case was a weak constructive possession case, for which the appellant should have been acquitted, that involved countless procedural and constitutional errors throughout. This court should find the cumulative error in this case was so pervasive that the only remedy available is to aside the findings.

8. The appellant's conviction for wrongful possession of marijuana with intent to distribute is factually insufficient.

The evidence presented by the government at trial failed to prove any of the elements of Specification 1 of Charge I beyond a reasonable doubt. Beginning with the first element, there was insufficient evidence to prove that appellant possessed marijuana. It follows, therefore, that the remaining elements could not have been proven beyond a reasonable doubt, as there was certainly no evidence admitted to prove that appellant somehow knew that he possessed marijuana. Even under a theory of constructive possession, there was insufficient evidence to prove that appellant had "the power or authority to preclude control by others." Instead, all of the evidence admitted at trial, including the admissions of the CPD officers involved, proved that the marijuana found inside the apartment belonged to appellant's roommate, and not the appellant.

Sergeant [redacted] the lead investigator, testified that the police believed the drugs belonged to Mr. [redacted] the appellant's roommate, who had in fact been killed during a drug deal. (R. at 385). This explains why the CPD made it clear during the trial that they never suspected appellant of any drug offenses, and they therefore never charged appellant with any drug offenses, as it "was not a concern" of theirs. (R. at 82). The fact that the suspected marijuana belonged to the dead drug dealer is further corroborated by the fact that the evidence in this case was not tested until January 2018, over a year after the incident occurred. (R. at 486).

Clearly, the CPD had no interest in testing the substance, as they had no intention of prosecuting appellant for drugs that were not his. Furthermore, since the true owner of the marijuana was dead, there was no reason for further testing in order to prosecute him. Obviously, things changed on 21 September 2017, when appellant's company commander preferred charges against him. (Charge Sheet). Ultimately, the government was successful in convincing the Tennessee Bureau of Investigation to devote its resources to testing the substances in January of the following year. (R. at 486). The fact that professional police officers from the CPD, who had years of experience with investigations, did not feel they had sufficient evidence to even charge the appellant with a crime further supports appellant's claim that there was certainly not enough evidence to find him guilty of the offense beyond a reasonable doubt. A review of the panel member questions shows that appellant was convicted of this offense because the members believed he made poor choices in having a drug dealer for a roommate. (See App. Ex. XXXVII). While his living situation may have been a poor choice on appellant's part, it should not serve as the basis for a felony drug conviction.

9. The military judge committed prejudicial error by prohibiting the defense from examining Appellate Exhibit XXXVI, a panel president statement that revealed a significant procedural error in the panel's voting process.

During deliberations, it became clear that the panel was struggling with the issue of whether they would find appellant guilty of the greater offense, including

the "intent to distribute" element of Specification 1 of Charge I, as opposed to the lesser included offense of wrongful possession. (R. at 663-685; App. Ex. XXXIII; App. Ex. XXXV; App. Ex. XXXVI (sealed)). Despite the military judge's attempts to properly instruct the panel on their options, the members continued to show concern and confusion. (R. at 683). Therefore, the military judge asked the president to write out a question, which he complied. (R. at 683; App. Ex. XXXVI (sealed)). However, instead of writing out a question, the panel president wrote out what had happened in the deliberation room, stating that there was a split in the vote. (App. Ex. XXXVI (sealed)). Rather than allow counsel to see this document, in order to propose any remedies or any additional questions or instructions to the members, the military judge simply reread the procedural instructions on voting and sent the members back into their deliberations. (R. at 684).

The military judge's actions, in failing to allow counsel to review the exhibit, and in failing to tailor a proper remedy to this scenario, resulted in significant prejudice to appellant. To compound this problem, the military judge, at the very least, misled counsel as to what the exhibit said. (R. at 686) ("I will state only for the record that Appellate Exhibit XXXVII [sic] does not indicate that the panel reached a verdict on any specification. But I am ordering it now to be sealed, and the parties will not be allowed to examine it."). Contrary to the

military judge's assertion, it is quite clear from reading the exhibit that the panel did reach a verdict on Specification 1 of Charge I. (App. Ex. XXXVI (sealed)). The verdict reached by the panel at this time was: "Not guilty of a violation of Article 112a, UCMJ, Wrongful Possession of Marijuana with Intent to Distribute, but Guilty of a violation of Article 112a, UCMJ, Wrongful Possession of Marijuana." (See App. Ex. XXXVI (sealed)). Assuming the panel followed the procedures as the military judge instructed them to, this is the only reasonable reading of the statement made in App. Ex. XXXVI (sealed).

Had defense counsel been allowed to see this exhibit, they would have at least been given the opportunity to be heard on this matter and requested the appropriate remedies, which could have been anything from additional instructions, voir dire questions for the military judge to ask the members, or even a basis to ask for a mistrial as to Specification 1 of Charge I. For example, as mentioned, the terminology used by the panel president in his statement, that there was a split in the vote, would indicate that a verdict was reached. (App. Ex. XXXVI (sealed)). On the other hand, if this language is not to be read as a finding, then the only other plain reading of the question indicates that the panel did not follow the proper voting procedures. Had the panel followed the proper procedures, there is no scenario in which there could be a "split" in the vote. (See App. Ex. XXXVI (sealed)). Rather, the members would have voted on the greater

offense, which apparently should have been a finding of not guilty. Next, the members would have voted on the lesser offense, which apparently would have resulted in a guilty verdict. (See App. Ex. XXX; App. Ex. XXXVI (sealed)).

Again, rather than allowing counsel to be heard on this matter, the military judge simply neglected to address this glaring issue and brushed it off since, in his opinion, "at best, it's just a panel member question on procedure." (R. at 686). Based on defense counsel's suspicions that something was not correct with the voting procedure, he requested that the panel member question be unsealed so that he could inspect it. (R. at 775) ("We're concerned that they may have had a misunderstanding about something or there may have been some sort of procedural error. That's basically our concern."). To quote the military judge's ruling on the motion to suppress, "[i]t is worth pointing out, although unknown to [defense counsel] at the time, his instincts were right on." (See App. Ex. XIII, p. 8). Had he known what was in the exhibit, defense counsel would have expanded on these concerns. However, because the military judge did not share those concerns, the request was denied. (R. at 776).

Because the military judge did not resolve this issue at trial, this court should reverse the finding of guilty of Specification 1 of Charge I, as the record shows that neither the military judge nor the panel followed proper procedures in this case.

10. The adjudged sentence of a bad-conduct discharge is inappropriately severe.

The Army Court of Criminal Appeals reviews sentence appropriateness de novo. *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001). The court must ensure that an approved sentence is supported under the facts of the case. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). It has an "awesome plenary, de novo power of review" to "substitute its judgment for that of the military judge." *Bauerbach*, 55 M.J. at 504 (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). Thus, the Army Court may only affirm a sentence it independently deems appropriate to the circumstances. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

"Sentence appropriateness should be evaluated through 'individualized consideration' of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Roukis*, 60 M.J. 925, 931 (Army Ct. Crim. App. 2005) (citing *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)) (quoting *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106, 27 C.M.R. 176, 180-181 (1959)).

"A soldier should not receive a more severe sentence than otherwise generally warranted by the offense, the circumstances surrounding the offense, the acceptance or lack of acceptance of responsibility for his offense, and his prior record." *Roukis*, 60 M.J. at 931 (citing *United States v. Aurich*, 31 M.J. 95, 97

(C.M.A. 1990) and *Bauerbach*, 55 M.J. at 505-506). "Accordingly, the punishment should 'fit the offender' and not merely the crime." *Roukis*, 60 M.J. at 931, (citing *United States v. Wright*, 20 M.J. 518, 519 (A.C.M.R. 1985)).

Even if this court finds that there was sufficient proof to find the appellant guilty beyond a reasonable doubt, it should at least reduce the sentence to reflect one more proportionate to the facts of the crime at issue. A bad-conduct discharge is extremely harsh and disproportionate when considering the matters in extenuation and mitigation. Despite the crimes for which he was convicted, the evidence is clear that the appellant was not a marijuana dealer, nor was he involved in the distribution of marijuana. At most, the government proved that on one occasion, appellant may have exchanged phone numbers between his roommate and another individual who was either buying or selling marijuana.

Regardless of the particular findings in the case, the facts simply do not warrant the lifetime stigma of a bad-conduct discharge. This case comes down to a terrible night where the appellant's roommate was murdered outside their apartment. He was distraught and fully cooperated with the Clarksville police so that he could assist them in finding the killer in any way possible. The Clarksville police never arrested or charged the appellant with any crimes, and the government put on no evidence in aggravation. The appellant completed his sentence to confinement long before initial action was taken in his case, a full year after the

trial ended. The circumstances do not warrant the additional burden of a bad-conduct discharge where appellant has already lost his military career, and will carry a federal conviction with him for the rest of his life.

Wherefore, SGT Hale respectfully requests this Honorable Court grant meaningful relief.

APPENDIX B

User Name: Kyle Sprague
Date and Time: Tuesday, February 11, 2020 3:00:00 PM EST
Job Number: 109769429

Document (1)

1. *United States v. Keefauver, 2015 CCA LEXIS 553*

Client/Matter: -None-
Search Terms: 2015 CCA LEXIS 553
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > U.S. Sup. Ct.

Neutral
As of: February 11, 2020 8:00 PM Z

United States v. Keefauver

United States Army Court of Criminal Appeals

November 25, 2015, Decided

ARMY 20121026

Reporter
2015 CCA LEXIS 553 *

UNITED STATES, Appellee v. Specialist LEVI A. KEEFAUVER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell (convened). Headquarters, Fort Campbell (action). Timothy Grammel, Military Judge (arraignment and motion hearing), Steven E. Walburn, Military Judge (trial), Lieutenant Colonel Jeff A. Bovarnick, Staff Judge Advocate.

United States v. Keefauver, 74 M.J. 230, 2015 CAAF LEXIS 547 (C.A.A.F., 2015)

Core Terms

box, marijuana, investigators, inside, Specification, plain view, package, possessed, military, alerted, sweep, bag, doctrine of inevitable discovery, wrongful possession, postal inspector, unlawful search, unregistered, delivery, harmless, team

Case Summary

Overview

HOLDINGS: [1]-In light of a ruling on appeal that a protective sweep of the servicemember's house was not warranted, the court had to determine whether there was any other basis upon which the bulk of the evidence against him could be considered; [2]-Inevitable discovery exception did not apply to any evidence found in the servicemember's house except for a box containing marijuana and thus, admission of the other evidence discovered in the protective sweep violated his *Fourth Amendment* rights; [3]-Error was not harmless, as there was a reasonable possibility that the erroneously admitted evidence might have contributed to his convictions for violating a lawful general regulation by wrongfully possessing drug paraphernalia and unregistered weapons on-post, wrongful possession of marijuana with intent to distribute, and child endangerment, in violation of UCMJ arts. 92, 112a, and 134.

Outcome
The findings of guilty and the sentence were set aside.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

Military & Veterans Law > Military Justice > Search

& Seizure > Unlawful Search & Seizure

Evidence > Burdens of Proof > Preponderance of Evidence

HN1[] Exceptions to Exclusionary Rule, Inevitable Discovery

The doctrine of inevitable discovery is an exception to the exclusionary rule allowing for the admission of evidence that, although obtained improperly, would have been properly obtained by other means. Mil. R. Evid. 311(b)(2), Manual Courts-Martial provides that evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made. For the inevitable discovery exception to apply, the government has to demonstrate 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 in a lawful manner.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

HN2[] Exceptions to Exclusionary Rule, Inevitable Discovery

The inevitable discovery doctrine requires a court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] Harmless & Invited Error, Constitutional Rights

A military court of criminal appeals reviews constitutional errors under the harmless beyond a reasonable doubt standard found in the United States Supreme Court's decision in Chapman. Whether a constitutional error in admitting evidence is harmless beyond a reasonable doubt is a question of law that the court reviews de novo.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] Harmless & Invited Error, Constitutional Rights

In assessing harmlessness in the constitutional context, the question is not whether the evidence is legally sufficient to uphold a servicemember's conviction without the erroneously admitted evidence. Rather, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Further, to say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. It is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

HN5[] Judicial Review, Courts of Criminal Appeals

A military court of criminal appeals' determination of whether or not there is a reasonable possibility that the evidence admitted erroneously in a case might have contributed to a conviction is made on the basis of the entire record.

Military & Veterans Law > Military Offenses > Controlled Substances

HN6[] **Military Offenses, Controlled Substances**

To convict a servicemember of wrongful possession (with the intent to distribute), the government is required to prove, inter alia, that the servicemember knowingly and intentionally possessed the controlled substance. Manual Courts-Martial pt. IV, para. 37.b.(6)(a), c.(2) (2008).

Evidence > Types of Evidence > Circumstantial Evidence

Military & Veterans Law > Military Offenses > Controlled Substances

HN7[] **Types of Evidence, Circumstantial Evidence**

Manual Courts-Martial pt. IV, para. 37.c.(2) (2008) provides that an accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Possession may be established by circumstantial as well as by direct evidence.

Counsel: For Appellant: Colonel Kevin Boyle, JA; Lieutenant Colonel Jonathan A. Potter, JA; Major Amy E. Nieman, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Kevin Boyle, JA; Lieutenant Colonel Jonathan F. Potter, JA; Captain Patrick J. Scudieri, JA (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major A.G. Courie III, JA; Major Steven J. Collins, JA; Captain Anne C. Hsieh, JA (on brief).

Judges: Before MULLIGAN, BURTON, and BORGERDING[1], Appellate Military Judges. Senior Judge MULLIGAN and Judge BURTON concur.

[1] Judge BORGERDING took final action in this case while on active duty.

Opinion by: BORGERDING

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

BORGERDING, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of violating a lawful general regulation by wrongfully possessing drug paraphernalia and unregistered weapons on-post, one specification of wrongful **[*2]** possession of marijuana with intent to distribute, and one specification of child endangerment, in violation of Articles 92, 112a, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 892*, *912a*, *934 (2006)* [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

On 29 July 2014, this court issued an opinion of the court in appellant's case, affirming the findings of guilty and the sentence as approved by the convening authority. *United States v. Keefauver, 73 M.J. 846 (Army Ct. Crim. App. 2014)*. On 12 June 2015, our superior court reversed that decision, finding error in our upholding of a "protective sweep" conducted in this case. *United States v. Keefauver, 74 M.J. 230, 237 (C.A.A.F. 2015)*. Our superior court then returned the record of trial to The Judge Advocate General of the Army for remand to this court for further action consistent with their resolution of the granted issue. *Id.*

FACTS

On 8 December 2011, Kentucky postal inspectors intercepted a suspicious box that smelled of marijuana and was addressed to a residential address on Fort Campbell, Kentucky belonging to appellant. Upon further inspection of the box, inspectors observed that **[*3]** it was a heavily taped, approximately eight-pound "Ready-Post" priority box, with delivery confirmation and insurance stickers. The return address was a hand-written label showing a "B. Samuelson"

mailed it from an address in northern California. While there was no record of a "B. Samuelson" at that return address, investigators did learn that appellant and his wife had claimed that address as their own in years past. These facts, coupled with the odor of marijuana emanating from the box, indicated to the postal inspectors that the box was being used for drug trafficking.

Since the box was addressed to a house located on Fort Campbell, the postal inspectors contacted the Drug Suppression Team Chief at the Fort Campbell Criminal Investigation Command (CID) office, Special Agent (SA) SR, in hopes of conducting a "controlled delivery."[2]

Special Agent SR then obtained a verbal authorization from **[*4]** the military magistrate, Captain (CPT) MR, to conduct a controlled delivery of the package and to conduct a search limited to the box itself.

Special Agent SR and his team conducted surveillance in the front and the rear of appellant's house and watched as a member of the postal inspection team delivered the box. When no one answered the door, the agent put the box on the front doorstep and the team waited outside for approximately an hour until an individual later identified as appellant's sixteen-year-old stepson, TC-D, arrived home and took the box inside.

Once the package was inside the house, the surveillance team moved in and entered the home to retrieve the box. Special Agent SR immediately located the package right inside the home in the hallway, about ten feet from the front door.

Once the package was located, SA SR conducted a "security sweep" of the home to "ensure that no one else [other than TC-D] was inside the house" and that no one was "destroying evidence."

Special Agent SR began this sweep in the downstairs area where he saw a "marijuana-type smoking device" on the kitchen counter. He then continued upstairs where he observed a bag of what appeared to be marijuana laying **[*5]** in plain view on the bed in TC-D's room as well as at least two items of drug paraphernalia, also in plain view, in the room. He also saw "a couple rifles" in an unlocked walk-in closet in the hallway. In the master bedroom, also in plain view, he saw more boxes with similar characteristics to the one that had just been delivered, all of which bore similar indicia of drug trafficking.

After the protective sweep was completed and the home was cleared, law enforcement brought in a military working dog (MWD) which conducted a search and alerted on multiple areas within the house. Upon entry into the house, several of the law enforcement agents noted there was a very strong smell of marijuana emanating from the house in general and not just from the box.

The MWD alerted as soon as it entered TC-D's room. In addition to the items seen in plain view by SA SR, investigators found more marijuana throughout the room, both loose and in small Ziploc bags. Next, although SA SR did not recall seeing any items in plain view in the room later determined to belong to appellant's thirteen-year-old biological son, EK, the MWD alerted on a container found in plain view on the floor in the middle of the **[*6]** room. In addition, the MWD alerted on a dresser drawer where investigators found more marijuana, rolling papers, and a pipe.

In the master bedroom, the MWD alerted to additional bags of marijuana located in a dresser. The investigators also found a vaporizer which appeared to be used to smoke marijuana, a scale which could be used to weigh drugs, and a large sum of money in a dresser drawer.

In the downstairs area of the home, the MWD alerted on a black duffel bag found inside a closet under the stairs. It contained no marijuana but did contain $4,000 in cash. Investigators also found an amount of cash inside a teapot in the dining room. In a closet immediately inside the residence, investigators found two handguns stored in a locked container and a bag of marijuana inside a bin of toy cars. Finally, investigators searched garbage cans outside the house and found plastic bags similar to ones found inside the house that had $1,000, $2,000, $8,000, and $8,300 written on them. All items, including those SA SR saw in plain view during his protective sweep, were seized and admitted into evidence at trial.

Following their search, investigators opened the box originally delivered to the home **[*7]** while it was still inside the residence. The box contained approximately three to four pounds of "high grade" marijuana packaged in a manner consistent with drug trafficking.

[2] The postal inspector testified that a "controlled delivery" is a delivery controlled by law enforcement personnel whereby they mimic what a regular letter carrier would normally do every day in the event that the individuals expecting the package are conducting surveillance and tracking the package.

Later, at the CID office, investigators searched both appellant and EK "for officer safety in accordance with . . . standard operating procedures." During these searches, they found $900 in cash consisting of nine $100 bills in appellant's pockets and $692 in EK's pockets. After seeing his sons at the CID office, appellant told the investigators "all the stuff you found in the house is mine, I don't want my family getting in trouble," or words to that effect.

LAW AND DISCUSSION

Inevitable Discovery

In light of our superior court's decision that SA SR's protective sweep of the home was not warranted, we must first determine if there is any other basis upon which the bulk of the evidence against appellant (besides the delivered box) can be considered. We find that there is not. Specifically, the doctrine of inevitable discovery is now inapplicable to the facts of this case.

HN1[↑] The doctrine of inevitable discovery is an exception to the exclusionary rule allowing for the admission of evidence that, although obtained improperly, **[*8]** would have been properly obtained by other means. *United States v. Wallace, 66 M.J. 5, 10 (C.A.A.F. 2008)* (citing *Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)*); *see also* Military Rule of Evidence [hereinafter Mil. R. Evid.] 311(b)(2) ("Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.").

For the inevitable discovery exception to apply, the government had to demonstrate 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 . . . in a lawful manner . . . ." *United States v. Dease, 71 M.J. 116, 122 (C.A.A.F. 2012)* (quoting *United States v. Kozak, 12 M.J. 389, 394 (C.M.A. 1982)*; *see also United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014)*.

In this case, the "illegality occurred" as soon as SA SR left the area in the immediate vicinity of the box. There is no evidence at this point that the agents possessed, or were pursuing, evidence or leads that would have inevitably led to the discovery of any other items in the home. *Wicks, 73 M.J. at 103*; *see also United States v. Alexander, 540 F.3d 494, 502 (6th Cir. 2008)* (***HN2***[↑] "The inevitable discovery doctrine 'requires [a] court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.'") (quoting *United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995)*). At this particular point **[*9]** in time, investigators had no further evidence to support a finding of probable cause to search than when they originally made the search request.[3] Thus, given that the investigators had, at this point, found only what they expected to find—the box—and nothing more, we cannot even say that "the routine procedures of a law enforcement agency would inevitably find the same evidence." *United States v. Owens, 51 M.J. 204, 210 (C.A.A.F. 1999)*. In short, the inevitable discovery doctrine cannot rescue any evidence found in the house beyond the box, and the admission of such evidence violated appellant's *Fourth Amendment* rights.

HN3[↑] We review constitutional errors under the harmless beyond a reasonable doubt standard found in *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. *See United States v. Mott, 72 M.J. 319, 332 (C.A.A.F. 2013)*; *United States v. Paige, 67 M.J. 442, 449 (C.A.A.F. 2009)*; *see also United States v. Simmons, 59 M.J. 485, 489 (C.A.A.F. 2004)*. "Whether a constitutional error in admitting evidence is harmless beyond a reasonable doubt is a question of law that we review *de novo*." *United States v. Crudup, 67 M.J. 92, 94 (C.A.A.F. 2008)*; *see also United States v. Gardinier, 67 M.J. 304, 306 (C.A.A.F. 2009))*.

HN4[↑] "In assessing harmlessness **[*10]** in the constitutional context, the question is not whether the evidence is legally sufficient to uphold [appellant's] conviction without the erroneously admitted evidence. Rather, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Gardinier, 67 M.J. at 306* (quoting *Chapman, 386 U.S. at 23*) (internal citations and quotation marks omitted). Further, as our superior

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[3] Even if the mere smell of the marijuana then constituted probable cause, the inevitable discovery doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant." *Wicks, 73 M.J. at 103* (citations and internal quotation marks omitted).

court noted in *United States v. Moran*,

> "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. It is, rather, "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)*, *overruled on other grounds by Estelle v. McGuire, 502 U.S. 62, 72 n.4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991))*.

Thus, ***HN5***[↑] our determination of whether or not there is a "reasonable possibility" that the evidence admitted erroneously in this case "might have contributed to the conviction," *Chapman, 386 U.S. at 24* (citing *Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963))*, is "made on the basis of the entire record . . . ." *Mott, 72 M.J. at 332* (quoting *United States v. Sweeney, 70 M.J. 296, 306 (C.A.A.F. 2011))*.

After a review of the entire record, we find there is a reasonable possibility that the erroneously admitted evidence might have contributed **[*11]** to appellant's convictions for all charges and specifications. With respect to the Specification of Charge II (wrongful possession of unregistered firearms) and the Specification of Additional Charge I (wrongful possession of drug paraphernalia), the only[4] evidence supporting the convictions was found during the illegal search of appellant's home. Further, although there was some testimony about appellant's 13-year-old son's drug use that was arguably not tainted by the illegal search, the bulk of the evidence supporting the conviction for child endangerment (Specification 1 of Additional Charge II) was discovered in the child's bedroom during the illegal search.

We also find that despite the fact that the box containing the majority of the marijuana appellant was charged with wrongfully possessing was properly admitted into evidence, there is still a "reasonable possibility" that the sheer volume of evidence illegally admitted "might have contributed to the conviction" for wrongful possession with the intent to distribute. *Chapman, 386 U.S. at 24* (citing *Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963)*. ***HN6***[↑] To convict appellant of wrongful possession (with the intent to distribute), the government was required to prove, *inter alia*, that appellant knowingly and intentionally possessed the controlled substance. *See United States v. Wilson, 7 M.J. 290 (C.M.A. 1979)*; *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 37.b.(6)(a), c.(2). Under the facts of this case, appellant's alleged possession of the marijuana was constructive, requiring the government to prove appellant "was knowingly in a position or had the right to exercise dominion and control over it either directly or through others." *Wilson, 7 M.J. at 293* (citations and internal **[*13]** quotation marks omitted); *see also* ***HN7***[↑] *MCM*, pt. IV, ¶ 37.c.(2) ("An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control."). "[P]ossession may be established by circumstantial as well as by direct evidence." *Wilson, 7 M.J. at 293* (citation omitted); *see also MCM*, pt. IV, ¶ 37.c.(2).

We recognize that besides the box and its contents, there are additional, untainted pieces of evidence which *may* be sufficient to prove beyond a reasonable doubt appellant had constructive possession of the marijuana. These include: a return address on the box previously connected to appellant; the smell of marijuana in the home from the front door; the large amount of cash found on appellant's person at CID; appellant's admission that "all the stuff you found in the house is mine, I don't want my family getting in trouble;" and the baggies found in the outside garbage cans. However, the sheer mass of inadmissible evidence found in the house eliminates any possibility the error was harmless beyond a reasonable doubt. *See Gardinier, 67 M.J. at 306*; *see also Chapman, 386 U.S. at 23*. Without the illegally obtained items, the defense claim that the drugs belonged to appellant's wife and that **[*14]** appellant

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[4] In his trial testimony, appellant did admit to possessing unregistered firearms in his home. However, "[u]nder the circumstances of this case, we are not convinced that the defense strategy of having [appellant] testify at trial [in an attempt to explain the vast amount of incriminating evidence found in his home], would have been the same in the absence of the improperly admitted evidence." *Simmons, 59 M.J. at 489-90* (citing *United States v. Grooters, 39 M.J. 269, 273 (C.M.A. 1994)* (accused may not have been compelled to testify to explain improperly admitted statements); *United States v. Bearchild, 17 U.S.C.M.A. 598, 602, 38 C.M.R. 396, 400 (1968)* (in-court testimony tainted if given to **[*12]** overcome inadmissible confession)). Thus, "we cannot view [appellant's] trial testimony as an 'independent' basis for concluding that the improperly admitted evidence 'did not contribute to'" any portion of the findings. *Simmons, 59 M.J. at 490*.

had no idea they were delivered to his house may have succeeded given that the evidence showed only one box delivered at a time when appellant was not home. However, since the military judge also considered the fact that there were multiple, similar boxes found in the home, along with a significant amount of cash and unregistered weapons, it is impossible for us to conclude this knowledge had no effect on his finding of guilt.

The importance of all of the evidence found in the home was underscored by trial counsel in his closing argument. For example, he began: "what does 5.25 pounds of marijuana, over $7,600 in cash, four unregistered firearms, numerous baggies, and a scale equal? We have a criminal enterprise." Of the five things he mentioned, only one was properly in evidence.[5] Moreover, trial counsel's focus on the evidence now determined to be illegally admitted supported not only the "criminal enterprise," but also appellant's knowledge of the drugs in the house, and the child endangerment specification. In short, the illegally admitted evidence formed the "cornerstone" of the government's case against appellant. *See* *United States v. Long, 64 M.J. 57, 66 (C.A.A.F. 2006)*.

For these reasons, at this stage in the proceedings, it is impossible to separate the impact of all these items on the ultimate conviction. Accordingly, we cannot conclude that the error was harmless beyond a reasonable doubt.

CONCLUSION

The findings of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority. *See generally* R.C.M. 810.

Senior Judge MULLIGAN and Judge BURTON concur.

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[5] The actual amount of marijuana in the box was closer **[*15]** to 3-4 pounds, according to the postal inspector. The rest of the 5.25 pounds purportedly included the amount of marijuana found throughout the home, an amount now improperly considered.

APPENDIX C

User Name: Kyle Sprague
Date and Time: Monday, December 23, 2019 2:07:00 PM EST
Job Number: 105954674

Document (1)

1. *United States v. Chatman, 2014 CCA LEXIS 353*

Client/Matter: -None-
Search Terms: army 20120494
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > Military Justice

United States v. Chatman

United States Army Court of Criminal Appeals

June 11, 2014, Decided

ARMY 20120494

Reporter
2014 CCA LEXIS 353 *

UNITED STATES, Appellee v. Private E1 JUSTIN S. CHATMAN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, Joint Readiness Training Center and Fort Polk. Kirsten V.C. Brunson, Military Judge. Colonel Keith C. Well, Staff Judge Advocate.

Core Terms

Investigator, military, interview, promise, immunity, inducement, confession, videotaped interview, stolen property, involuntary, charges, rooms, hashish, motion to suppress, circumstances, larceny, minutes, talk, grant immunity, inadmissible, unlawfully, garrison, session, rights, defense counsel, court-martial, prosecuted, admitting, convicted, cooperate

Case Summary

Overview
HOLDINGS: [1]-A servicemember's incriminating statements during an initial interview were not shown to be voluntary and were improperly admitted since the investigator unlawfully induced the statements by promising that the servicemember would not be charged, and stating that the investigator had significant influence with the prosecutor and the garrison commander; [2]-While a second interview by a detective did not directly involve promises or unlawful influence, the servicemember's statements in that interview were also improperly admitted since the statements made in the second interview, which closely followed the first interview without a cleansing warning that the statements could be used at trial, were derivative of the first flagrantly unlawful interview and not sufficiently attenuated so as to allow admission of the statements.

Outcome
Findings and sentence set aside and charges dismissed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Evidence, Evidentiary Rulings**

A military appellate court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Abuse of discretion

is a term of art applied to appellate review of the discretionary judgments of a trial court. An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN2[] Admissibility of Evidence, Admissions & Confessions

Except in limited circumstances, an involuntary statement or any derivative evidence therefrom may not be received in evidence against a servicemember who made the statement if the servicemember makes a timely motion to suppress or an objection to the evidence. Mil. R. Evid. 304(a), Manual Courts-Martial. In this regard, a statement is involuntary if it is obtained in violation of the self-incrimination privilege or *due process clause of the Fifth Amendment to the Constitution of the United States*, Unif. Code Mil. Justice art. 31, *10 U.S.C.S. § 831*, or through the use of coercion, unlawful influence, or unlawful inducement. Rule 304(c)(3).

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN3[] Admissibility of Evidence, Admissions & Confessions

See Unif. Code Mil. Justice art. 31(d), *10 U.S.C.S. § 831(d)*.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN4[] Admissibility of Evidence, Admissions & Confessions

Once a motion to suppress a servicemember's statements is brought, the burden is on the government to establish the admissibility of the offered statements.

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN5[] Motions, Suppression

See Mil. R. Evid. 304(e)(1), Manual Courts-Martial.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] Admissibility of Evidence, Admissions & Confessions

Conclusions regarding voluntariness of a servicemember's confession are reviewed de novo.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN7[] Admissibility of Evidence, Admissions & Confessions

See Mil. R. Evid. 304(b), Manual Courts-Martial.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN8[] Admissibility of Evidence, Admissions & Confessions

The lawfulness of a servicemember's confession is determined upon examination of the totality of the surrounding circumstances. Promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness. Similarly, lies, threats, or inducements are not determinative either.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9[] **Admissibility of Evidence, Admissions & Confessions**

If a military appellate court finds that a military judge abused her discretion by admitting an involuntary confession, the conviction must be set aside unless the court determines that the error in admitting the confession was harmless beyond a reasonable doubt. When deciding whether the military judge abused her discretion, the judge's ruling is afforded deference on appeal only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN10[] **Admissibility of Evidence, Admissions & Confessions**

Even limited promises of immunity can render a servicemember's confession to other crimes involuntary.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

HN11[] **Admissibility of Evidence, Admissions & Confessions**

A military appellate court need not hold that all evidence of a servicemember's confession is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which the 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. To make this determination, the court considers three factors: temporal proximity of the violation and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.

Counsel: For Appellant: Captain Brian J. Sullivan, JA (argued); Colonel Kevin Boyle, JA; Lieutenant Colonel Peter Kageleiry, JA; Major Amy E. Nieman, JA; Captain J. Fred Ingram, JA (on brief).

For Appellee: Captain Sean P. Fitzgibbon, JA (argued); Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Elisabeth A. Claus, JA; Captain Sean P. Fitzgibbon, JA (on brief).

Judges: Before GLANVILLE, ALDYKIEWICZ, and MARTIN[1], Appellate Military Judges. Judge ALDYKIEWICZ and Judge MARTIN concur.

Opinion by: GLANVILLE

Opinion

MEMORANDUM OPINION

GLANVILLE, Chief Judge:

A military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of three specifications of larceny and three specifications of burglary, in violation of Articles 121 and 129, Uniform Code of Military Justice [hereinafter UCMJ], *10 U.S.C. §§ 921*, *929 (2006)*. The convening authority approved appellant's adjudged sentence to a bad-conduct discharge, confinement for fourteen months, and reduction **[*2]** to the grade of E-1.

The above-captioned case is now before this court for

[1] Judge MARTIN took final action in this case prior to her permanent change of station.

review pursuant to *Article 66, UCMJ*.[2] Appellant raises two assignments of error. First, appellant argues that the purported incriminating statements to law enforcement were inadmissible "because they were made following a military police investigator's assurances that appellant would not be prosecuted if he cooperated with law enforcement" and the military judge abused her discretion in limiting any "promised immunity" to the possession of stolen property, an uncharged offense. Second, appellant argues that the "corroborating evidence to appellant's confession" regarding Specialist PG, one of the three victims, was "inadmissible testimonial hearsay." Appellant's first assignment of error has merit, and thus, the court need not address appellant's second assignment of error or those matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

BACKGROUND

The above-captioned **[*3]** case involves a simple barracks larceny of three rooms by appellant while the victims, members of appellant's unit, were in the field on a training exercise ("FTX") from 5-9 December 2011. Appellant stayed behind as a member of the rear detachment. This case also involves two different interviews of appellant by Military Police Investigation ("MPI"). Both of appellant's MPI interviews were videotaped, incorporated in the defense's 17 May 2012 suppression motion, and offered as prosecution exhibits (*i.e.*, Pros. Ex. 1A, 1B, and 2)[3] during the government's case-in-chief.

In the early morning hours of 8 December 2011, appellant used his rear detachment status to burglarize three barracks rooms belonging to members of his company who were in the field on an FTX: Specialist (SPC) JS, SPC KS, and SPC PG. Appellant unlawfully gained entry into the locked rooms by using a master key, after which **[*4]** he carried various items of personal property belonging to the three soldiers to his car, thereafter taking the property to his off-post apartment. The stolen property included three televisions, three video game consoles, video game controllers, assorted video games, and a laptop computer.

On the evening of 9 December 2011, SPC JS, SPC KS, and SPC PG returned from their five-day FTX to find their barracks rooms burglarized. After notifying the chain of command, law enforcement was contacted, and the victims provided statements documenting those items taken from their respective rooms.

The following day, 10 December 2011, SPC KS, along with another soldier, went to see appellant at his off-post apartment. While inside, SPC KS observed what he believed to be some of his stolen property, observations that prompted SPC KS to provide a second military police report documenting what he observed. The focus of the criminal investigation then shifted to appellant.

Later that day, appellant was at the MPI office for what would be the first of his two videotaped interviews. Appellant's presence at the MPI office was the result of him being brought in for the interview by law enforcement personnel. **[*5]** Contemporaneously, law enforcement authorities searched appellant's apartment, however, the search failed to discover any of the stolen property.

10-11 December 2011 Interview (Interview #1)

As noted above, appellant's first MPI interview began the evening of 10 December 2011. Appellant's interviewer was Investigator E. Appellant's interactions with Investigator E began sometime after 2000, 10 December 2011 and ended shortly before 0300 the next morning, 11 December 2011. The videotaped interview lasted just over one hour and forty-five minutes.

At the start of the videotaped interview, appellant was advised of his *Article 31, UCMJ*, rights. During the course of the interview, Investigator E made no less than five statements regarding the following: (1) coordination with the prosecution or garrison commander vis-à-vis helping appellant, (2) immunity, and (3) no-prosecution in exchange for action by appellant.

Thirteen minutes into the interview, Investigator E told appellant, "I have a real big influence with the prosecutor as far as what happens to subjects." Less than three minutes later, after telling appellant he did not

[2] Oral argument in this case was heard in Durham, N.C. on 23 January 2014 at North Carolina Central University School of Law as part of the "Outreach Program" of the United States Army Court of Criminal Appeals.

[3] The first MPI interview began on the evening on 10 December 2011 and ended in the early morning hours of 11 December 2011. This interview is captured collectively in Pros. Ex. 1A and 1B. The second interview began and ended on the same day, 12 December 2011. This interview is captured in Pros. Ex. 2.

believe the denials of involvement, Investigator E said, "I wish **[*6]** you would help yourself out and bring that [sh--] to light so I got something to tell the prosecutor instead of just saying hem him up." As the interview progressed, Investigator E advised appellant of the possible sentence for "housebreaking and larceny," a period of confinement that did not include additional confinement for conspiracy and being an "accessory" because appellant was in possession of the stolen property.

After nearly an hour, Investigator E discussed how appellant would not be charged for simply possessing stolen property, telling him,

> [I]f you didn't have anything to do with it and you're just holding for some - - something for somebody else, the only thing you can really get hit with is possession of stolen property. However, if you lead the prosecutor to who really did this [sh--] they're not gonna charge you for that - - that's piddly [sh--]. You're a witness now, you're not a subject. Right now you're a subject; you're the subject.

As the interview continued, appellant brought up "Carlos," the alleged burglar and thief. Appellant suggested that he could coordinate with Carlos to try and get the stolen property back. This course of action, however, was unacceptable **[*7]** to Investigator E.

After stepping out of the interview room and purportedly speaking with the prosecutor, Investigator E advised appellant, "I just talked with the prosecutor and there is [sh--] we can do to help you out." Investigator E continued, "You're gonna have to give me some information . . . . You're gonna have to start giving me some fact (sic) man, cause I'm trying to work with you . . . . I just called the prosecutor at 12:30 at night, told him a little about the situation." At this point, Investigator E again advised appellant that all the evidence pointed to him as the burglar and thief. Investigator E then shifted focus to what could be done to help appellant out, again referencing the prosecutor: "the prosecutor has already said man that he's willing - - you know, we're - - they're willing to work - - to work [sh--] out - - if you're legitimately honest. . . . I mean, we can work with you."

After further give and take, appellant told Investigator E that Carlos gained entry into the barracks rooms using a master key and appellant was simply holding the property for Carlos at his apartment. Upon hearing this, Investigator E advised appellant, in part, "[I]f you wouldn't **[*8]** have told that [sh--] you were gonna get charged. . . . But now I've got something to go off of. So I'm gonna stay true to my word and I'm not gonna charge you. But there's gonna be some conditions on that . . . . [Y]ou gotta cooperate with us, from here on out. . . . I mean you're a part of this now, on our side. So you're not gonna get [f---ed] with; aint gonna charge you." Investigator E added, "[R]ight now you're on my side. You went from being the person I was trying to get; now you're on my side."

At the close of the interview and after advising appellant again that he was not being charged, Investigator E placed limits on what appellant could do and who appellant could speak with. Investigator E told appellant: "I told you I was gonna work with you. I aint [bullsh---ing] you because you aint getting charged. . . . Be loyal to me and help us out with this investigation and we'll - - I mean we'll be loyal to you." After telling appellant he was "gonna walk tonight," Investigator E advised appellant that "there's gonna be conditions on who you can talk to about this [sh--]. You can't talk to anybody about this [sh--], nothing, this is it." Investigator E characterized the discussions **[*9]** as "protected information." Investigator E ended the interview by referencing the garrison commander and MPI's influence over him, stating: "we report directly to the garrison commander, so, whatever we need to do to help you out, as long as you help us out, it can get done."

12 December 2011 Interview (Interview #2)

Thirty-six hours after the initial MPI interview, appellant was back at the MPI office. This time, appellant was interviewed by Detective B, an interview lasting just over thirty minutes and preceded by *Article 31, UCMJ*, rights warnings. Appellant was not, however, given any cleansing warning, nor was he advised that Investigator E's promises from the day prior were no longer in play. Similarly, appellant was not advised that anything he said to Investigator E the day prior could not be used against him. Unlike Investigator E, Detective B did not promise appellant anything. In fact, just over seventeen minutes into the interview, the discussion focused on an alleged statement by one of the victims, SPC KS, to appellant where SPC KS allegedly told appellant that he would "block" charges if he got his property back. Hearing this, Detective B asked appellant if he assumed charges **[*10]** would be blocked if the property was returned. Appellant negatively responded because he was "guilty for going into those rooms."

As the interview progressed, appellant's story changed

from simply holding property for Carlos to himself burglarizing the rooms and stealing the property with Carlos, the ultimate goal being the sale of the stolen property.

Seven minutes after admitting guilt for "going into those rooms," Investigator E entered the interview room, again making promises of no prosecution. This time, Investigator E promised not to prosecute whoever was currently holding the property for appellant. Subsequently, the focus of the discussions was the immediate retrieval of the stolen property.

After obtaining appellant's confession to the burglary and larcenies and clarifying Carlos' actual existence and limited role in the crimes, both Investigator E and Detective B left appellant in the interview room, where appellant received a call from an unidentified party. During this call, a conversation that was partially recorded, appellant advised the caller that he needed the property he took returned as soon as possible. Most notably, appellant advised the unidentified party: "they **[*11]** said the [sh--] was - - if the [sh--] pops back up - - they said the [sh--] pops back up they gonna drop all the damn charges . . . ." Shortly thereafter, the property was returned to appellant's apartment, where it was identified by the victims as their stolen property and thereafter returned to them.

Pretrial Litigation

On the morning of trial, 17 May 2012, trial defense counsel brought a written suppression motion, seeking to exclude all of appellant's statements, alleging the statements were involuntarily obtained in violation of *Article 31, UCMJ*, the *Fifth Amendment to the Constitution of the United States*, and Military Rule of Evidence [hereinafter "Mil. R. Evid."] 305 as well as being obtained by "unlawful influence and unlawful inducement." The essence of appellant's pretrial motion was that the actions of Investigator E on 10-11 December 2011 unlawfully induced and influenced appellant into providing the first statement. Regarding the second statement to Detective B, appellant's motion noted: "[i]t was only after the promises made by INV [E] that [appellant] provided these inculpatory statements to Mrs. [B]." The defense's motion concluded with the following:

> [T]he only reason **[*12]** that PV1 Chatman gave the two statements is because he was induced into believing that he would not get in trouble, and that INV [E] and Mrs. [B] would help him. Therefore, like Churnovic, PV1 Chatman's statements should be suppressed because they are proscribed by M.R.E. 304(c)(3) and inadmissible.

Due to the appellant's last-minute motion, the government did not respond in writing. Rather than delay the proceeding, the military judge entertained the motion and proceeded with the trial, noting:

> Counsel came in this morning and advised me that the defense counsel has a motion to suppress statements which they just raised. The motion is Appellate Exhibit I, dated today, 17 May 2012. We have discussed it briefly in chambers this morning. And as I understand, it centers around an interview of the accused by military police investigators. Is that correct?

After receiving an affirmative response from the defense counsel, the military judge attempted to highlight the issue: "And the issue is whether — if I understand your motion Captain [H], essentially, what you are saying is the accused was led to believe that he was being offered immunity for his statement." The defense counsel responded: **[*13]** "Yes, ma'am. Specifically, that he would not be prosecuted for these suspected offenses [ ]."

Neither side called any witnesses and the only evidence offered and considered by the military judge was the two videotaped interviews. The session and discussions focused primarily, if not exclusively, on whether appellant was granted immunity from prosecution by Investigator E and the impact of said immunity on the government's prosecution. Although appellant's written motion focused on voluntariness, the military judge never mentioned voluntariness during the session or ruling.

Review of the time designations in the authenticated record reveals the court recessed at 1325, 17 May 2012 and reconvened at 1455, one and a half hours later. Of note, the recess period was insufficient in length to allow the military judge to review the entirety of both videotaped interviews, which totaled over two hours and 15 minutes in duration and the session fails to reveal that the military judge conducted a complete review of both videotaped interviews. Rather, during the session, counsel referred to portions of the interview deemed relevant.

At approximately 1455, the military judge issued an oral ruling denying **[*14]** the defense's motion. The military judge found, in part, that "[appellant] was promised

immunity for the charge of possession of stolen property in exchange for providing information on the actual culprit."[4] The military judge's oral ruling provides no conclusions of law and fails to cite what, if any, legal authority was relied upon to reach the decision.[5]

Government's Case-in-Chief

During its case-in-chief, the government introduced, *inter alia*, both of appellant's videotaped interviews at MPI as well as testimony from two of the three burglary victims. At the close of evidence, the military judge found appellant guilty of all charges and specifications as charged with the exception of one of the larceny charges, which she excepted from the specification an item of property allegedly stolen and reduced the charged value of the larceny from "more than $500" to "some value."

LAW AND DISCUSSION

HN1[] We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Barnett, 63 M.J. 388, 394 (C.A.A.F. 2006)*; **[*15]** *United States v. Whigham, 72 M.J. 653, 658 (Army Ct. Crim. App. 2013)*. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)* (citing *United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010))*. "'Abuse of discretion' is a term of art applied to appellate review of the discretionary judgments of a trial court. An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008)* (citing *United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007))*.

HN2[] Except in limited circumstances, "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."[6] Mil. R. Evid. 304(a). In this regard, a statement is involuntary "if it is obtained in violation of the self-incrimination privilege **[*16]** or *due process clause of the Fifth Amendment to the Constitution of the United States*, *Article 31*, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3). ***HN3***[] "No statement obtained from any person in violation of [*Article 31, UCMJ*], or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." *UCMJ art. 31(d)*. ***HN4***[] Once a motion to suppress is brought, the burden is on the government to establish the admissibility of the offered statements.

> ***HN5***[] When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. . . . The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence.

Mil. R. Evid. 304(e)(1); *see also United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F 1996)*. ***HN6***[] Conclusions regarding voluntariness are reviewed de novo. *Bubonics, 45 M.J. at 95* (citing *Arizona v. Fulminante, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L.*

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[4] Appellant was never charged with "possession of stolen property."

[5] The military judge's oral findings are not later supplemented with written findings of fact or conclusions of law.

[6] Mil. R. Evid. 304 provides for three limited exceptions:

> ***HN7***[] (1) Where the statement **[*17]** is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.
>
> (2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.
>
> (3) Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

Mil. R. Evid. 304(b).

Ed. 2d 302 (1991))*.

HN8[↑] The lawfulness of a confession is determined upon examination of "the totality of the surrounding circumstances."[7] *Freeman, 65 M.J. 451, 453* (citing *Bubonics, 45 M.J. at 95*). **[*18]** "Before *Fulminante*, a confession "obtained by any direct or implied promises, however slight," was not voluntary." *Freeman, 65 M.J. at 455* (citation omitted). "Since *Fulminante*, however, promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness." *Id*. (citations omitted). "Similarly, lies, threats, or inducements are not determinative either." *Id*. (citations omitted).

HN9[↑] If this court finds the military judge abused her discretion by admitting an involuntary confession, the conviction must be set aside "unless we determine the error in admitting the **[*19]** confession was harmless beyond a reasonable doubt." *Freeman, 65 M.J. at 453* (citing *Fulminante, 499 U.S. at 285*). When deciding whether the military judge abused her discretion, the judge's ruling is afforded deference on appeal "only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts." *United States v. Briggs, 64 M.J. 285, 287* (citing *United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002)*.

The military judge's handling of the defense's 17 May 2012 motion, albeit last minute and handled without the benefit of written response, leads the court to conclude that it should be accorded no deference. As previously noted, notwithstanding a written suppression motion based on the involuntary nature of appellant's statement, the entirety of the pretrial motion session focused on "immunity" and was devoid of any discussion regarding the voluntariness of appellant's 10-11 December 2011 statements to Investigator E. As a result, the military judge's factual findings are limited to immunity and silent with respect to voluntariness. Some of the blame for this lack of focus rests with the defense by responding in the **[*20]** affirmative when the military judge asked "what you are saying is the accused was led to believe that he was being offered immunity for his statement?" However, the military judge is not without fault. Before the court was App. Ex. I, a written motion that focused the issue on the voluntariness of appellant's statements. At a minimum, the military judge should have sought clarification regarding the potential issues before her and resolved any inconsistencies between the written pleadings submitted by the trial defense counsel and counsel's in-court response to her query. That the military judge may have been urged to address "immunity" to the exclusion of "voluntariness" by appellant's counsel's query response does not relieve her of her obligation to fully address and resolve the motion before her, something she failed to do with regard to App. Ex. I.

Additionally, although limited factual findings were entered prior to her ruling, those findings focus on the issue of immunity, not voluntariness. Furthermore, the military judge failed to make any conclusions of law whatsoever which might inform this court regarding her decision. It is problematic that the military judge did not address **[*21]** whether appellant's statements were involuntary — that is, unlawfully induced or unlawfully influenced. As noted above, the military judge found that Investigator E made a limited promise of immunity. The problem is that ***HN10***[↑] even limited promises of immunity can render a confession to other crimes involuntary. *See United States v. Churnovic, 22 M.J. 401, 408 (C.M.A. 1986)* ("Indeed, use of such a promise to obtain a statement but not honoring that promise constitutes an 'unlawful inducement' for purposes of *Article 31(d), [UCMJ]*."). In this case, the issues of promised immunity and voluntariness are so intertwined as to be inseparable.

Interview #1

Turning to the first videotaped interview, the issue is whether Investigator E's statements unlawfully induced or influenced appellant's statement. As noted in the background section, Investigator E made promises to appellant and created, at a minimum, the appearance that Investigator E was speaking with the authority of the prosecutor and arguably the garrison commander.

Almost immediately after advising appellant of his *Article 31, UCMJ*, rights, Investigator E told appellant "I have a real big influence with the prosecutor as far as what

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[7] Consideration of the "totality of the surrounding circumstances" focuses on "both the characteristics of the accused and the details of the interrogation." *Freeman, 65 M.J. at 453*. A non-exclusive list of factors includes: the youth of the accused, his lack of education, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id*. (quoting *Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973))* (internal citations omitted).

happens **[*22]** to subjects." Investigator E then discussed how appellant would not be charged for possessing stolen property, telling appellant "if you lead the prosecutor to who really did this . . . they're not gonna charge you for that - - that's piddly [sh--]," a statement the Military Judge found to be the equivalent of promised immunity from prosecution for possessing stolen property.[8]

When Investigator E did not get what he wanted from appellant, Investigator E told appellant that JAG, not MPI, was charging him and the paperwork was "already in." Investigator E immediately followed this statement with, "I just talked with the prosecutor and **[*23]** there is [sh--] we can do to help you out." The offer of help was contingent upon appellant giving MPI some facts and cooperating with MPI. Investigator E told appellant, "[y]ou're gonna have to start giving me some fact (sic) man . . . . I just called the prosecutor at 12:30 at night, told him a little about the situation." Investigator E added, "[t]he prosecutor has already said man that he's willing - - you know, we're - - they're willing to work - - to work [sh--] out - - if you're legitimately honest and you know, you - - you just want to get out of this [sh--], I mean, we can work with you."

Investigator E's efforts to obtain "fact[s]" from appellant were eventually answered when appellant brought Carlos into the story, laying blame for the burglaries and larcenies at Carlos' feet. Having gotten facts as requested, Investigator E then advised that appellant was not being charged, specifically telling him "I'm not gonna charge you" and appellant was "gonna walk tonight." There were, however, some conditions in place: appellant would have to "cooperate" with MPI; "[b]e loyal to [Investigator E]; help [ ] out with [the] investigation;" and refrain from talking to anybody about the **[*24]** investigation. Investigator E characterized the exchanged information "protected information," information accessible to Investigator E, Investigator E's Lieutenant, and the prosecutor only.

By the close of the interview, appellant went from being the person Investigator E was "trying to get" to being on his "side." After telling appellant that they were now teammates, for lack of a better term, Investigator E again advised appellant that he was not being charged, telling him: "I told you I was gonna work with you. I aint [bullsh---ing] you because you aint getting charged." Finally, Investigator E told appellant that MPI reports directly to the garrison commander, assuring appellant that "whatever we need to do to help you out, as long as you help us out, it can get done."

Investigator E's promises and statements to appellant on 10-11 December 2011 equaled or exceeded in scope those comments held by our superior court to rise to the level of unlawful inducement in *United States v. Churnovic. 22 M.J. 401 (C.M.A. 1986)*. In *Churnovic*, Petty Officer (PO) Churnovic told his supervisor, Chief Petty Officer E, where hashish was hidden aboard the USS OUELLET. *22 M.J. at 403*. This disclosure **[*25]** was made following a promise from the Chief Petty Officer that whoever turned in the contraband "wouldn't get in trouble." *Id*. Petty Officer Churnovic later confessed to Naval Investigative Service Special Agent Waddell that he used hashish at substantially the same time. *Id*. Thereafter, however, appellant was charged with, *inter alia*, wrongful possession and wrongful use of hashish. *Id. at 402*. Petty Officer Churnovic's pretrial motion to dismiss based on a "grant of immunity" as well as the absence of *Article 31, UCMJ*, warnings were denied by the trial judge and he was eventually convicted of both possessing and using hashish. *Id. at 405*.

In setting aside PO Churnovic's conviction, the court found the statements at issue, such as the location of the hashish, were unlawfully induced by the promise made to PO Churnovic.[9] The court also found that the hashish itself was "derivative" evidence of the *Article 31(d), UCMJ*, violation. *Id. at 408*. The court specifically noted, "use of such a promise to obtain a statement but not honoring that promise constitutes an 'unlawful inducement' for purposes of *Article 31(d)*." *Id*. Regarding PO Churnovic's confession regarding his use of hashish to **[*26]** Naval Investigative Service Special Agent Waddell made two days after disclosure of the hashish's location, the court noted:

[8] We need not address and do not reach the issue of whether appellant was granted actual or de facto immunity from prosecution as a result of Investigator E's comments. Our decision in this case rests on the voluntariness of appellant's statements to Investigator E and its impact on the statements made the following day to Detective B. In other words, we need not and do not decide the validity of the Military Judge's ruling finding a limited grant of immunity from prosecution for possessing stolen property, an offense for which appellant was never charged.

[9] However, the court also noted that "even if the claim of transactional immunity were upheld, it would not dispose of the offenses of use for which Churnovic was convicted." *22 M.J. at 407*.

> [I]t is clear that here the original unwarned statements to [Chief Petty Officer E] directly produced the later statements to Waddell. The relationship in time and place is too close to allow reception of the later statement. Clearly the later statement would not have been made if earlier Churnovic had not made his inadmissible statement to [Chief Petty Officer E] disclosing the exact location of the hashish.

Id.

In *United States v. Kimble*, Air Force Technical Sergeant Kimble was tried and convicted for committing indecent acts on his younger daughter. 33 M.J. 284, 284 (C.M.A. 1991). As part of a civilian pretrial diversionary program, Technical Sergeant Kimble was enrolled in a downtown treatment program. Technical Sergeant Kimble's squadron commander advised appellant that the Special Court-Martial Convening Authority decided that successful completion of the treatment program **[*27]** would prevent any court-martial action. *Id. at 285-86*. Notwithstanding the promise, appellant was tried at a general court-martial where the government introduced the testimony of a clinical therapist to whom appellant made inculpatory statements as part of the treatment program. The statements were the subject of an unsuccessful defense suppression motion alleging that appellant was granted immunity from prosecution and that the statements were unlawfully induced or influenced by the no-prosecution promise, both of which arguments were rejected by the trial judge. *Id. at 288-89*. The court of military review affirmed. *30 M.J. 892 (A.F.C.M.R. 1990)*. The Court of Military Appeals, however, disagreed.

On appeal before the Court of Military Appeals, the government focused on Technical Sergeant Kimble's alleged deception by not advising the command of the full scope and extent of his daughter's abuse. That is, the chain of command was led to believe appellant abused his daughter on two occasions and only after they discovered the full extent of his abuse during appellant's treatment did they decide to prosecute appellant. In other words, had the abuse been limited as initially believed, **[*28]** appellant would not have been prosecuted. The court found this argument unpersuasive, noting: "If the Government relied solely on appellant's version of events in making its decision and its subsequent promise—without any expression of a caveat that that version must have been accurate and complete—the Government proceeded at its own risk." *Kimble, 33 M.J. at 290*. Furthermore, "the failure of Air Force officials to be 'knowledgeable' in making their promise was due to their own inattention and lack of even rudimentary investigation, not to appellant's deception." *Id. at 291*. Lastly, the court referred back to its admonishment in *Churnovic*: "Care should be taken in making promises of immunity; . . . However, once made, the promise should be complied with by the Government rather than evaded on technical grounds." *Id. at 293* (quoting *Churnovic, 22 M.J. at 407*).

The court concluded:

> Fundamentally, however, what military officials at all levels must keep in mind is this: Regardless whether the promise be one formally of immunity pursuant to RCM 704, or whether it be one that induces the accused into making incriminating admissions as in *Churnovic*, or whether it is one that in some other **[*29]** way is relied upon by an accused to his detriment, due process requires that the accused get the benefit of his bargain.

Id. at 293 (citation omitted). Judge Cox, while dissenting from the majority opinion's finding of immunity, noted he would "strike all evidence from the record which was or could have been derived from [ ] when the decision was communicated to appellant that the case would be handled by civilian agencies." Judge Cox concluded:

> There is no question in my mind that appellant had a right to rely upon his commanding officer's representation that the matter would not result in court-martial if he cooperated with the civil authorities. I would not elevate this promise to a grant of immunity, but I would find that it constituted a form of legal coercion under *Article 31*.
> Accordingly, I dissent from the majority opinion, but I do so recognizing that the end result might well be the same.

Id. at 294; *see also* *Cunningham v. Gilevich, 36 M.J. 94, 101 (C.M.A. 1992)* (repeated conversations and advice by command to accuseds (i.e., petitioners) advising them that they should testify before board investigating training accident and it would all "work out" did not rise to level of promised **[*30]** immunity but did "[influence] the advice given by petitioners' counsel" overcoming their reluctance to testify and constituted "'unlawful influence' within the meaning of *Article 31(d) [UCMJ]*;" statements held inadmissible).

In less than two hours with appellant, Investigator E noted: his significant influence with the prosecutor; that

appellant would not be prosecuted for possessing stolen property; that Investigator E personally spoke with the prosecutor at "12:30" (0030); that Investigator E and the prosecutor were willing to work with appellant; and that appellant, once he provided "fact[s]," which he did, would not be charged. Although Investigator E asked appellant to be honest, the statement that appellant would not be charged was not contingent upon a complete, honest, and full accounting of appellant's role in the crimes. In fact, the statement regarding no charges, if contingent upon anything, was contingent upon appellant "cooperating" with MPI, being "loyal" to Investigator E, and refraining from talking to anybody other than MPI. The statement by Investigator E that appellant was not being charged was made not once, but twice. Perhaps in an effort to enhance credibility **[*31]** or apparent authority, Investigator E ended the interview by highlighting MPI's relationship with "the garrison commander," noting "whatever we need to do to help you out, as long as you help us out, it can get done."

Although appellant's lack of forthrightness with Investigator E regarding his full involvement in the burglaries and larcenies is a factor considered by this court in reaching its decision, it is not dispositive of whether Investigator E improperly induced or influenced appellant to make his 10-11 December 2011 statement. We reiterate the sage advice provided by our higher court in *Kimble* over twenty years ago: "If the Government relied solely on appellant's version of events in making its decision and its subsequent promise—without any expression of a caveat that that version must have been accurate and complete—the Government proceeded at its own risk." *Kimble, 33 M.J. at 290*. Stated another way, "Care should be taken in making promises." *Id. at 293* (quoting *Churnovic, 22 M.J. at 407*).

When considering the "totality of the surrounding circumstances," we find Investigator E's statements collectively constitute unlawful inducement or unlawful influence resulting in an involuntary **[*32]** confession under Mil. R. Evid. 304(c)(3) and one obtained in violation of *Article 31(d), UCMJ*. Thus, the military judge erred in denying the defense's suppression motion and in admitting the 10-11 December 2011 videotaped interview as captured collectively in Pros. Ex. 1A and 1B.

Interview #2

We now address appellant's 12 December 2011 interview by Detective B, one unencumbered by promises and references to the prosecutor and garrison commander. The question before us, considering our suppression of the first interview, is what impact, if any, did appellant's first confession have on his second? In other words, is the second confession "fruit of the poisonous tree" or derivative of the first. *United States v. Conklin, 63 M.J. 333, 334 (C.A.A.F.2006)* (citing *Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)*). If so, the evidence is inadmissible. *Id*. However, if the government can establish that the second confession was "an independent act of free will," the confession would be admissible. *Conklin, 63 M.J. at 338*.

In *Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)*, the Supreme Court noted,

> ***HN11***[⬆] We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have **[*33]** come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which the 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, 371 U.S. at 487-88, 83 S.Ct. 407 (internal citations and quotation marks omitted). To make this determination, we consider three factors: "temporal proximity of the [violation] and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)*; *see Conklin, 63 M.J. at 338*.

As previously noted, the session in appellant's case was limited exclusively to the issue of immunity. As such, the session failed to develop any evidence regarding the facts and circumstances surrounding appellant's second interview. What can be gleaned from review of Pros. Ex. 2 and the record reveals an interview that occurred within approximately thirty-six hours of appellant's first interview. Although appellant was advised of his *Article 31, UCMJ*, **[*34]** rights, no cleansing warnings were given nor were any of the promises previously made by Investigator E discussed. The only discussion arguably related to immunity or no prosecution focused on a statement one victim made to appellant indicating he would "block" charges if he, the victim, received his

property back. When asked by Detective B if appellant thought charges would be "blocked," appellant responded he did not, because he was "guilty for going into those rooms." As for appellant's return to MPI for a supplemental interview, the record fails to reveal whether appellant returned of his own accord without prompting or whether he was brought in for additional questioning. Whether appellant had access to defense counsel or sought the advice of counsel, military or civilian, is likewise unaddressed.[10] What is without dispute, however, is that appellant was told by Investigator E he could not talk to anyone except members of MPI or the prosecutor.

Applying the *Brown* factors, all three cut against the government. First, temporal proximity, favors appellant when considering 10-12 **[*35]** December 2011 was a weekend period and appellant was advised by Investigator E that he could not talk to anyone about the case. The government failed to introduce any evidence that appellant did anything except sit around and wait to be re-interviewed by law enforcement in accordance with Investigator E's' specific guidance. Second, intervening circumstances also favor appellant even when considering that appellant was properly advised of his *Article 31, UCMJ*, rights before the second interview. This advice is, however, viewed against a backdrop where appellant was not given a cleansing warning and not advised that Investigator E was acting well beyond his authority in advising appellant that he was no longer a subject, not being charged, and now a part of Investigator E's team. Finally, the purpose and flagrancy of the official misconduct favors appellant for the reasons noted in our discussion of the first interview.

Furthermore, the facts and analysis of *Churnovic* are useful in analyzing appellant's second interview. The grant of immunity in *Churnovic*, even if established, would not have covered every crime of which PO Churnovic was convicted. *22 M.J. at 407*. However, the initial **[*36]** unlawful inducement in *Churnovic* "directly produced" the later statements. *Id. at 408*. Here, the military judge found a limited grant of immunity that did not cover the crimes of which appellant was convicted. But, similar to *Churnovic*, "it is clear that here the original [ ] statements [ ] directly produced the later statements [ ]. The relationship in time and place is too close to allow reception of the later statement." *Churnovic, 22 M.J. at 405*. Given the absence of evidence to the contrary in the record, appellant's second videotaped interview with Detective B is derivative of his first unlawful interview and not sufficiently attenuated so as to allow its admission. As such, the military judge erred in denying the defense's suppression motion and in admitting the 12 December 2011 videotaped interview as captured in Pros. Ex. 2.

CONCLUSION

We find, for the reasons noted *supra*, that the military judge abused her discretion in admitting appellant's 10-11 December 2011 statements to Investigator E as documented collectively in Pros. Ex. 1A and 1B, appellant's first videotaped interview. After considering the totality of the circumstances surrounding the taking of appellant's initial **[*37]** videotaped interview, we find the statements were the result of unlawful inducement or influence. We further find that the government has failed to establish that the second videotaped interview with Detective B, Pros. Ex. 2, was not derivative of the first and as such, is likewise inadmissible against appellant. Finally, we find that admission of Pros. Ex. 1A, 1B, and 2 was not harmless beyond a reasonable doubt.

The findings of guilty and the sentence are set aside. The charges are dismissed. All rights, privileges, and property, of which appellant has been deprived by virtue of this decision setting aside the findings and sentence are ordered restored. *See UCMJ arts. 58a(b)*, *58b(c)*, and *75(a)*.

Judge ALDYKIEWICZ and Judge MARTIN concur.

End of Document

[10] The court takes judicial notice of the fact that 10-12 December 2011 was a Saturday through Monday.

APPENDIX D

User Name: Kyle Sprague
Date and Time: Monday, December 23, 2019 2:10:00 PM EST
Job Number: 105954885

Document (1)

1. *United States v. Hendricks, 2008 CCA LEXIS 305*

Client/Matter: -None-
Search Terms: NMCCA 200701009
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > Military Justice

United States v. Hendricks

United States Navy-Marine Corps Court of Criminal Appeals

September 16, 2008, Decided

NMCCA 200701009

Reporter
2008 CCA LEXIS 305 *; 2008 WL 4299499

UNITED STATES OF AMERICA v. CHRISTOPHER L. HENDRICKS, PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

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

Prior History: [*1] SPECIAL COURT-MARTIAL. Sentence Adjudged: 21 August 2007. Military Judge: CDR Mario DeOliveira, JAGC, USN. Convening Authority: Commanding Officer, Aviation Maintenance Squadron One, Marine Aviation Training Support Group-21, Pensacola, FL. Staff Judge Advocate's Recommendation: LtCol J.R. Woodworth, USMC.

Core Terms

authorities, obstruction of justice, misconduct, criminal proceeding, obstruction, sentence, drugs, criminal investigation, investigating, marijuana, military, flushed, impede, alleged obstruction, guilty plea

Case Summary

Procedural Posture

A military judge, sitting as a special court-martial, convicted appellant servicemember, pursuant to his pleas, of wrongful use of cocaine and marijuana on divers occasions, wrongful introduction of cocaine onto an installation under the control of the armed forces on divers occasions, and obstruction of justice, in violation of Unif. Code Mil. Justice (UCMJ) arts. 112a and 134, *10 U.S.C.S. §§ 912a* and *934*. The servicemember appealed.

Overview
The servicemember was charged with violating UCMJ arts. 112a and 134 after military authorities learned that he took marijuana he had in his room in the barracks to another room and flushed it down the toilet so it would not be discovered during a health and comfort inspection. The servicemember pled guilty, and he was convicted of the charges and sentenced to a bad-conduct discharge, confinement for seven months, and reduction to E-1. The convening authority approved the findings and sentence , but suspended all confinement in excess of four months. The servicemember appealed, and the court of criminal appeals decided that the parties' briefs raised the issue of whether the servicemember's plea to obstruction of justice was provident. The court found that the servicemember's plea to obstruction of justice was improvident because the evidence, including statements he made to the court, did not show he committed that offense. The conduct the servicemember described amounted to an effort to avoid detection, not to obstruct justice. At the time the servicemember flushed the marijuana down the toilet, military authorities did not know he possessed it, nor were they "on the scent."

Outcome

The court of criminal appeals set aside the findings of guilty to the charge and specification alleging that the servicemember committed obstruction of justice, and dismissed that charge. It affirmed the remaining findings of guilty, reassessed the servicemember's sentence, and approved only so much of the sentence as provided for a bad-conduct discharge, confinement for five months, and reduction to E-1.

LexisNexis® Headnotes

Military & Veterans Law > ... > Trial Procedures > Pleas > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Trial Procedures, Pleas**

The United States Court of Appeals for the Armed Forced recently restated the standard of review for a guilty plea. Military appellate courts review a military judge's decision to accept a guilty plea for an abuse of discretion, and questions of law arising from the guilty plea de novo. In doing so, they apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.

Military & Veterans Law > Military Offenses > General Article > Obstruction of Justice

HN2[] **General Article, Obstruction of Justice**

Obstruction of justice requires that (1) the accused wrongfully did a certain act, (2) in the case of a person against whom the accused had reason to believe there were or would be criminal proceedings pending, (3) with the intent to influence, impede, or otherwise obstruct the due administration of justice, and (4) under the circumstances, the conduct was to the prejudice of good order and discipline in, or of a nature to bring discredit upon, the armed forces. Manual Courts-Martial pt. IV, para. 96b (2005). The gravamen of the offense is the corruption of the due administration of the processes of justice, and not simply the frustration of justice in the abstract sense.

Military & Veterans Law > Military Offenses > General Article > Obstruction of Justice

HN3[] **General Article, Obstruction of Justice**

An accused may obstruct justice even if there are neither charges pending, nor an investigation already underway. The law simply requires that, at the time of the alleged obstruction, the accused have reason to believe there were or would be criminal proceedings pending against him or some other person. On the other hand, mere concealment of one's misconduct is not obstruction of justice. Nor is the mere realization that one's misconduct, if revealed, might result in criminal prosecution enough to give one reason to believe there would be criminal proceedings pending. It can be difficult, of course, to distinguish whether an act was taken as an effort by an accused to avoid detection (concealment), or whether it was taken in an effort to corrupt the due administration of the processes of justice (obstruction). To make this distinction, courts must consider, on a case-by-case basis, the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice. This distinction can be called the "concealment-obstruction dichotomy."

Military & Veterans Law > Military Offenses > General Article > Obstruction of Justice

HN4[] **General Article, Obstruction of Justice**

The United States Court of Military Appeals and the United States Court of Appeals for the Armed Forces' decisions on the concealment-obstruction dichotomy divide into two categories: (1) those in which the appellant believed the authorities knew, or would inevitably learn, information that would lead to a criminal investigation or charges, i.e., where the Government was "on the scent," so to speak; and (2) those in which the appellant believed the authorities did not know, or would not inevitably learn, information that would lead to a criminal investigation or charges. In those cases falling into the first category, the Court of Military

Appeals and the Court of Appeals for the Armed Forces have found obstruction of justice, whereas in those cases falling into the second category, the Court of Military Appeals has found the appellant's conduct to be mere concealment, not amounting to obstruction of justice.

Military & Veterans Law > Military Offenses > General Article > Obstruction of Justice

HN5[] **General Article, Obstruction of Justice**

A servicemember's mere realization that his misconduct, if revealed, might result in criminal prosecution is not reason to believe there will be criminal proceedings pending.

Counsel: For Appellant: LT Anthony Yim, JAGC, USN.

For Appellee: Maj Tai Le, USMC.

Judges: Before R.E. VINCENT, E.S. WHITE, J.E. STOLASZ, Appellate Military Judges. Senior Judge VINCENT and Judge STOLASZ concur. Senior Judge WHITE participated in the decision of this case prior to detaching from the court.

Opinion by: E.S. WHITE

Opinion

OPINION OF THE COURT

WHITE, Senior Judge:

This case is before the court on appeal under Article 66, Uniform Code of Military Justice, *10 U.S.C. § 866*. The case was originally submitted on its merits, but after reviewing the record of trial, the court specified the issue of whether the appellant's guilty plea to obstruction of justice was provident where the appellant destroyed contraband to prevent its discovery by a health and comfort inspection, but the Government did not know of the contraband.

After considering the record of trial and the parties' briefs on the specified issue, we conclude **[*2]** the appellant's plea to obstruction of justice was improvident, as the conduct he described during the providence inquiry amounts to mere concealment of his misconduct, and not to obstruction of justice. We will take corrective action in our decretal paragraph. *Arts. 59(a)* and *66(c), UCMJ*.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND

A. Procedural posture

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use of cocaine on divers occasions, wrongful use of marijuana on divers occasions, wrongful introduction of cocaine onto an installation under the control of the armed forces on divers occasions, and obstruction of justice, in violation of *Articles 112a* and *134, UCMJ*. He was sentenced to seven months confinement, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of four months for 12 months from the date of his action.

B. Factual background

On 19 June 2007, the appellant, who lived in the barracks, heard the Staff Duty Officer tell the Marines in the next room that there would be a health and comfort inspection that day. Fearing **[*3]** the inspectors would discover the marijuana in his room, the appellant took the marijuana to another Marine's room and flushed it down the toilet. Some of the marijuana, however, was left on the toilet bowl rim, ultimately leading authorities to discover what the appellant had done.

During the providence inquiry, the appellant and the military judge had the following colloquy:

MJ: . . . [Y]ou said that there was no investigation

pending, but you did believe that, *had you been caught with the drugs,* there would have been a case filed against you?
ACC: Yes, sir.
MJ: And how did you believe this?
ACC: That if I had been caught with an illegal substance that I would have been took into custody and later went to court for the crime that I have committed.
MJ: And again, what did you think might happen as a result of such an investigation?
ACC: A more harsh punishment, sir.
MJ: And again, what was the purpose of you flushing the drugs?
ACC: To impede an investigation.
MJ: And did you intentionally -- excuse me, did you specifically intend to impede the due administration of justice?
ACC: Yes, sir.

Record at 41-42 (emphasis added).

II. DISCUSSION

A. Principles of Law

HN1[↑] Our superior court recently restated **[*4]** the standard of review for a guilty plea.

> [W]e review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novo.* In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.

United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).

With that standard in mind, we now examine the law related to obstruction of justice. ***HN2***[↑] Obstruction of justice requires that: (1) the accused wrongfully did a certain act, (2) in the case of a person against whom the accused had reason to believe there were or would be criminal proceedings pending, (3) with the intent to influence, impede, or otherwise obstruct the due administration of justice, and (4) that under the circumstances, the conduct was to the prejudice of good order and discipline in, or of a nature to bring discredit upon, the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, P 96b.

"'[T]he gravamen of the offense is the corruption of the "due administration" of the *processes* **[*5]** of justice and *not simply the frustration of justice in the abstract sense.'" United States v. Turner, 33 M.J. 40, 43 (C.M.A. 1991)*(quoting *United States v. Asfeld, 30 M.J. 917, 926 (A.C.M.R. 1990)*(emphasis added)).

HN3[↑] An accused may obstruct justice even if there are neither charges pending, nor an investigation already underway. *United States v. Finsel, 36 M.J. 441, 443 (C.M.A. 1993)*; *United States v. Athey, 34 M.J. 44, 48 (C.M.A. 1992)*; *United States v. Guerrero, 28 M.J. 223, 225 (C.M.A. 1989)*; *United States v. Culbertson, 65 M.J. 587, 591 (N.M.Ct.Crim.App. 2007)*. The law simply requires that, at the time of the alleged obstruction, the accused have "'reason to believe there were or *would be* criminal proceedings pending' against himself or some other person." *Athey, 34 M.J. at 48* (emphasis in original)(citing P 96b(2), MCM and *Guerrero, 28 M.J. at 225*).

On the other hand, mere concealment of one's misconduct is not obstruction of justice. *United States v. Lennette, 41 M.J. 488, 490 (C.A.A.F. 1995)*; *Finsel, 36 M.J. at 443*; *Turner, 33 M.J. at 42*. Nor is the mere realization that one's misconduct, if revealed, might result in criminal prosecution enough to give one reason to believe there **[*6]** *would be* criminal proceedings pending. *Athey, 34 M.J. at 49*.

It can be difficult, of course, to distinguish "whether an act was taken as an effort by the accused to avoid detection [concealment], or whether it was taken in an effort to corrupt the due administration of the processes of justice [obstruction]." *Lennette, 41 M.J. at 490*. To make this distinction, the court must consider, on a case-by-case basis, "'the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice.'" *Id.* (quoting *Finsel, 36 M.J. at 443*). We shall call this distinction the "concealment-obstruction dichotomy."

B. Concealment-Obstruction Dichotomy

HN4[↑] Our superior court's decisions on the concealment-obstruction dichotomy -- which we will examine below -- divide into two categories: (1) those in which the appellant believed the authorities knew, or would inevitably learn, information that would lead to a

criminal investigation or charges, i.e. where the Government was "on the scent," so to speak; and (2) those in which the appellant believed the authorities did not know, or would not inevitably learn, information that would lead to a criminal **[*7]** investigation or charges. In those cases falling into the first category, our superior court has found obstruction of justice, whereas in those cases falling into the second category, the court has found the appellant's conduct to be mere concealment, not amounting to obstruction of justice.

1. Authorities "on the scent"

In *United States v. Barner, 56 M.J. 131 (C.A.A.F. 2001)*, the appellant, a drill instructor (DI), assaulted a recruit, who then reported it to another DI. When that DI informed Barner of the report, Barner attempted to convince the recruit not to pursue her allegation. At the time, Barner knew his misconduct had been reported to someone in authority, and believed a criminal investigation would result. *Barner, 56 M.J. at 135-36*.

In *Lennette,* the appellant, who worked in his unit's personnel section, stole blank armed forces identification cards. His co-conspirator then falsified an identification card from one of the blanks, and, with Lennette, went to a bank where he attempted to use the false identification care to negotiate a fraudulent check. The co-conspirator, however, was caught in the act, as Lennette watched. Lennette then left the bank and destroyed the remaining **[*8]** blank identification cards in his possession. At the time he did so, Lennette knew the authorities were investigating his crime. *Lennette, 41 M.J. at 490*.

In *Finsel,* the appellant lost a pistol on loan from a superior, for which he was accountable, in a Panamanian brothel during Operation JUST CAUSE. He then staged a fire-fight and falsely told authorities he lost the pistol during the fire-fight. At the time Finsel staged the firefight, authorities had not yet learned of the pistol's loss, but Finsel nevertheless had reason to believe the authorities would inevitably learn of the pistol's loss when he returned to base and was unable to turn it in, and then investigate its loss. *Finsel, 36 M.J. at 444*.

In *Guerrero,* the appellant struck pedestrians with his car, then told his passengers to lie to military police. At the time, he knew he had hit pedestrians, and "believed some law enforcement official . . . would be investigating his actions." *Guerrero, 28 M.J. at 225*. While military authorities had not yet learned of Guerrero's hit and run at the time he told his passengers to lie (and therefore had not yet begun an investigation), it was inevitable the authorities would learn of the **[*9]** hit and run, and then investigate.

2. Authorities not "on the scent"

In *Turner,* the appellant was required to submit a urine specimen as part of a random urinalysis inspection. Turner, however, feared the analysis of her urine would reveal her illegal drug use. Consequently, she attempted to substitute toilet water for urine in her specimen bottle. Our superior court held that Turner "merely sought to preclude discovery of her recent drug use; such action does not support an obstruction of justice charge." *Turner, 33 M.J. at 43*. At the time Turner attempted to submit the adulterated specimen, no one in authority knew of her misconduct (as was the case in *Barner* and *Lennette*) or of facts that would have inevitably led to a criminal investigation (as was the case in *Guerrero* and *Finsel*).

Likewise, in *Athey,* the appellant told a subordinate, with whom he had an inappropriate relationship, to lie to authorities investigating a different, but related, matter if she were asked about their relationship. At the time, Athey had no reason to believe authorities knew about the relationship, though he realized that, if his misconduct were revealed, he might be prosecuted. That realization, however, **[*10]** was insufficient to render his conduct obstruction of justice, where he did not believe the authorities then had, or would inevitably learn, information that would result in a criminal investigation. *Athey, 34 M.J. at 49*. [1]

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[1] Precedents of the service courts of criminal appeals also easily divide into these two categories. *Compare* *Culbertson, 65 M.J. at 591* (obstruction found where appellant, who asked witness to illicit sexual relations to lie, clearly "was aware that one or more persons in authority had been apprised of his misconduct"); *United States v. Jenkins, 48 M.J. 594 (Army Ct.Crim.App. 1998)* (obstruction found where appellant lied to police investigating allegation of spousal abuse) and *United States v. Kawai, 2007 CCA LEXIS 474 at 7-8* (A.F.Ct.Crim.App. 2 Oct 2007)(obstruction found where the appellant slit wrists on corpse of woman he had murdered to make it appear she committed suicide because he knew the body would be quickly discovered, a criminal investigation would ensue, and he would likely be identified as one of the last people to be seen with the victim), *aff'd,* ***66 M.J. 495, 2008 CAAF LEXIS 781 (C.A.A.F. June 24, 2008)***(summary

3. Applying the precedents to the instant case

In light of these precedents, we conclude the appellant's conduct in the case *sub judice* amounts merely to an effort to avoid detection. At the time the appellant flushed the marijuana down the toilet, the authorities did not know he possessed it, nor were they "on the scent," as in *Guerrero* and *Finsel.* In *Guerrero* and *Finsel,* while the Government did not yet know of the appellants' misconduct at the time of the alleged obstructions, events had occurred [2] that would inevitably come to the Government's attention and cause it to launch an investigation. In the instant case, the providence inquiry contains no hint that, at the time of the alleged obstruction, the Government in any way suspected the appellant possessed contraband drugs, or even that there **[*12]** were contraband drugs present in the barracks.

Rather, as in *Turner,* where the appellant submitted an adulterated urine specimen to avoid detection of her illegal drug use, no "process of justice" was underway at the time of the alleged obstruction to be corrupted. Rather, the appellant's conduct simply frustrated justice in the abstract, and such conduct is not obstruction of justice. On these facts, then, the appellant did not "have reason to believe there was or would be criminal proceedings pending," nor the intent to corrupt the due administration of the processes of justice.

Finally, we recognize that, during the providence inquiry, the appellant "admitted" that he believed criminal proceedings would be pending, and intended to impede the due administration of justice. Record at 41-42. Those admissions, however, are conclusory and resulted from his misunderstanding of the law. The providence inquiry reveals the reason the appellant believed criminal proceedings *would be* pending against him was because he believed that, *if he were caught* with the marijuana during the inspection, he would be prosecuted. **[*13]** *Id. at 41*. The appellant clearly stated that, at the time he flushed the drugs, no investigation was pending. *Id.* As our superior court held in *Finsel, HN5*[↑] the appellant's mere realization that his misconduct, if revealed, might result in criminal prosecution is not reason to believe there *would be* criminal proceedings pending. Further, while the appellant said he flushed the drugs "to impede an investigation," in context, he meant that he flushed the drugs to impede their detection, and thereby avoid an investigation. *Id.*

Accordingly, will set aside the findings of guilty to, and dismiss, this charge and specification.

C. Sentence Reassessment

Having decided that we must dismiss the obstruction of justice charge, we must reassess the appellant's sentence. Applying the analysis set forth in *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, *United States v. Cook, 48 M.J. 434, 438 (C.A.A.F. 1998)*, and *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, and after carefully considering the entire record, we are satisfied beyond a reasonable doubt that, if error had not occurred, the court-martial would have adjudged a sentence no less than confinement for five months, reduction to pay grade **[*14]** E-1, and a bad-conduct discharge. We are further satisfied that such a sentence is appropriate to this offender and these offenses. Finally, we note that our corrective action does not create a dramatic change in the sentencing landscape of the appellant's court-martial. *See United States v. Buber, 62 M.J. 476 (C.A.A.F. 2006)*.

III. CONCLUSION

The findings of guilty to Charge III, and the sole specification thereunder, are set aside, and Charge III and its specification are dismissed. The remaining findings of guilty are affirmed. So much of the approved sentence as extends to confinement for five months, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

Senior Judge VINCENT and Judge STOLASZ concur.

Senior Judge WHITE participated in the decision of this case prior to detaching from the court.

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disposition) *with Asfeld, 30 M.J. at 917* **[*11]** (no obstruction where appellant asked recipient of his obscene phone call not to report him immediately upon her indication that she recognized his voice) and *United States v. Gray, 28 M.J. 858 (A.C.M.R. 1989)*(no obstruction where the appellant not aware of any investigation or official knowledge of his illicit relationship at time he tells paramour not to tell anyone about the relationship).

[2] A hit and run in *Guerrero,* and the loss of a government-issued sidearm in *Finsel.*

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on February 14, 2020.

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