UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, BURTON, and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant ANTHONY R. HALE
United States Army, Appellant

ARMY 20180407

Headquarters, Fort Campbell
Matthew A. Calarco, Military Judge
Colonel Andras M. Marton, Staff Judge Advocate

For Appellant: Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA (on brief); Jonathan F. Potter, Esquire; Lieutenant Colonel Angela D. Swilley, JA; Major Kyle C. Sprague, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain R. Tristan De Vega, JA (on brief).

3 June 2021

OPINION OF THE COURT

ALDYKIEWICZ, Senior Judge:

I. OVERVIEW

"At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961) (citations omitted). "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (citation omitted).

In appellant's case,[1] civilian law enforcement officials violated the sanctity of appellant's home by executing a warrantless entry and search of his apartment, a search that, by all accounts, was conducted in accordance with then-existing standard operating procedures. The search led to the discovery of marijuana, admissions to both civilian and military law enforcement officers, and the discovery of inculpatory text messages on appellant's cell phone. At trial, appellant moved to suppress all evidence found in his apartment, all statements made by him to civilian and military law enforcement, and the text messages from his phone. The military judge denied the motion in its entirety.

We find the military judge erred, in part, in denying the suppression motion as it relates to the evidence discovered in appellant's apartment as well as any statements made by appellant to civilian law enforcement officers. Disregarding the evidence that should have been suppressed and considering only that which was properly before the court, we are not convinced that admission of the evidence that should have been excluded is "harmless beyond a reasonable doubt." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 87 (1967)). As a result, we set aside the findings of guilty and the sentence.

Our resolution of the suppression issue relating to the evidence discovered in appellant's apartment and statements made the morning of 23 December 2016, appellant's first and second assignments of error (AE I and II), and the relief provided herein moots the need to address appellant's remaining AEs as well as the matters personally raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).[2]

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[1] Contrary to his plea, appellant was convicted at a general court-martial by an officer panel 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, 10 U.S.C. §§ 912a, 934, and 907 [UCMJ]. The panel acquitted appellant of one specification of conspiracy to commit wrongful distribution of marijuana, in violation of Article 81, UCMJ. Prior to findings, the military judge granted a defense motion pursuant to Rule for Courts-Martial (R.C.M.) 917 for a finding of not guilty of one specification of wrongful distribution of marijuana and one specification of violating a lawful general regulation, in violation of Articles 112a and 92, UCMJ. The convening authority approved the adjudged sentence of a bad-conduct discharge, three months' confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

[2] Assignments of error I and II allege:

(continued . . .)

II. BACKGROUND

A. The Search of Appellant's Apartment and Subsequent Law Enforcement Interviews

In the early morning hours of 23 December 2016, Officers BH and MD, members of the Clarksville, Tennessee Police Department (CPD) responded, separately, to the Royster Lane Apartments.[3] A civilian witness, noticing an adult male "stumbling" in the parking lot called law enforcement. Officer BH was dispatched to conduct a "welfare check." Officer MD was similarly dispatched, however, he recalled the radio call as "shooting already occurred or shots fired."

Arriving on scene at approximately 0100 hours, the officers noticed a vehicle with its driver's side door open and a trail of blood that ran from the vehicle door to the body of an adult male who was lying in the parking lot, dead from an apparent gunshot. While in the parking lot, a civilian approached the officers and told them that the decedent, identified as J[redacted] G[redacted] [JG aka "JoJo"], lived in apartment 701, the entrance to which Officer BH estimated to be a mere twenty-five feet from JG's body.

Officers BH and MD proceeded to Apartment 701 to "make contact with the occupants there." As Officer BH approached the apartment, he noticed "a strong odor of raw marijuana coming from . . . that apartment up the entire building," an odor Officer BH was able to identify from his law enforcement "training and experience." Prior to the officers knocking on the apartment door, both appellant and Specialist (SPC) MF, JG's girlfriend, were asleep in separate bedrooms. Awakened by someone knocking on the apartment door, and seeing police lights shining through his bedroom window, appellant went to answer the door. Upon entering the living room area, appellant saw some marijuana on the living room table which he claimed belonged to his roommate, JG. Concerned that either he or JG

(. . . continued)

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.

[3] Officer BH testified for the government in response to the suppression motion. Officer MD did not. Both, however, testified on the merits.

would get in trouble for the drugs, he threw the marijuana in the toilet and then answered the door.[4] The door was a solid door without any windows.

Because Officer BH's initial knock on the apartment door was not immediately answered, Officer MD went to the side of the apartment and looked through some broken window blinds. According to Officer MD, lights were on inside and he "heard basically just movement . . . definitely footsteps moving around the house, which I thought was suspicious." Officer MD responded to what he heard by telling the occupants that "we knew they were in there and that we were Clarksville Police and to come to the door." When asked why he said what he said, Officer MD testified, "Because I figured they would possibly be scared if -- because they were in the immediate area where the shooting occurred so I didn't want them to think it was anybody else, you know attempting to get them as well."

After Officer MD told the occupants through the window that he and Officer BH were members of the CPD, he rejoined Officer BH at the apartment door. Once appellant opened the door, Officers BH and MD entered the apartment without seeking consent. Officer MD immediately noticed the odor of marijuana. When asked by Officer MD if there was anyone else in the apartment, appellant responded in the negative. As appellant and Officer BH remained in the living room, Officer MD knocked on SPC MF's bedroom door and found the room occupied by SPC MF. Specialist MF's cell phone was seized and she was directed to join appellant on the couch and "just sit there," where the two remained for approximately one-and-a-half hours, under the guard of CPD officers. Although appellant and SPC MF asked what was going on, their requests for information generally went unanswered. Officer BH did, however, advise the two that "based on the strong odor of marijuana," they would be conducting a "protective sweep" of the apartment. He told the two, "we were not searching the apartment. The only places that we look is a place that a person could be because a person would be the way that evidence would be destroyed."

While on the couch and under observation by Officer BH, Officer MD and a third officer executed the "protective sweep."[5] According to Officer BH, who testified during the suppression hearing, the sweep was conducted to ensure that "no

[4] The record does not reveal whether appellant attempted to flush the marijuana down the toilet and was unsuccessful or did in fact flush the drugs with some remaining behind. Also, the record is silent as to whether appellant left the toilet seat "open" or "closed." Special Agent RDG, who arrived on scene around 0300, testified that he found the marijuana in the "open" toilet as he searched the apartment.

[5] At this point, it appears a third CPD officer was also present.

evidence would be destroyed in the residence until the investigation is complete." He continued, "two other officers went and did a security sweep of the residence to make sure nothing else was being--nothing was being destroyed."[6] When asked if "protective sweeps" were "common practice," Officer BH responded, "Very much so."

Officer BH continued:

> Whenever any residence we go to, if they're--if we think that they're--or 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. After we do that, we would ask for consent. If consent isn't granted, we would apply for a search warrant, things along those lines.
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> . . .
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> 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.

When asked by the government if the search had anything to do with the homicide, Officer BH testified:

> The reason for the protective sweep--I mean, for the most part we know that the deceased party lived in that residence. There is also a strong odor of marijuana coming from that residence. There is a high probability that those two things could be linked. So in order to preserve both the homicide case and whatever else that may be, we do the security sweep, make sure nothing is being destroyed, and freeze the residence.

During the sweep, which lasted about one minute, officers found what was suspected as marijuana in the toilet. Approximately ten minutes after initially entering the apartment, Officer BH left to secure the homicide scene outside and to contact his superiors. Appellant and SPC MF remained on the couch under the guard of CPD Officers.

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[6] In response to a panel member's question about whether he conducted the "protective sweep alone," Officer MD testified, "To my memory, I did it myself."

At approximately 0230, Officer EE, then a homicide investigator for CPD, arrived on scene. He was eventually joined by Sergeant (SGT) GB, a homicide unit sergeant and Special Agent (SA) RDG, a CPD narcotics officer.[7]

Sometime between 0300 and 0347, SGT GB asked appellant, who was still under guard on the couch with SPC MF, if he could retrieve the handgun that was found in appellant's room earlier during the "protective sweep." Around this same time, Officer EE asked appellant for consent to search the apartment. Both SGT GB and Officer EE testified that appellant consented to their respective requests.[8] Sergeant GB and SA RDG then executed the search of appellant's apartment. The result was the discovery and seizure of, among other items: a .380 caliber handgun from appellant's closet; green plant material from the top of a shoebox in appellant's room; green plant material from the toilet; seven burnt marijuana cigarettes from a bedroom; three vacuum seal bags (empty) from the living room; a gallon bag containing three separate bags of green plant material from the living room; and a gallon bag with green plant material from the living room. Of the items seized, only the three separate bags of green plant material from the living room were tested by authorities, and they tested positive for marijuana.[9]

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[7] Neither SGT GB nor SA RDG testified during the suppression motion hearing. During his merits testimony, SGT GB testified that he arrived on scene at approximately 0247 hours. Special Agent RDG testified he arrived at "[a]pproximately midnight, give or take a few minutes. I'm not sure of the exact time." A review of the record, in its entirety, reveals that SA RDG arrived on scene no earlier than 0230. His involvement in the case came after hearing radio traffic from SGT GB. Sergeant GB arrived no earlier than Officer EE who arrived at approximately 0230. Further, SGT GB testified SA RDG arrived at approximately 0347 hours.

[8] During the suppression motions hearing, appellant testified, for the limited purpose of the motions hearing, that he never consented to a search of his apartment. Specialist MF, who was on the couch with appellant when consent was sought, testified that she never heard appellant give consent. Considering the evidence in "the light most favorable to the party that prevailed on the motion at trial," the government in this case, we will assume appellant consented to the search of his apartment as testified to by Officer EE and SGT GB. *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (citations omitted). Our assumption, however, does not resolve the issue of whether the consent was "voluntary," a question of law we review de novo. *United States v. Lewis*, 78 M.J. 47, 453 (C.A.A.F. 2019) (citation omitted).

[9] Although seized, neither civilian nor military law enforcement authorities tested the green plant material found in appellant's bedroom or in the toilet.

While detained in the apartment, Officer EE questioned appellant. Officer EE testified the questioning was "voluminous" and occurred without a rights advisement under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) or Article 31(b), UCMJ.

At some time after 0347 hours, appellant and SPC MF were transported to Officer EE's CPD office for "more of a formal interview setting." Transportation was accomplished by other CPD officers in the back of a CPD vehicle. Appellant was not advised that he was under arrest or being detained. Neither appellant nor SPC MF were handcuffed. En route, the transporting officers asked appellant and SPC MF if they needed anything from the store, prompting the officers to stop at a local gas station and afford both the opportunity to purchase whatever they might need. Both appellant and SPC MF were allowed to walk freely throughout the store as they made their purchases.

Once at Officer EE's office, appellant was placed in an interview room where he waited several hours before speaking with Officer EE. The delay was prompted by Officer EE's decision to interview SPC MF prior to appellant. Appellant's interview was videotaped and lasted approximately twenty-three minutes. During the interview, appellant was free to come and go from the interview room. Appellant was not given any *Miranda* warnings prior to the interview. When asked why appellant was not advised of his rights, Officer EE testified, "Because [appellant] wasn't in custody and I wasn't asking accusatory questions."[10] Following his interview, appellant agreed to make a written statement, which he prepared while Officer EE was not present in the interview room.

Officer EE testified that, during the office interview, appellant made the following admissions: that he knew his roommate sold marijuana "at times"; and

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[10] A simple review of the video tells a different story. While the non-custodial interview lasted less than thirty minutes, Officer EE's questioning was not limited to non-accusatory statements. Officer EE asked appellant what he knew about alleged drug deals and his role therein. When seeking consent to search appellant's cell phone, Officer EE advised appellant the search could be used to confirm "your innocence of the whole weed thing." Officer EE continued that any search of his phone would include a search of all pictures because "pictures can be helpful to back up your claim that you're not involved in any kind of dope stuff." Officer EE said the search was for the "death **and** the drug investigation" (emphasis added). After advising appellant that CPD was dealing with "felony amounts of marijuana," Officer EE told appellant, "if you are involved, just tell the truth and let's move forward." Near the close of the interview, Officer EE advised appellant, "if you're lying to me and you deal drugs with J[redacted], that's bad news." Officer EE's testimony that he only asked non-accusatory questions is, simply put, refuted by the video.

when he saw the police, he noticed some marijuana out on the table that belonged to the deceased and "flushed it" because he did not want to get in trouble. Appellant also made the following admissions, in writing: "as I was going to the door I noticed JoJo [JG] had some weed on the table, I put it in the toilet, and answered the door."[11] Officer EE also noted that appellant expressed concern about the military finding out he was associated with another individual who was involved with drugs. During the interview, Officer EE told appellant that "nobody was getting arrested" and "nobody was going to jail," statements directly relating to the marijuana found in the apartment.

On 4 January 2017, Army CID SA ZR interviewed SPC MF. Specialist MF's written, sworn statement implicated appellant in JG's drug trade.[12] Specialist MF's statement begins with: "As far as deals being made I have never fiscally (sic) seen it done but whenever JoJo (JG) wasn't home and Hollywood [appellant] was home he would tell him someone is coming to the house and let him know what they needed." Specialist MF explained that "deals being made" referred to "[d]rug related" deals, specifically "marijuana" deals. Specialist MF noted that JG would call appellant and tell appellant what the buyer wanted and the buyer would then get the drugs from appellant.

On 17 January 2017, appellant waived his Article 31(b), UCMJ, rights and spoke with SA ZR. At no point was appellant advised that either the evidence found in his apartment or statements made by him to Officer EE were inadmissible. In other words, SA ZR's interview did not include any cleansing warning. *See United States v. Lichtenhan*, 40 M.J. 466, 470 (C.A.A.F. 1994).

During the interview, appellant admitted to throwing marijuana in the toilet as officers were knocking on his door.[13] When asked how much marijuana he flushed, he stated, "I don't know, it was on a piece of paper and I just picked up the paper with the weed on it and put it in the toilet. It wasn't a lot." When asked about the "three ounces" of marijuana seized by CPD from the living room table, appellant claimed he had no knowledge of its presence and only found out it was there when

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[11] Appellant's written statement to Officer EE was marked as a prosecution exhibit but never offered or admitted at trial.

[12] Specialist MF's 4 January 2017 interview resulted in a written sworn statement; however, SPC MF did not testify during the merits and her written statement, although marked, was never offered or admitted at trial.

[13] Appellant's 17 January 2017 interview resulted in a written sworn statement. Appellant's sworn statement, although marked, was never offered or admitted at trial.

CPD officers told him about it. Despite being asked numerous questions about possession, use, and distribution of marijuana, appellant made no additional inculpatory statements to SA ZR beyond knowing that his roommate occasionally smoked marijuana in the apartment, something JG did against appellant's stated objection.

Following the interview, SA ZR asked appellant for consent to search his cell phone. Appellant declined. Special Agent ZR responded by seizing the phone and seeking authorization from a military magistrate to search the phone. A military magistrate granted authorization that same day, authorizing the 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."

B. Motion to Suppress and the Military Judge's Ruling

Prior to trial, defense counsel filed a comprehensive suppression motion, seeking to suppress all evidence seized from appellant's apartment and any evidence derived therefrom, all statements made by appellant to CPD and CID, and all evidence obtained from the search of his cell phone. During the suppression hearing, the government called four witnesses: Officer BH, Officer EE, SA ZR, and SPC MF. The defense called appellant for the limited purpose of testifying on the motion. *See* Military Rule of Evidence (Mil. R. Evid.) 104(d); 304(f)(3).

In denying the motion, in its entirety, the military judge, found, inter alia, that: "Officer [BH]'s testimony clearly indicated he believed there may be other individuals in the accused's apartment when he conveyed he only went to areas where another person might be;" "Officer [H] met the first *Buie* (*Maryland v. Buie*, 494 U.S. 325 (1990)) factor;" "[t]he Court finds Officer [BH]'s reliance on the exigent circumstances doctrine, within the very limited scope of his sweep, was appropriate;" "[t]he Court also agrees with [Officer EE], that the circumstances of the scene provided probable cause upon which an authorization to search would have been obtained, had it been necessary;" and, "[t]he subsequent search of the accused's apartment was legal because the accused gave consent." In addressing appellant's apparent consent to search, the military judge noted, "In arriving at this conclusion, the Court also considered whether the accused was in custody at the time consent was requested and whether that may have impacted his freely given consent. As discussed below, he was not in custody for *Miranda* purposes."

Finally, the military judge found that the evidence found in the apartment would have been inevitably discovered, ruling:

> Assuming, *arguendo*, the search of the accused's residence was illegal, law enforcement agents possessed the dead

> body of an occupant just outside the door, an expended casing next to the body, the odor of marijuana emanating from the apartment, and they would soon possess the statement of SPC Freeman. None of the evidence before the court suggests SPC Freeman's statements lack credibility or would have changed. SPC Freeman has no standing to challenge the search. The available, legally obtained evidence, to include SPC Freeman's eventual statement that the accused assisted the deceased in distributing marijuana, would have led to the inevitable, legal discovery of the evidence.

In addressing appellant's follow-on statements to Officer EE, the military judge stated, "[t]he determinative issue in deciding whether the accused's statement to Clarksville Police Department (CPD) is admissible is whether the accused was in custody during the interrogation." Finding appellant was not in custody and thus not entitled to *Miranda* warnings, the military judge ruled appellant's statements to Officer EE "admissible evidence, subject to the other rules of evidence."[14]

III. LAW AND DISCUSSION

Although not expressly invoked, it appears from the testimony of the CPD officers as well as the military judge's suppression ruling that the "murder scene exception" was alive and well on 23 December 2016 when CPD officers searched appellant's apartment and on 4 April 2018 when the military judge ruled on the defense's suppression motion. The Fourth Amendment's warrant requirement, however, recognizes no such exception. *Mincey v. Arizona*, 437 U.S. 385, 395 (1978) (holding the "murder scene exception" was "inconsistent with the Fourth and Fourteenth Amendments" and that the "warrantless search of [the defendant's] apartment was not constitutionally permissible simply because a homicide had recently occurred there").

In denying the defense's suppression motion in toto, the military judge cited to the following legal principles, all of which warrant discussion in this opinion: probable cause, the protective sweep doctrine, consent, exigent circumstances, and inevitable discovery.

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[14] Our resolution of AEs I and II and the relief provided herein moots any need to discuss the military judge's ruling as it relates to the admissibility of evidence derived from appellant's CID interview with SA ZR or from the search of his seized phone.

A. Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (internal quotation marks omitted) (citation omitted). When reviewing a military judge's ruling on a suppression motion, we review the evidence in the light most favorable to the prevailing party below. *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020).

B. Analysis of the Military Judge's Rulings

1. Threshold Matters—Appellant's Objection and Expectation of Privacy

The Fourth Amendment provides "[t]he 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." U.S. Const. amend. IV. "[W]arrantless searches are presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions." *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (internal quotation marks and citations omitted); *see Mincey*, 437 U.S. at 390 ("[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.'") (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "The military has implemented the Fourth Amendment through Military Rules of Evidence . . . 311–317)." *Hoffmann*, 75 M.J. at 123.

Military Rule of Evidence 311(a), *Manual for Courts-Martial, United States* (2016 ed.),[15] states:

> (a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:
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> (1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

[15] Appellant's case was referred to trial on 9 November 2017.

> (2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and
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> (3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.

Here, it is undisputed that appellant timely moved to suppress the evidence in question and that on 23 December 2016, Apartment [redacted], Royster Lane Apartments was appellant's home in which he had a reasonable expectation of privacy. *See United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013) ("Appellant had a reasonable expectation of privacy in his apartment . . ."). It is also undisputed that the government's entry into appellant's residence and subsequent searches inside were conducted without a warrant. Having found appellant had a reasonable expectation of privacy in his apartment and that a warrantless entry and searches occurred therein, the government bears the burden of establishing an exception to the Fourth Amendment's warrant requirement. *See United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014). In this case, that a homicide, albeit tragic, occurred near the decedent's apartment entrance is of no consequence to appellant's right to privacy within that same apartment; however, if law enforcement had developed probable cause to obtain a warrant for the apartment which was connected to the homicide, then the homicide would be of consequence to appellant's right to privacy in the apartment. *See Mincey*, 437 U.S. at 395; *see also Thompson v. Louisiana*, 469 U.S. 17, 21 (1984); *Flippo v. W. Va.*, 528 U.S. 11, 14 (1999).

2. The Odor of "Raw" Marijuana and Probable Cause

Probable cause is "a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Williamson*, 65 M.J. 706, 712 (Army Ct. Crim. App. 2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Probable cause requires only "the kind of fair probability on which reasonable and prudent people, not legal technicians," would rely. *United States v. Jones*, 952 F.3d 153, 158 (4th Cir. 2020) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)). Probable cause is "not a high bar," and it must be assessed objectively based on a totality of the circumstances, including "common-sense conclusions about human behavior." *Id.* (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 586–87 (2018)).

On 23 December 2016, Officer BH, a trained and experienced officer, positively identified the odor of marijuana. While the odor of "raw" marijuana alone gave Officer BH probable cause to believe that contraband was or had been within appellant's apartment, it provided no information relevant to the amount of marijuana at issue or the marijuana's owner's intended purpose vis-à-vis the marijuana. *See United States v. Cunningham*, 11 M.J. 242, 247–48 (C.M.A. 1981) (finding a police officer's statement that he detected the odor of marijuana coming from a particular room was sufficient to establish probable cause to obtain search warrant for the room); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (finding the detection of odor "distinctive to identify a forbidden substance" by a person qualified to identify the odor was sufficient to establish probable cause); *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006) ("It is well settled that the smell of marijuana alone, if articulable and particularized, may establish not merely reasonable suspicion, but probable cause.") (citation omitted).

Under Tennessee law at the time, simple possession of marijuana, regardless of weight, was a Class A misdemeanor punishable by a maximum period of confinement not to exceed eleven months and twenty-nine days, a fine not to exceed $2,500, or both. *See* Tenn. Code Ann. § 39-17-418 (2016) (Simple possession or casual exchange); Tenn. Code Ann. § 40-35-111 (2016) (Authorized terms of imprisonment and fines for felonies and misdemeanors). Possession of marijuana with intent to "deliver," depending on weight and type, ranged in severity from a Class E to Class A felony with a confinement range from one to sixty years and a fine ranging from $3,000 to $50,000. *See* Tenn. Code Ann. § 39-17-417 (2016) (Criminal offenses and penalties); Tenn. Code Ann. § 40-35-111 (2016) (Authorized terms of imprisonment and fines for felonies and misdemeanors).

At the time Officer BH entered the apartment, he did not and could not know whether any contraband was present in the apartment and if so, whether he was dealing with a misdemeanor vice felony level offense. Further, at the time, there was no evidence linking the smell of "raw marijuana" to JG's homicide. The information regarding JG's possible connection to marijuana distribution was not developed until after officers made entry into the apartment. While Officer BH testified to the "high probability" that the odor of raw marijuana and JG's homicide "could be linked," why, how, or what evidence connected the two was never articulated let alone developed. Saying something does not make it so. At the time of entry, neither Officer BH nor Officer MD had any evidence linking the body in the parking lot to the odor of "raw marijuana." This critical missing link was either unnoticed or ignored by the military judge.

3. The "Protective Sweep"

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly

confined to a cursory visual inspection of those places in which a person might be hiding." *Buie*, 494 U.S. at 327. The sweep is justified upon a showing of "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 334; *see United States v. Keefauver*, 74 M.J. 230, 235 (C.A.A.F. 2015). The standard is objective. *Keefauver*, 74 M.J. at 235.

Although the military judge's ruling correctly found that the "protective sweep doctrine" did not justify the warrantless search of appellant's apartment, his ruling makes clear that the doctrine played a role, arguably a significant role, in his later rulings regarding exigent circumstances, consent, and inevitable discovery. Regarding the *Buie* protective sweep doctrine, the military judge noted, inter alia:

> Officer [BH] met the first *Buie* factor. He reasonably concluded from facts of the crime scene along with the odor of marijuana, taken together with rational inferences, that other persons may be in the apartment. At the time, he did not know if Mr. [G] had a roommate, a girlfriend, family members, or anyone else living with him. But when he knocked on the door, someone answered. With a dead occupant feet behind him, an unknown person standing in the doorway, and the smell of marijuana in the air, the officer was wise to conclude he should be wary of other personnel in the apartment.
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> Officer [BH] did not articulate any rational belief that anyone at the apartment posed a danger to those on the scene. This Court is confused by Officer [BH]'s lack of such a belief, given the immediate circumstances of the scene. However, it is the belief of the officer, not the Court, that is important and Officer [BH] never testified that he believed he or other personnel at the scene were in danger. Accordingly, the Court now finds the government presented insufficient evidence to support a warrantless search under the protective sweep doctrine. The Court is aware the government did not argue this doctrine but their witness used it as his justification. The Court was, accordingly, compelled to address it.

Although *Buie* focused on an in-home arrest, the doctrine applies equally to non-arrest situations where the police are within a home lawfully.

> [A] majority of federal circuit courts have held that agents entering a home lawfully for an objective other than arrest may make a protective sweep so long as the *Buie* criteria are met. In their view, the same concerns underlying officer safety in the context of an in-home arrest may pertain in equal measure when agents lawfully enter a home for some other purpose.

Keefauver, 74 M.J. at 234 (citations omitted). In discussing *Buie*'s "protective sweep" doctrine, our higher court noted:

> *Buie* acknowledged two types of protective sweeps. In the first type of sweep, which may be conducted "as a precautionary matter and without probable cause or reasonable suspicion," agents may search only "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" during or after an arrest. The second, more extensive *Buie* exception permits agents to make a protective sweep of areas beyond those immediately adjoining the place of arrest where "articulable facts . . . taken together with the rational inferences from those facts . . . would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." "[S]uch a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found."

Id. at 233–234 (quoting *Buie*, 494 U.S. at 334–35). The focus of the doctrine is officer safety, not the preservation of evidence.

Officer BH made clear during his suppression hearing testimony, the sweep was conducted to "preserve evidence." According to Officer BH, under then-existing CPD "policy and practice," officers first conducted a sweep, then asked for consent, and, if consent was denied, they applied for a search warrant. At no time did Officer BH testify that he, or his partner, believed the apartment "[harbored] an individual posing a danger to those on the [ ] scene." *United States v. Soria*, 959 F.2d 855, 857 (10th Cir. 1992).

4. Appellant's Custodial Status on the Couch

In his ruling, the military judge found that appellant was not in custody while detained in the apartment, on his couch, for over one-and-a-half-hours pending

arrival of Officer EE and other members of the CPD. In finding that "the accused gave consent" to the search of his apartment, the military judge noted: "In arriving at this conclusion, the Court also considered whether the accused was in custody at the time consent was requested and whether that may have impacted his freely given consent. As discussed below, he was not in custody for *Miranda* purposes." We disagree.

Whether appellant was in custody "is a de novo question of law to be decided on the basis of facts found by the factfinder." *United States v. Catrett*, 55 M.J. 400, 404 (C.A.A.F. 2001); *see United States v. Schake*, 30 M.J. 314, 318 (C.M.A. 1990) ("This is largely a question of fact, although the ultimate conclusion is a legal one.").

"No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. In *Miranda*, the Supreme Court noted, "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." 384 U.S. at 444. The Court further noted, "[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." *Id.*

Miranda, however, only applies if the individual is interrogated while in custody. *Id.*; *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). Whether the interrogation was custodial in nature depends on whether the individual was questioned by law enforcement after being "taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

Whether an individual was in custody is viewed objectively. *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004) ("The *Miranda* custody inquiry is an objective test."). "[I]t is not enough to say that they are not immediately free to leave without delay." *United States v. Lewis*, 78 M.J. 602, 612 (Army Ct. Crim. App. 2018). Rather, "custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Yarborough*, 541 U.S. at 662. In conducting this test, two discrete inquiries are essential:

> [F]irst, 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. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to

> resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Yarborough, 541 U.S. at 663 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

Courts look to the totality of the circumstances to determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Id.* (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam)). Relevant factors in determining whether a subject was in custody include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning. *Howes v. Fields*, 565 U.S. 499, 509 (2012) (internal quotation marks and citations omitted). Additional factors include whether the person appeared for questioning voluntarily, the atmosphere of the place in which questioning occurred, and the number of law enforcement officers present at the scene. *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017) (internal quotation marks and citations omitted).

Before considering the factors noted by the Supreme Court and Court of Appeals for the Armed Forces in *Fields* and *Mitchell* respectively, we note that the military judge's custody determination is entitled to no deference. Although his ruling states, in part, "As discussed below, he was not in custody for *Miranda* purposes[,]" the military judge's ruling "below" is devoid of any factual or legal discussion regarding appellant's custodial status while in the apartment.

A review of the *Fields* and *Mitchell* factors reveals the following. The "location of the questioning," at first blush, appears to favor the government as Officer EE's "voluminous" questioning of appellant occurred in his apartment. Such a conclusion, however, ignores the fact that the situs of questioning was established following nonconsensual entry by armed law enforcement officers in the early morning hours. Once inside, appellant was ordered to sit on the couch for over an hour-and-a-half. During this time, appellant was not free to leave or move around and was denied basic information regarding what was happening. The "duration" of appellant's detention was no less than one-and-a-half hours before questioning commenced followed by continued detention until Officer EE "asked" appellant and SPC MF to go to the CPD office for "more of a formal interview setting." The duration of the actual questioning by Officer EE, however, was short. The statements made by appellant involve his disposal, i.e., flushing, of marijuana in the toilet and his knowledge regarding JG's involvement with marijuana. While not restrained physically, appellant was directed to sit on the living room couch, a

directive he was not free to ignore. Further, the directive by the officers was enforced by no less than one armed law enforcement officer at all times.

Whether appellant was "released" after questioning in the apartment is unclear. Officer EE testified appellant proceeded to the CPD station voluntarily but the military judge noted:

> There is insufficient evidence to make a distinct finding about voluntary appearance. The officers are unsure if they asked the accused and SPC [MF] to go to the police station or told them they needed them to go there to give a statement. SPC [MF] remembers it as the latter.

Finally, considering the number of law enforcement officers in appellant's apartment during his period of detention and questioning, our review of the record indicates the number varied from as low as two to as high as five. By all accounts, all officers were armed.

Appellant's situation is indistinguishable from that of Senior Airman (SrA) Catrett, Jr. where he was questioned by civilian law enforcement in his apartment. In reversing the military judge's determination that SrA Catrett, Jr. was not in custody, the Air Force Court of Criminal Appeals noted:

> After reviewing the evidence, we disagree with the military judge and conclude the appellant was in custody once the police told him he was not free to leave the living room unless a police officer accompanied him. After receiving this instruction, the appellant never left the living room until he was taken to the police station. While the appellant was in the living room, there was always a police officer present to control his movements. Therefore, from that time on, the appellant was under constant police supervision. According to Officer M's testimony, the appellant was under detention, was not free to leave, and would have been stopped if he attempted to do so.
>
> Based upon these factors, we find that a reasonable person, finding themselves in like circumstances, would conclude they were not free to leave the control of the police. In this regard, we find the facts present in this case are not unlike those found in *Orozco v. Texas*, 394 U.S. 324, 22 L. Ed. 2d 311, 89 S. Ct. 1095 (1969).

United States v. Catrett, 2000 CCA LEXIS 198, *15–16 (A.F. Ct. Crim. App. 16 Aug. 2000) (unpublished). Our superior court concurred, stating "we note our agreement with the Court of Criminal Appeals (CCA) that appellant was in custody when questioned by civilian police in his apartment." *Catrett*, 55 M.J. at 404.

When viewed objectively and having considered the totality of the circumstances, like our sister service court in *Catrett*, we find that a reasonable person, finding themselves in appellant's circumstances, would conclude they were in custody equivalent to a formal arrest. *Yarborough*, 541 U.S. at 663. Officer EE's "voluminous" questioning of appellant inside the apartment on 23 December 2016 was custodial in nature, thus triggering the requirement to provide *Miranda* warnings before questioning. Because no warnings were given, the custodial interrogation of appellant on his couch violated his rights against self-incrimination. The military judge erred by concluding otherwise.

5. Appellant's Post-Protective Sweep "Consent"

Having found an abuse of discretion in the military judge's "custody" determination, we likewise find an abuse of discretion regarding the military judge's ruling regarding appellant's consent to the search of his apartment. In his ruling, the military judge noted, "the Court also considered whether the accused was in custody at the time consent was requested and whether that may have impacted his freely given consent." In other words, his ruling that appellant consented to the search was based, in part, on his erroneous determination that appellant was not in custody. We disagree and find appellant did not freely and voluntarily consent to the search of his apartment.

"[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Consent is valid when given "freely and voluntarily." *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227; *United States v. Piren*, 74 M.J. 24, 28 (C.A.A.F. 2015). The burden to establish valid consent rests with the government. *Schneckloth*, 412 U.S. at 222; *United States v. McClain*, 31 M.J. 130, 134 (C.M.A. 1990). "The prosecution must prove consent by clear and convincing evidence." Mil. R. Evid. 314(e)(5).

Non-exhaustive factors relevant to whether consent to search was voluntary include: "(1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's mental state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's

rights." *United States v. Wallace*, 66 M.J. 5, 9 (C.A.A.F. 2008); *United States v. Olson*, 74 M.J. 132, 134–35 (C.A.A.F. 2015). "Mere 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).

While the military judge's ruling purports to discuss appellant's consent to the apartment search, the ruling is little more than a recitation of the suppression testimony whereby the officers within the apartment testified appellant consented and appellant testified to the contrary. Having recited the contrasting testimony, the military judge determined the officers' version to be more credible than appellant's. That said, the military judge provided no discussion regarding whether appellant's consent was "free and voluntary;" rather, he simply concluded it was.

Considering the *Wallace* factors, and assuming without deciding that appellant did in fact utter words of consent as the military judge found, we find his consent was not "freely and voluntarily" given. A review of the *Wallace* factors follows. The "degree to which the suspect's liberty was restricted" favors appellant. As noted above, appellant had been in custody for over one hour when consent was sought. The "presence of coercion or intimidation" also favors appellant. At approximately 0100, two armed CPD officers entered appellant's apartment without his consent, directed him to sit on a couch under guard, searched the apartment, and refused to tell him why they were in his apartment or why he was being detained. The "suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors," favors the government, albeit slightly. At the time of the search, appellant was a [redacted]-old Sergeant with nearly seven years of military service. Assigned to the 194th Military Police Company, his Military Occupational Specialty (MOS) was 31E, internment/resettlement specialist, whose duties include: "supervision of confinement and detention operations, external security to facilities, counseling/guidance to individual prisoners within a rehabilitative program, and, records of prisoners/internees and their programs."[16] It stands to reason that the consideration of "the suspect's mental state at the time," favors appellant. After being awakened from his sleep and told to sit on his couch by two armed officers, and having his requests for information denied, Officer EE told appellant his roommate was dead outside and then asked to search his apartment. The "suspect's consultation, or lack thereof, with counsel," favors appellant as consent was sought without affording appellant the opportunity to move from his couch, let alone contact or seek counsel. Finally, "the coercive effects of any prior violations of the suspect's rights," also favors appellant. Balancing all

[16] *See* https://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/legal-and-law-enforcement/internment-resettlement-specialist.html (last visited 15 April 2021).

factors, we conclude appellant did not freely and voluntarily consent to the search of his apartment.

Two additional factors warrant brief discussion. After over one-and-a-half hours of detention on his couch, a CPD officer, after telling appellant that his roommate was dead outside in the parking lot, sought consent to search his apartment. This request was made without telling appellant that: (i) any evidence found during the earlier "protective sweep" was not admissible against him (a cleansing warning), *see Lichtenhan*, 40 M.J. at 470; or (ii) he could refuse consent, *see United States v. Drayton*, 536 U.S. 194, 206–07 (2002). While neither a cleansing warning nor a statement that a subject may refuse consent are requirements in order to obtain a valid consent, they are nevertheless factors we consider under a totality of the circumstances review. That said, our conclusion regarding the absence of valid consent would remain the same even if we disregarded these additional considerations.

In conclusion, we determine this situation is akin to the scenario envisioned in Mil. R. Evid. 314(e)(4), specifically "[m]ere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search." Considering the totality of the circumstances, we find the military judge abused his discretion in finding that appellant freely and voluntarily consented to the search of his apartment on 23 December 2016.

6. Exigent Circumstances

"Exigent circumstances" is a recognized exception to the Fourth Amendment's warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013); *United States v. Jackson*, 34 M.J. 1145, 1148 (A.C.M.R. 1992). This exception applies:

> [W]hen the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in "hot pursuit" of a fleeing suspect, enter a burning building to put out a fire and investigate its cause . . . [and] in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence.

McNeely, 569 U.S. at 148–49 (2013) (internal quotation marks and citations omitted); *see Kentucky v. King*, 563 U.S. 452, 460 (2006) (noting the need "to

prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search of a home). "Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." *King*, 563 U.S. at 470 (citation omitted).

The exigent circumstances exception is incorporated into military law through Military Rule of Evidence 315, which states in part:

> (g) Exigencies. Evidence obtained from a probable cause search is admissible without a search warrant or search authorization when there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought. Military operational necessity may create an exigency by prohibiting or preventing communication with a person empowered to grant a search authorization.

Mil. R. Evid. 315(g). *See United States v. Jones*, 64 M.J. 596, 598 n.2 (Army Ct. Crim. App. 2007) (citing Mil. R. Evid. 315) ("Exigent circumstances exist where, for example, the passage of time would permit a suspect to destroy evidence, police officers are in hot pursuit of a fleeing felon, an ongoing emergency exists on the premises, i.e., a fire, or conditions exist extremely adverse to officer safety.").

The military judge found that Officers BH and MD had "exigent circumstances" authorizing the warrantless entry into appellant's apartment. "The determination of whether exigent circumstances justified a warrantless search is a mixed question of law and fact;" meaning the military judge's factual findings shall be reviewed for clear error and the military judge's ultimate conclusion about the existence of exigent circumstances shall be reviewed de novo. *See, e.g.*, *Tamez v. City of San Marcos*, 118 F.3d 1085, 1094 (5th Cir. 1997); *United States v. Moreno*, 701 F.3d 64, 72 (2d Cir. 2012).

The nature and seriousness of the offense factors into the exigency of the situation. *Welsh*, 466 U.S. at 753–55 (holding exigent circumstances did not justify warrantless bedroom arrest for the civil traffic offense of driving while intoxicated); *United States v. Ayala*, 26 M.J. 190, 192–93 (C.M.A. 1988) (applying *Welsh* to a situation involving the warrantless apprehension of a murder suspect in a hotel room). While no exigency is created simply because there is probable cause to believe a serious crime has been committed, "application of the exigent-circumstances exception in the context of a home entry should be rarely sanctioned when there is probable cause to believe that only a minor offense . . . has been committed." *Welsh*, 466 U.S. at 753.

Whether exigent circumstances existed is evaluated by an objective standard; the officer's subjective belief is irrelevant. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (collecting cases emphasizing the Fourth Amendment's touchstone of objective reasonableness). Reviewing courts consider the totality of the circumstances surrounding the officers' actions, including the investigative tactics leading up to the exigency alleged to have necessitated the warrantless entry. *Untied States v. Howard*, 106 F.3d 70, 74 (5th Cir. 1997) (stating exigent circumstances review is "more akin to examining a video tape by instant replay than to examining a snapshot"). Appellate courts should assess those actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (per curiam). However, the inverse must also be true. Just as judges should not cast doubt on the objective reasonableness of an officer's actions through the distorting lens of hindsight, an officer's actions that were objectively *unreasonable* under the circumstances cannot be deemed reasonable based on evidence that was undeveloped and therefore unknown to the officer leading up to and during the warrantless entry.

A review of his ruling, noted in part below, highlights the fact that the military judge placed significant weight on the fact that Officers BH and MD were responding to a homicide, or as the military judge stated, a "murder scene." Additionally, citing no legal authority, the military judge factored not-yet developed or known evidence into his exigent circumstances calculus. The military judge noted, in part

> Officer BH had an unsolved murder scene with a dead body and an expended casing directly outside an apartment that was identified as that of the deceased. He detected a strong odor of marijuana. An unknown male answered the door to the apartment. Officer [BH] and his fellow officers then did no more than was required to accomplish their stated goal - preserve evidence based on the crime scene and the odor. Their stated purpose was clear and there is no evidence that they exceeded the scope of what was necessary. To the contrary, the testimony and statements demonstrate considerable restraint, as the officers froze the scene, with the occupants still in the apartment in full view of what the officers were doing, until detectives arrived.
>
> In *Segura v. United States*, 468 U.S. 796, 809 (1984), the Supreme Court of the United States considered the legality of seizing a residence while in pursuit of an authorization to search, to prevent the removal or destruction of evidence. They reasoned a home is sacred in Fourth

> Amendment terms not because of possessory interests in the premises, but because of privacy interest in the activities therein. *Id.* at 810. They held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Id.* The Court reaffirmed, however, that, absent exigent circumstances, a warrantless search is illegal. *Id.* The C.A.A.F. has also recognized the ability of law enforcement officers to freeze a scene, with either probable cause or exigent circumstances, to procure search authorization. *United States v. Hoffman*, 75 M.J. 120 (C.A.A.F. 2015), citing *Segura* at 810.

In appellant's case, Officer BH smelled raw marijuana while outside the apartment door. Until entry was achieved, Officer MD smelled nothing. Officer BH's suppression testimony provided no testimony that he believed evidence was being destroyed or even in danger of imminent destruction. Officer BH's testimony was simply that his knock on the apartment door at 0100 was not "immediately" answered. Similarly, the colloquy between Officer [MD][17] and the trial counsel during the merits portion of the trial fails to support any exigency finding. Officer MD's testimony amounted to little more than, "we knocked on the door, I heard movement, that movement was suspicious, and I advised the occupants not to be afraid." Nothing in his testimony establishes an exigency. Like Officer BH, his testimony was similarly silent regarding any belief that evidence was being destroyed or in danger of imminent destruction. Officer MD's subjective belief that movement within the apartment was "suspicious" is objectively dubious. After all, his partner knocked on appellant's door in the middle of the night. The knocking ostensibly awakened appellant and SPC MF. Officer MD's testimony invites the question—how was appellant or SPC MF to answer the door without "movement" within the apartment?

What the government did not present is a case of burning marijuana which, by its very nature, is arguably evidence that contraband is being destroyed or in danger of imminent destruction, although even this scenario is not universally accepted as creating an exigency justifying warrantless entry. *See State v. Holland*, 744 A.2d 656, 661–62 (N.J. Sup. Ct. 2000) (comparing cases from varied jurisdictions on whether the smell of burning marijuana establishes an exigency). Ultimately, the *Holland* court, applying *Welsh* and following the position of other courts that had similarly applied *Welsh*, held it does not. *Id.* at 662; *see also Taylor v. United*

[17] Officer MD testified on the merits but not during the suppression hearing.

States, 286 U.S. 1, 6 (1932) (holding the odor of whiskey coming from the defendant's garage did not justify the federal prohibition agents' warrantless entry); *Johnson v. United States*, 333 U.S. 10, 15 (1948) (holding the odor of burning opium coming from a hotel room did not justify the agents' warrantless entry).

In finding exigent circumstances, the military judge relied on *Segura v. United States*, 468 U.S. 796 (1984) and *United States v. Hoffmann*, 75 M.J. 120 (C.A.A.F. 2016) in support of his ruling, precedent which allows for the seizure of a residence to "prevent" removal or destruction of evidence" while law enforcement pursue a warrant.

In *Segura*, officers had probable cause to believe that petitioners (Segura and Colon) were trafficking in cocaine. After surveilling petitioners, observing and confirming that a drug sale occurred, and coordinating with and receiving authorization from an Assistant United States Attorney to arrest petitioners, agents were advised to "secure" petitioner's apartment to "prevent the destruction of evidence" while a search warrant was being processed. *Segura*, 468 U.S. at 799–800. Agents entered petitioner's apartment and arrested all inside. Once inside, they conducted "a limited security check of the apartment to ensure that no one else was there who might pose a threat to their safety or destroy evidence." *Id.* at 800–01. During this limited check, "the agents observed, in a bedroom in plain view, a triple-beam scale, jars of lactose, and numerous small cellophane bags, all accouterments of drug trafficking. None of these items was disturbed by the agents." *Id.* at 801. Once the warrant was obtained, a full search was conducted which revealed, "almost three pounds of cocaine, 18 rounds of .38-caliber ammunition fitting the revolver agents had found in Colon's possession at the time of her arrest, more than $ 50,000 cash, and records of narcotics transactions." *Id.*

On appeal, the District Court ruled officers lacked exigent circumstances justifying the initial entry and limited security check and thus suppressed all evidence seized. *Id.* at 802. The Court of Appeals affirmed as to the evidence found during the "limited security check" but reversed as to the evidence discovered during the execution of the warrant. *Id.* at 802–03. The Supreme Court agreed, holding:

> [W]here officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.

Id. at 798.

In *Hoffmann*, unlike *Segura*, the law enforcement agents in Corporal Hoffmann's barracks room were there with his consent, executing, at least at the outset, a consensual search of the room. 75 M.J. at 123. After approximately twenty-five minutes, however, Corporal Hoffmann withdrew his consent. *Id.* The following day, Corporal Hoffmann "formally revoked his consent in writing and demanded the return of all property in the Government's possession without it being searched." *Id.* at 122. Although the agents stopped the search, they seized the evidence that was collected prior to the revocation. *Id.* at 123. Four months later, pursuant to a command-issued search authorization, the collected evidence was searched and the search led to the discovery of child pornography. *Id.* At trial, the military judge denied Corporal Hoffman's suppression motion. *Id.*

On appeal, the Navy–Marine Corps Court of Criminal Appeals, avoiding the withdrawal of consent issue, held that the evidence would have been inevitably discovered, claiming that law enforcement agent would have "frozen the scene and sought a search authorization." *Id.* The Navy Court also found that the commander who authorized the search of the digital media had a substantial basis to conclude that probable cause existed to believe Corporal Hoffmann's laptop contained child pornography. *United States v. Hoffmann*, 74 M.J. 542, 547 (N.M. Ct. Crim. App. 2014).

In reversing appellant's child pornography conviction, the Court of Appeals for the Armed Forces (CAAF) found no basis justifying the warrantless seizure and search of appellant's laptop. 75 M.J. at 124. The CAAF found appellant withdrew his consent prior to any "meaningful" interference with his property by law enforcement. *Id.* In other words, consent was withdrawn prior to the seizure of appellant's laptop. The CAAF also found that the evidence failed to provide the commander with a substantial basis "for concluding that there was probable cause to believe Appellant possessed child pornography." *Id.* at 127 (citation omitted). Finding probable cause lacking, the court noted that "inevitable discovery" necessarily fails as a justification for the warrantless seizure and search:

> There is no evidence that, at the time of the seizure, the government agents possessed or were actively pursuing leads that would have inevitably led to discovery of the child pornography images by lawful means. The assumption that the investigators could have lawfully frozen the scene at Appellant's barracks room and pursued a command authorization based on probable cause is unjustified. Freezing the scene to procure a command authorization requires probable cause or exigent circumstances. *Segura v. United States*, 468 U.S. 796, 810

> (1984) (plurality opinion). The Government has not argued and the record does not contain any exigent circumstances justifying freezing the scene. Moreover, as discussed below, the Government failed to establish that the investigators had probable cause to believe that child pornography or evidence of the alleged offenses would be found on Appellant's computer equipment.

Id. at 125.

Here, the military judge's reliance on *Segura* is misplaced. Officers BH and MD did not simply freeze the scene to prevent the destruction of evidence while a warrant was obtained; they searched the apartment absent any exigency, using then-existing standard operating procedures to do so. Furthermore, the record contains no evidence about any CPD officer pursuing a warrant or discussion as to why pursuit of a warrant was unreasonable under the circumstances. In other words, they did exactly what the District and Circuit Court Judges in *Segura* found to be illegal. Further, the military judge's citation to *Hoffmann*, while not necessarily misplaced, simply restates that which the Supreme Court noted in *Segura*—officers armed with probable cause can freeze a scene while they obtain a warrant. Neither *Segura* nor *Hoffmann* authorize the search that occurred at appellant's apartment on 23 December 2016.

Finally, in reaching his "exigent circumstances" finding, the military judge relied heavily on the fact that officers were responding to "an unsolved murder scene." The smell of "raw" marijuana, the evidence that gave Officer BH probable cause, however, was never, leading up to or at the time of entry, linked to the homicide or the decedent. Rather, the military judge considered evidence unknown to Officers BH and MD at the time of entry to find exigent circumstances at the time of entry. The military judge's ruling states, in part:

> It is worth pointing out, **although unknown to Officer [BH] at the time**, his instincts were right on. Subsequent investigation by CPD and CID revealed considerable evidence that Mr. [G] was involved in the sale and distribution of marijuana, and the accused has since admitted to destroying evidence of marijuana before responding to Officer [BH's] knock at the door (emphasis added).

Unlike the military judge, we fail to see the value of pointing out not-yet developed or known evidence when evaluating whether a warrantless entry was justified under exigent circumstances. Whether viewed objectively or subjectively, evidence unknown to an officer making entry cannot factor into an objective

exigency determination. We find no legal support for the proposition that an otherwise objectively unreasonable warrantless entry can later be transformed into an objectively reasonable warrantless entry based on later-developed evidence that no objective officer in the circumstances would be capable of knowing.

In evaluating the exigency, the military judge's ruling links the smell of "raw" marijuana to the "murder scene," however, there was absolutely no evidence, at the time of entry, linking the decedent to drugs. The military judge's ruling is devoid of any discussion regarding the gravity or seriousness of the relevant offense for which the officers had probable cause. Rather, the military judge's analysis improperly linked the entry into the apartment to the homicide and drugs. However, nothing then known to Officers BH and MD linked the smell of "raw" marijuana to the body in the parking lot.

The government shoulders the "heavy burden of proof of demonstrating exigent circumstances." *Jackson*, 34 M.J. at 1148 (citing *Welsh*, 466 U.S. at 749–50). The government failed to meet its burden in appellant's case and the military judge erred by concluding otherwise. The Supreme Court's admonition in *Johnson* carries as much weight as it did over seventy years ago: "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." 333 U.S. at 15.

7. Inevitable Discovery

Inevitable discovery, unlike exigent circumstances, is not an exception to the Fourth Amendment's warrant requirement; rather, it is an exception to the exclusionary rule that would otherwise preclude governmental use of evidence obtained in violation of the Fourth Amendment. *United States v. Dease*, 71 M.J. 116, 121 (C.A.A.F. 2012) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)); *United States v. Eppes*, 77 M.J. 339, 347 (C.A.A.F. 2018). Inevitable discovery, as an exception to the exclusionary rule, is promulgated in Mil. R. Evid. 311(c)(2), which states, "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." *See Dease*, 71 M.J. at 121. The burden is on the government 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 and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *Dease*, 71 M.J. at 122 (quoting *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982)).

Whether inevitable discovery applies is a "mixed question of law and fact, which we review de novo." *United States v. Stokes*, 733 F.3d 438, 443 (2d Cir.

2013) (citing *United States v. Mendez*, 315 F.3d 132, 135 (2d Cir. 2002)); *see United States v. Kennedy*, 61 F.3d 494, 497 (6th Cir. 1995) (citing *United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987)).

Here, the military judge's inevitable discovery ruling covers three paragraphs, the first two of which generally state the legal framework. The third paragraph of his ruling states:

> 15. Assuming, *arguendo*, the search of the accused's residence was illegal, law enforcement agents possessed the dead body of an occupant just outside the door, an expended casing next to the body, the odor of marijuana emanating from the apartment, and they would soon possess the statement of SPC [MF]. None of the evidence before the court suggests SPC [MF's] statements lack credibility or would have changed. SPC [MF] has no standing to challenge the search. The available, legally obtained evidence, to include SPC [MF's] eventual statement that the accused assisted the deceased in distributing marijuana, would have led to the inevitable, legal discovery of the evidence.

During the suppression hearing, the government called Officers BH and EE (CPD), SA ZR (CID), and SPC MF. Neither Officer BH nor Officer EE provided any information, obtained from SPC MF, linking appellant to the decedent's drug trade. The search occurred on 23 December 2016; however, SPC MF's statement to CID SA ZR, upon which the military judge relied, did not exist prior to 4 January 2017, nearly two weeks after the entry and search of appellant's apartment. Further, SPC MF's statement was obtained by military authorities during their drug investigation, an investigation in which the CPD had no interest. In response to the military judge's questioning during the suppression hearing, Officer EE stated:

> The accused was never charged with the drugs from the Clarksville Police Department; it was not a concern of ours. The drugs just stick into the puzzle of why the deceased victim was killed at 1 o'clock in the morning in a parking lot because he was out conducting a drug deal.

The aforementioned testimony linking the decedent to drugs, however, was not known at the time of the search and could not be based on SPC MF's statement to SA ZR, which was not produced until 4 January 2017.

At its core, the military judge's inevitable discovery ruling ignores that Officers BH and MD were following standard operating procedure when they entered

and searched appellant's apartment absent exigent circumstances and relies entirely on Officer EE's testimony that had appellant not consented, he would have sought a warrant and was confident it would have been issued. Concluding that a warrant was forthcoming, however, does not make it so, especially where, as here, there was no evidence of officers even contemplating seeking a warrant prior to unlawfully entering appellant's residence. *See United States v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994) ("[T]o hold 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."). It appears the centerpiece of the government's inevitable discovery argument is: "If we hadn't done it wrong, we would have done it right." *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992). This assertion is far from compelling.

Considering the totality of the circumstances and our previous rulings regarding the protective sweep, the absence of any exigency, the failure to account for the seriousness of the offense for which the authorities had probable cause, the lack of freely and voluntarily given consent, and the military judge's reliance on evidence not yet known or developed at the time of the warrantless entry into the apartment, the military judge's inevitable discovery finding constitutes an abuse of discretion.

8. Appellant's Follow-On Interview with Officer EE

Finally, we address the statements appellant made to Officer EE at the CPD station. In ruling that the statements were admissible, the military judge focused solely on the issue of custody without regard to what occurred earlier in appellant's apartment. In finding the statements admissible, the military judge noted that Officer EE's questioning was "not a custodial interrogation." On this point, we agree. His ruling, however, ignores the prior illegal entry, search, and questioning by CPD Officers. In other words, the military judge's ruling was made in a vacuum, without any discussion of the voluntariness of appellant's statements to Officer EE in light of the prior illegalities.

In *Wong Sun v. United States*, the Supreme Court noted:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means

> sufficiently distinguishable to be purged of the primary taint.

371 U.S. 471, 487–88 (1963) (internal citations and quotation marks omitted). "Confessions derivative of an illegal search or seizure in violation of the Fourth Amendment are generally inadmissible, notwithstanding a proper rights advisement pursuant to *Miranda* . . . or Article 31, UCMJ." *United States v. Spiess*, 71 M.J. 636, 641 (Army Ct. Crim. App. 2012). Such a confession may be admissible, however, "if 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 v. Illinois*, 422 U.S. 590, 602 (1975)).

In *Brown*, the Supreme Court espoused a three-factor test to determine whether such a confession is admissible. Specifically, reviewing courts consider the totality of the circumstances with special emphasis on the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. 422 U.S. at 603–04; *see also United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F. 2006).

Applying *Brown*'s three-factor analysis to appellant's case, we find that all three factors favor appellant. Appellant was at the CPD offices within hours after law enforcement's unlawful entry into his apartment. Officers entered appellant's apartment around 0100 and appellant's statement to CPD was completed at approximately 0823. There were no significant intervening circumstances between his initial detention and eventual interview by Officer EE. As noted above, appellant spent a considerable amount of time under guard in his own residence. Finally, the purpose and flagrancy of the official misconduct favors appellant. Clarksville Police Department officers should have known that absent exigent circumstances, of which there were none, they lacked any legal authority to enter appellant's apartment. Rather than knock and seek consent to enter, Officer BH and MD followed then existing procedure to enter and search.

The flagrancy of the violation is summed up best by Officer BH's suppression hearing testimony:

> [I]f 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. After we do that, we would ask for consent. If consent isn't granted, we would apply for a search warrant, things along those lines.

Simply stated, as understood by Officer BH, the CPD policy was to violate citizens' Fourth Amendment rights. This factor alone weighs so heavily in appellant's favor to warrant a finding of inadmissibility.

While the military judge was correct in finding that appellant was not in custody during his follow-on interview with Officer EE, he failed to consider the voluntariness and admissibility of appellant's statements in light of the prior illegalities. Having considered the totality of the circumstances and the *Brown* factors, we find appellant's statement to be insufficiently attenuated from the prior illegal actions of the CPD officers. Therefore, we conclude the military judge abused his discretion in finding appellant's statements to Officer EE admissible.

C. Prejudice

Having found multiple errors of constitutional dimension, including violations of appellant's Fourth and Fifth Amendment rights, the errors must be tested for prejudice under a harmless beyond a reasonable doubt standard. *Tovarchavez*, 78 M.J. at 462. It is the government's burden to demonstrate harmlessness beyond a reasonable doubt. *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018) (citing *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011)). "That standard is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *Tovarchavez*, 78 M.J. at 460 (citation omitted).

We are not confident and cannot say with any degree of certainty that the erroneously admitted evidence from the searches of appellant's apartment as well as the statements made by him to Officer EE did not contribute to appellant's convictions. Removing these critical pieces of evidence from the equation eviscerates the government's case. For that reason, the errors in question were not 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 different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge BURTON and Judge WALKER concur.

FOR THE COURT:

[redacted]

JOHN P. TAITT
Acting Clerk of Court