IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,
Appellee

v.

Captain
CHRISTOPHER GRAY,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

DOCKET No. ARMY 20090259

Tried at Camp Henry, Republic of Korea, on 12 November 2008 and 22-26 March 2009 before a general court-martial convened by Commander, Headquarters, 19th Expeditionary Sustainment Command, Colonel Donna M. Wright, Military Judge, presiding.

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

Statement of the Case

A general court-martial composed of officer members convicted appellant, contrary to his pleas,[1] of premeditated murder, conduct unbecoming an officer, and obstruction of justice, in violation of Articles 118, 133, and 134, Uniform Code of Military Justice (UCMJ).[2] The panel sentenced appellant to be reprimanded, to forfeit all pay and allowances, to be confined for life with the eligibility for parole, and to be dismissed from the service.[3] The convening authority approved the sentence as adjudged.[4]

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[1] Record (R.) at 290.
[2] R. at 1257.
[3] R. at 1285.
[4] Action.

Statement of Facts

On 24 April 2008, the Korean National Police (KNP) contacted the 20th Military Police Detachment Criminal Investigation Division (CID) office for assistance in contacting appellant regarding the whereabouts of appellant's wife, [redacted] had been reported missing for five days.[6] On 25 April, Special Agent (SA) [redacted], the CID detachment commander, opened a missing person's investigation.[7]

SA [redacted] was the team chief for the investigation.[8] SA [redacted] contacted [redacted] appellant's battalion commander. [redacted] informed [redacted] that appellant and [redacted] had conflicts in the past and there had been a no contact order between appellant and his wife.[9] [redacted] also explained that [redacted] had gone missing on at least four other occasions travelling to Camp Casey, Korea, Seoul, Korea, and Houston, Texas without contacting anyone.[10] [redacted] requested [redacted] have appellant come to the CID office for an interview.[11]

Appellant arrived at the CID office around 1215 hours on 25 April 2008.[12] [redacted] interviewed appellant in the CID

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[5] R. at 122-23.
[6] R. at 123-24.
[7] R. at 124.
[8] R. at 124.
[9] R. at 45, 57.
[10] R. at 47.
[11] R. at 47.
[12] R. at 48.

conference room for roughly ninety minutes.[13] [redacted] did not read appellant his rights because at the time he did not suspect a crime had occurred and he did not suspect appellant of any wrongdoing.[14] Appellant was very cooperative and calm throughout the interview.[15] He wore a sling on his arm because he had injured his wrist in a fall while moving his belongings.[16]

During the interview, appellant explained he had not seen [redacted] since approximately 1300 hours on 20 April 2008.[17] Appellant stated they were separated and that a previous no contact order issued against him had been lifted.[18] Appellant related that he had moved from his residence on Camp George (where [redacted] was still residing) to the Basic Officers Quarters (BOQ) on Camp Walker as a result of the no contact order.[19] While moving his belongings on the morning of 20 April, [redacted] and her daughter [redacted] arrived at the residence.[20] Appellant informed [redacted] he was preparing to have her returned to [redacted] under the Early Return of Dependents (ERD), to which appellant claims she became upset and left the apartment at roughly 1300 hours alone.[21] Appellant explained that on the evening of 20 April 2008, he traveled to Camp

[13] R. at 48, 50.
[14] R. at 48, 49.
[15] R. at 49.
[16] Appellate Exhibit [AE] XXVII; R. at 59.
[17] AE XXVII; R. at 48-9.
[18] R. at 48.
[19] AE XXVII; R. at 49.
[20] AE XXVII; R. at 49.
[21] AE XXVII; R. at 49.

Carroll with [redacted] to find [redacted] residence but was unsuccessful and returned to Camp George.[22]

Appellant informed [redacted] that [redacted] had gone missing four times before and would leave [redacted] for hours or days with neighbors.[23] [redacted] was scheduled to travel to Hawaii on 4 May 2009 for immigration purposes.[24]

Following the interview, appellant consented to a search of his quarters on Camp George, the BOQ on Camp Walker, and his vehicle.[25] The scope of the search was for serological fluids and [redacted] identification card and cell phone.[26] Appellant and CID each drove their own vehicles to the Camp George residence where CID conducted a search for evidence of [redacted] whereabouts.[27] CID and appellant then travelled to the Camp Walker BOQ where CID searched the residence.[28] [redacted] located a receipt from the Camp Walker Main Store inside a bag underneath appellant's sink.[29] The receipt showed a purchase on 8 April 2008 of a blue poly tarp, duct tape, boning knife, two ten-count boxes of trash bags, a twin pack enema, Pain Medicine PM, disposable gloves, and two bottles of simply

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[22] AE XXVII.
[23] AE XXVII.
[24] AE XXVII.
[25] AE XXX, XXXI; R. at 50.
[26] AE XXX, XXXI; R. at 50.
[27] R. at 51.
[28] R. at 50-51.
[29] R. at 53.

sleep.[30] The bag also contained a green towel, a blue tarp, an opened box of latex gloves missing five gloves, two boxes of lawn and leaf bags (one opened and missing two bags), and one individual lawn and leaf bag.[31] [redacted] considered the receipt and items to be "suspicious," but did not consider it sufficient on its own to establish a crime had been committed because they were common household items.[32]

[redacted] asked appellant if he knew where the other items on the receipt were.[33] Appellant stated the knife might be in the Camp George apartment, the duct tape might be in his office, and that he and [redacted] had taken some of the medication.[34] CID and appellant then returned to the Camp George apartment to look for the items, but could not locate them.[35] Appellant then gave [redacted] consent to retrieve and seize the receipt and bag of items from the Camp Walker apartment.[36]

On 25 April 2008, [redacted] conducted canvas interviews looking for information regarding [redacted].[37] On 26 April 2008, [redacted] and [redacted] travelled to the Camp George apartment building and discovered a security camera in the elevator.[38] They viewed and then obtained a copy of the security footage on

[30] Prosecution Exhibit [PE] 54.
[31] AE XXIX.
[32] R. at 53, 67-68.
[33] R. at 53.
[34] R. at 120.
[35] R. at 54.
[36] R. at 54, 72.
[37] R. at 126.
[38] R. at 126.

28 April 2008.[39] The security footage showed [redacted] and appellant on the elevators at various times on 20 April 2008.[40] [redacted] and [redacted] entered the elevator at 1106 hours on the third floor and traveled to the fifth floor.[41] [redacted] is never seen entering the elevator again.[42] Near midnight, appellant is seen dragging a large suitcase to the first floor, struggling with its weight.[43] He was not seen returning to the elevator until roughly 0200 hours.[44]

Following the review of the elevator security footage, [redacted] obtained the Defense Biometric Identification System (DBIDS) records for the military installations in the area, standard procedure for a missing person case.[45] The DBIDS records showed appellant entering Camp George immediately prior to him returning to the elevator on the first floor and going to the fifth floor.[46]

Based on this information, [redacted] coordinated with the KNP to obtain traffic camera imagery for the area from the time appellant is last seen leaving the elevator until his re-entry

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[39] R. at 128.
[40] R. at 128-131; PE 55.
[41] R. at 130; PE 55.
[42] R. at 130-31.
[43] R. at 137-38; PE 55.
[44] R. at 139; PE 55.
[45] R. at 131-32. DBIDS records the date and time of every entry onto a military installation in Korea. R. at 132.
[46] R. at 140. DBIDS does not record when persons exit the military installation. R. at 140-41.

onto Camp George.[47] [redacted] provided appellant's name, the time, date, and tag numbers from the vehicles.[48] KNP provided a number of captured images of appellant's vehicle travelling during the time-frame specified based on the tag numbers provided.[49]

Based on the last location that the traffic cameras captured appellant's vehicle location, CID conducted a search of the immediate area.[50] Utilizing a large search team and search dogs, CID located [redacted] body within a ten minute drive from the last location appellant's car was seen travelling away from Camp George.[51]

Assignment of Error I

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENTS MADE ON 25 APRIL 2008 AND ALL EVIDENCE PROCURED BY USING HIS STATEMENTS WHICH WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AMENDMENT AND ARTICLE 31, UCMJ.

Summary of Argument

The totality of the circumstances establish that appellant could not have been considered a suspect as of 25 April 2008, and therefore CID was not required to advise him of his Article

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[47] R. at 141. Traffic cameras are positioned at all large intersections and all toll roads in Korea. R. at 142.
[48] R. at 144.
[49] R. at 144, 147.
[50] R. at 145. Twenty-one minutes elapsed between the last image of appellant's vehicle travelling away from Camp George and the first image of appellant's vehicle travelling towards Camp George. This narrowed CID's search to an area within ten minutes from the last image. R. at 145-46.
[51] R. at 146.

31 rights. There was no evidence that a crime had been committed against [redacted]

Standard of Review

Whether a person is a suspect necessitating the advisement of Article 31 rights is a question of law reviewed de novo.[52] "The military judge's factual determinations pertaining to what criminal investigators knew at the time of the interview will be upheld unless "clearly erroneous."[53]

Law and Argument

The rights afforded pursuant to Article 31, UCMJ, apply to persons "suspected of an offense."[54] "Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense."[55] However, "in some cases, a subjective test may be appropriate; that is, [courts] look at what the investigator, in fact, believed, and [courts] decide if the investigator

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[52] *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999).
[53] *United States v. Meeks*, 41 M.J. 150, 161 (C.M.A. 1994) (*citing United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)).
[54] Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) [hereinafter UCMJ]; *Muirhead*, 51 M.J. at 96; *United States v. Kendig*, 36 M.J. 291, 294 (C.M.A. 1993)("[i]t is axiomatic that only servicemembers suspected of a crime must be given Article 31(b) warnings before official interrogation.").
[55] *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)(*citing United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)); *Muirhead*, 51 M.J. at 96 ("[t]he question is whether a reasonable person would consider someone to be a suspect under the totality of the circumstances.").

considered the interrogated person a suspect."[56] "The purpose and nature of the questioning—and, hence, the motivation of the person asking the questions—are pertinent in analyzing when warnings are required."[57]

As the Court of Appeals for the Armed Forces (CAAF) has noted:

> In the course of inquiry into apparent misconduct many persons may be questioned. Information available to the investigator may so clearly identify the conduct as criminal and a person as the wrongdoer as to require threshold advice to the individual regarding his right to remain silent; in other instances, the investigator may have no reason to anticipate or suspect that a person from whom he seeks information is implicated in a crime. Thus, the conclusion as to criminality or suspicion in a particular case depends on the totality of the surrounding circumstances.[58]

Mere "hunches" that a crime has been committed do not trigger Article 31(b), UCMJ.[59]

The key issue in this case is therefore what CID knew when it questioned appellant on 25 April 2008. The following list highlights the primary facts known to and discovered by CID during its preliminary investigation on 25 April 2008:

1. Known Prior to Appellant's Interview with [redacted]:
   a. [redacted] had been missing for a period of five days.[60]
   b. [redacted] seven-year-old daughter was accounted for.[61]

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[56] *Muirhead*, 51 M.J. at 96.
[57] *United States v. Pownall*, 42 M.J. 682, 686 (Army Ct. Crim. App. 1995).
[58] *United States v. Henry*, 44 C.M.R. 152, 153-54 (C.M.A. 1971).
[59] *United States v. Meeks*, 41 M.J. 150, 161 (C.M.A. 1994).
[60] R. at 124.
[61] R. at 58.

c. Appellant and [redacted] were experiencing marital problems.[62]
d. Appellant's commander had issued a no contact order against appellant for [redacted].[63]
e. [redacted] had spontaneously disappeared on at least four prior occasions for reasons unrelated to appellant.[64]
f. During one of [redacted] disappearances, she travelled to Houston, Texas.[65]
g. [redacted] was often located within the local [redacted] community when she went missing.[66]
h. [redacted] was planning to travel to Hawaii on 5 May for immigration proceedings.[67]
i. [redacted] boyfriend, [redacted], indicated to [redacted] he was concerned for [redacted] safety.[68]

2. Discovered during the Interview of Appellant:
a. Appellant's arm was in a sling due to an injury sustained while moving his personal belongings.[69]
b. Appellant's no contact order had been lifted.[70]
c. A local citizen discovered [redacted] purse inside a taxi cab and returned it to appellant.[71]

3. Discovered during the Search of Appellant's Quarters:
a. [redacted] located a receipt inside a bag underneath appellant's sink with various items including a blue poly tarp, duct tape, boning knife, two ten-count boxes of trash bags, a twin pack enema, Pain Medicine PM, disposable gloves, and two bottles of simply sleep.[72]

The facts known to CID on 25 April 2008 concerning [redacted] were insufficient for a military questioner to reasonably

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[62] R. at 47, 57.
[63] R. at 45, 57.
[64] R. at 47, 59.
[65] R. at 47.
[66] R. at 47.
[67] R. at 55, 214.
[68] R. at 61, 63, 184. [redacted] was not aware of [redacted] concern during his interview with appellant because [redacted], who interviewed [redacted] an hour prior to appellant's interview, had not informed him of the statement. (R. at 61)
[69] R. at 59, 70.
[70] R. at 100.
[71] R. at 58, 98.
[72] R. at 53.

believe a crime had been committed against [redacted] or that appellant was suspected of any such crime.

To be suspected of a crime, there must be some evidence a crime actually occurred. As of 25 April 2008, there was no evidence any harm had befallen [redacted] other than she had not been seen for five days. CID initiated a "missing persons" investigation, logically indicating the focus was on locating [redacted], not investigating who committed a crime against her. Considered in conjunction with her history of disappearing (to include travelling as far as Houston, Texas), and her impending travel to Hawaii,[73] her absence would not necessarily be startling to the CID agents initiating the investigation.

The only initial indication of a crime was [redacted] statement to CID; however, [redacted] was reluctant to provide information, and the agent did not interpret the statement to mean [redacted] had been harmed.[74] This unsubstantiated opinion with nothing to support that a crime had actually been committed is an insufficient basis to consider appellant a suspect.[75]

Events subsequent to CID's interview of appellant on 25 April 2008 did not alter the investigation or indicate a crime

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[73] R. at 55. CID initially considered it possible that she may have merely travelled to Hawaii early. (R. at 55).

[74] R. at 185-86.

[75] As noted by [redacted], in responding to a question concerning why appellant was not read his Article 31 rights on 25 April, "I can't even think of a reason why he would have been advised of his rights at that point in time. I don't know what you would advise him for."

occurred. While the discovery of the receipt and various items could be considered "suspicious" or "odd,"[76] they were common household items.[77] The items only garnered true evidentiary significance when the autopsy of [redacted] body concluded the cause of death was diphenhydramine, a primary ingredient of simply sleep, potentially lethally administered through an enema.[78] As noted by [redacted], on "the 25th we had suspicious items, but there was not—there wasn't enough facts to see that a crime was committed."[79]

CID's actions on 25 April 2008 support that they did not consider appellant a suspect. Had CID suspected appellant of murder, they would have transported him to the CID office, escorted him at all times, interviewed him in an interviewing room (as opposed to a conference room), searched him upon arrival at CID headquarters, would not have allowed him to keep [redacted] purse, and would have advised him of his rights.[80] It is unreasonable to conclude that CID would have allowed appellant to roam freely if they had actually suspected him of murdering [redacted]. Further, it is unreasonable to believe that CID would not have taken appellant into custody if CID felt the receipt and items were evidence of foul play.

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[76] R. at 53, 190.
[77] R. at 67, 191.
[78] Arguably the most "suspicious" item on the receipt is the knife. However, there was no evidence the knife was used in [redacted] murder.
[79] R. at 69.
[80] R. at 52.

On 25 April 2008, the totality of the circumstances establishes that no reasonable person would consider appellant a suspect of an offense. The most known to CID was that a woman known for disappearing for long periods of time, who was planning to travel to Hawaii within two weeks, had not been seen for five days. No statement made during appellant's 25 April interview indicated any harm had befallen [redacted] While the receipt and items found in appellant's quarters might be considered suspicious, they did not, in and of themselves, indicate the commission of a crime or that appellant was a suspect. As a result, at no time on 25 April 2008 was appellant a suspect necessitating advisement of Article 31, UCMJ rights.

Assignment of Error II

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S STATEMENTS AND ALL EVIDENCE PROCURED BY USING HIS STATEMENTS MADE AFTER HE ATTEMPTED TO INVOKE HIS RIGHT TO COUNSEL DURING THE CID INTERROGATION CONDUCTED ON 1 MAY 2008.

Summary of Argument

Appellant's ambiguous request for an attorney during his interview with [redacted] did not sufficiently invoke his right to counsel to require cessation of all questioning. Further, no incriminating evidence was discerned after his ambiguous request, and CID terminated the interview following appellant's eventual unequivocal request for counsel.

Additional Facts

On 1 May 2008, [redacted] interviewed appellant.[81] [redacted] read appellant his rights verbatim from the DA Form 3881,[82] informing appellant that he was under investigation for murder[83] and that he could request a lawyer.[84] [redacted] told appellant he could stop the interview at any time and request a lawyer, to which appellant responded, "ok," and "I do understand."[85] Appellant noted he had previously requested a lawyer during questioning for an unrelated investigation while he was in the Air Force.[86]

[redacted] then asked appellant whether he was willing to waive his rights and provide a statement. Appellant responded "I am willing to answer, but, uh, this of course disturbs me...I would like to, I guess, talk to an attorney...I don't know [it's/what's][87] going on now."[88] While making this statement, appellant's voice trails off into a whisper beginning with the words "I guess." Additionally, between saying "I guess" and "talk to an attorney," and while making the latter statement, appellant can be heard signing the DA Form 3881 waiving his right to remain silent and indicating he is willing to discuss

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[81] R. at 147. An audio recording of the interview is contained at Tab O, Appellate Exhibit XIII.
[82] AE XIII, Tab O, beginning at the 24:15 mark of track 1. The DA Form 3881, dated 1 May 2008, is located in the pre-trial allied papers, but is referenced as an exhibit to both AE XIII and AE XIV.
[83] AE XIII, Tab O, at the 25:40 mark of track 1.
[84] AE XIII, Tab O, at the 26:30 mark of track 1.
[85] AE XIII, Tab O, beginning at the 27:00 mark of track 1.
[86] AE XIII, Tab O, at the 28:00 mark of track 1.
[87] The exact word appellant used is difficult to decipher.
[88] AE XIII, Tab O, at the 28:44 mark of track 1.

the offenses under investigation.[89] [redacted] then attempted to clarify why appellant had just signed the DA Form 3881 indicating he was willing to discuss the allegations without an attorney.[90] Appellant merely states "but number 4," indicating the right to stop the interview at any time.[91] [redacted] clarified that appellant had the right to stop the interview at any time.[92]

The interview then proceeded for one and a half hours, and appellant readily answered [redacted] questions and denied any involvement in the disappearance of [redacted][93] After [redacted] suggests appellant was not being "100% truthful," appellant stated "I think at this time, since I am being looked at this hard...I do need an attorney."[94] [redacted] replied, "That is your choice...that's the door right there. When you walk out of this room now the opportunity you have doesn't exist anymore."[95] Appellant then asked for the number to an attorney, and [redacted] stated: "We still need to get this issue resolved...If you want to talk to an attorney now, we'll make that available," to which appellant responded "yes please."[96]

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[89] AE XIII, Tab O, beginning at the 28:44 mark of track 1.
[90] AE XIII, Tab O, beginning at the 28:44 mark of track 1.
[91] *Id.*
[92] *Id.*
[93] AE XIII, Tab O.
[94] AE XIII, Tab O, beginning at the 20:40 mark of track 3.
[95] *Id.*
[96] *Id.*

Following this invocation of his right to counsel, [redacted] ceased the interrogation.[97]

Standard of Review

Whether a confession is voluntary is a question of law reviewed de novo.[98] The military judge's findings of fact are reviewed under a clearly erroneous standard.[99]

Law and Argument

The well-established rule is that once a suspect invokes his right to counsel or to silence, investigators may not question him until his lawyer is present or until he reinitiates discussions with the investigator.[100] However, an ambiguous comment or request does not require that interrogation cease.[101] The request for counsel must be articulated "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[102] Merely stating that you "might" wish to have an attorney or stating "maybe I should get a lawyer" is

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[97] The recording shows that after [redacted] left the room, appellant whispered to himself, "Never stops...what more can happen now, what more can happen now, what more can happen now." (AE XIII, Tab O, at the 24:25 mark). [redacted] returned at the 25:43 mark and told appellant if he was truly telling the truth, CID would be able to give him a polygraph examination once appellant's attorney consented. It is clear from [redacted] comments that he was offering the polygraph examination only after appellant spoke to an attorney.

[98] *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999).

[99] *Id.*

[100] *Edwards v. Arizona*, 451 U.S. 477 (1981); *United States v. Henderson*, 52 M.J. 14, 17 (C.A.A.F. 1999); Military Rules of Evidence [hereinafter Mil. R. Evid.] 305(f)(2); *Ford*, 51 M.J. at 451 ("[i]nterrogation of a suspect in custody must cease if the suspect requests counsel.").

[101] *Ford*, 51 M.J. at 451.

[102] *Ford*, 51 M.J. at 451; *Davis v. United States*, 512 U.S. 452, 459 (1994).

insufficient to require questioning to cease.[103] Further, "[t]here is no blanket prohibition against a comment or a statement by a police officer after an invocation of rights."[104] It is often "good police practice for the interviewing officers to clarify whether or not a suspect actually wants an attorney."[105]

The military judge here found that appellant "initially waived his rights" and then "clarified that he might want to speak to an attorney at some point and would stop answering questions at that point."[106] It is clear from the audio recording that appellant's whispered statement "talk to an attorney," spoken as he signed the DA Form 3881 waiving his right to counsel, was at best an ambiguous request for an attorney. [redacted] attempted to clarify this statement. The context of appellant's next statement, pointing to number four on the DA Form 3881, indicates appellant was merely clarifying he could stop the interview at any time and request an attorney. This is supported by the fact that appellant began answering questions and did not raise the issue of an attorney again until SA Nix questioned appellant's truthfulness.

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[103] *Davis*, 512 U.S. at 462; *Ford*, 51 M.J. at 452.
[104] *Ford*, 51 M.J. at 451 (*citing United States v. Young*, 49 M.J. 265, 267 (C.A.A.F. 1998)).
[105] *Ford*, 51 M.J. at 451 (*citing Davis*, 512 U.S. at 461).
[106] AE LXXV, ¶1.s.

Once appellant unequivocally requested an attorney, CID terminated the interview. [redacted] two additional comments following the request were an attempt to clarify that appellant actually did wish to terminate the interview and to speak with an attorney. [redacted] told appellant an attorney would be made available. After appellant stated, "I do need an attorney," all questioning ceased in compliance with the 5th Amendment and Article 31, UCMJ. Appellant provided no further information.

Even assuming, *arguendo*, appellant did unequivocally request an attorney at the outset of the interview, he has suffered no prejudice. Appellant has not alleged how any statement on 1 May 2008 was ever used against him or what derivative evidence was obtained from the interview. In fact, all of appellant's statements are exculpatory and deny involvement in [redacted] death.[107]

Based on the foregoing, the military judge's findings of fact regarding the context of appellant's ambiguous request for an attorney are not clearly erroneous, and she did not abuse her discretion in admitting appellants 1 May 2008 statements.

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[107] R. at 671-710. [redacted] testified to what appellant told him during the interview; however, nothing was inculpatory.

Assignment of Error III

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS COMPUTER EVIDENCE SEIZED FROM APPELLANT'S CAMP GEORGE APARTMENT ON 1 MAY 2008 IN VIOLATION OF THE FOURTH AMENDMENT.

Summary of Argument

The military judge did not abuse her discretion by admitting the computer evidence seized from appellant's Camp George apartment on 1 May 2008 because the evidence is admissible under the independent source doctrine.

Additional Facts

On 26 April 2008, appellant provided written consent to CID to search his Camp Walker quarters and to seize any and all "computers, hard disks, removable data storage media, portable data storage devices, computer input/output devises and associated power cords/cable/wires."[108] Based on that consent, CID collected appellant's personal HP Compac laptop computer and an external hard-drive.[109] [redacted] conducted a forensic examination of the laptop and hard drive on 29 April 2008 and found numerous Internet web searches including "where to buy sulfuric acid," "murder out of principle," "tie up a person," "duct tape restraint," and "identifying body parts hands, teeth."[110]

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[108] AE XXX; AE XXVII at 7.
[109] AE XXVII at 7; AE XXIX at 7.
[110] AE XXVII at 8.

Based on the evidence gathered, to specifically include the video evidence of appellant and [redacted] on 20 April 2008 at the Camp George apartment, CID requested a search and seizure authorization for both residences for "uniform, blood, luggage key, green towel, [redacted] dependent ID card, [redacted] passports, and a plaid blanket."[111] The military magistrate issued a search authorization on 30 April 2008,[112] and CID conducted the search on 1 May 2008.[113] CID discovered and seized a Dell Dimension Desktop computer, Apple iPod, Canon digital camera with SD card, and a Sony Vaio laptop computer.[114]

On 2 May 2008, CID returned to the magistrate and specifically requested a search and seizure authorization for the electronic evidence seized on 1 May 2008, based primarily on the results from the 29 April 2008 forensic examination of appellant's laptop computer and hard drive.[115] The magistrate granted the search and seizure authorization for the specific electronic equipment seized.[116]

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[111] AE XXVII at 1-2.
[112] AE XXVII at 3.
[113] R. at 107.
[114] R. at 109; AE XXIX at 12.
[115] AE XXVII at 5-9.
[116] AE XXVII at 10-16. The original authorization only included appellant's government office. Once CID realized the error, it returned to the magistrate with a new affidavit clarifying what was requested. The magistrate issued a new authorization including the specific items. *Id.*

Standard of Review

This court reviews "a military judge's denial of a motion to suppress for an abuse of discretion."[117] "An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or based upon a misapprehension of the law."[118]

Law and Argument

Evidence obtained through an unlawful search or seizure is inadmissible against an accused.[119] The "independent source doctrine," developed almost coextensively with the exclusionary rule, provides that where unlawfully seized evidence has an otherwise independent source for its seizure, it is admissible against an accused.[120] The purpose behind the rule has been described as follows:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred....When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.[121]

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[117] *United States v. Huntzinger*, 69 M.J. 1, 5 (C.A.A.F. 2010).
[118] *Id.*
[119] U.S. Const. amend IV; Mil. R. Evid. 311(a); *Murray v. United States*, 487 U.S. 533, 536-37 (1988)(discussing exclusionary rule in general).
[120] *Murray*, 487 U.S. at 537.
[121] *Nix v. Williams*, 467 U.S. 431, 443 (1984).

Assuming, *arguendo*, this Honorable Court finds the seizure of the electronic equipment on 1 May 2008 unlawful,[122] the independent source doctrine renders that evidence, and the resulting evidence discovered from the searches of those items, admissible.

Prior to CID entering appellant's residence on 1 May 2008 pursuant to the 30 April 2008 search and seizure authorization, CID had sufficient evidence to establish probable cause to seize all electronic and computer media appellant possessed based on the 29 April 2008 forensic examination of appellant's laptop.[123]

CID lawfully entered appellant's apartment on 1 May 2008 pursuant to the 30 April 2008 search and seizure authorization and secured the residence with padlocks.[124] While searching for the items listed in the 30 April 2008 authorization, the Dell computer, iPod, camera, and laptop were visible in plain sight.[125] Based on the evidence CID possessed prior to the 1 May 2008 search, had CID left the electronic equipment observed in plain view at the Camp George apartment, secured the room, and

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[122] The military judge found as a matter of law that the CID agents had authority to seize the electronic equipment based on the 30 April 2008 search authorization (AE LXXV, ¶2.k).
[123] In fact, the military magistrate issued the 2 May 2008 search and seizure authorization based primarily on the 29 April 2008 forensic examination.
[124] R. at 110, 115; AE XXVII at 3.
[125] R. at 109.

then sought seizure authorization, a military magistrate would have undoubtedly granted such authorization.[126]

Precluding the electronic evidence obtained during the 1 May 2008 search would place the government in a *worse*, not the same, position had the unlawful seizure not occurred. The mistake was not constitutional error, but merely investigators prematurely seizing evidence they would otherwise have been authorized to seize. Consequently, pursuant to the independent source doctrine, the military judge did not abuse her discretion in admitting the electronic evidence seized on 1 May 2008.

Assignment of Error IV

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN SHE DENIED THE DEFENSE MOTION TO SUPPRESS A RECEIPT AND OTHER ITEMS OF EVIDENCE THAT WERE SEIZED FROM APPELLANT'S RESIDENCE ON OR ABOUT 25 APRIL 2008 IN VIOLATION OF THE FOURTH AMENDMENT.

Summary of Argument

Appellant's consent to search his premises and to seize the located items was voluntary, not the product of coercion or duress, and was an independent act of free will.

Standard of Review

The admission by a military judge of evidence seized pursuant to consent by an accused is reviewed for an abuse of

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[126] *Segura v. United States*, 468 U.S. 796, 814 (1984)("Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here.").

discretion.[127] "Findings of fact and conclusions of law are reviewed under the clearly erroneous and de novo standards, respectively."[128]

Additional Facts

Following [redacted] interview of appellant on 25 April 2008, appellant provided consent to search his quarters on Camp George, his BOQ room on Camp Walker, and his vehicle.[129] Appellant consented to a search for serological fluids, [redacted] identification card, and a cellular phone.[130] [redacted] searched appellant's vehicle located in the CID parking lot, and then appellant, [redacted], [redacted], and [redacted] travelled in the same vehicle to the local fire station to try to track [redacted] cell phone.[131] The fire department was unable to track the cell phone, so [redacted], [redacted], and appellant (who drove his own vehicle alone) travelled to Camp George where they searched his quarters for evidence of [redacted] whereabouts.[132] Following this search, the three travelled in separate vehicles again to the Camp Walker quarters.[133] There, [redacted] located a receipt and certain items in a bag.[134] Some of the items on the receipt were not in

[127] *United States v. Wallace*, 66 M.J. 5, 7 (C.A.A.F. 2008).
[128] *Wallace*, 66 M.J. at 7.
[129] R. at 50; 196, AE XXX and XXXI.
[130] AE XXX; AE XXXI.
[131] R. at 50-51.
[132] R. at 51.
[133] R. at 52.
[134] R. at 53.

the bag, including a knife, duct tape, medication, and two enemas. CID returned to the Camp George apartment to search for the missing items, but did not locate them.[135] CID then requested, and appellant provided, consent to seize the initial items and receipt in the Camp Walker apartment.[136]

Law and Argument

The well-established rule is that "a search conducted pursuant to a valid consent is constitutionally permissible."[137] The only limitation is that the consent must be voluntarily given and not the result of duress or coercion, express or implied.[138] "Voluntariness is a question of fact to be determined from all the circumstances."[139]

CAAF has adopted six factors in evaluating the voluntariness of consent: (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

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[135] R. at 53-54.
[136] R. at 54, 72, 192; AE XXIX.
[137] *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The military has adopted the admissibility of consent searches through Mil. R. Evid. 314(e).
[138] *Id.* at 248.
[139] *Id.* at 248-49.

suspect's rights.[140] "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."[141]

Article 31 and 5th Amendment warnings are not required prior to law enforcement officials requesting consent.[142]

There is no evidence in the record to suggest CID coerced appellant into providing consent to search his quarters or to seize the items discovered. To the contrary, appellant was calm and cooperative on 25 April.[143] CID interviewed appellant in a conference room as opposed to an interrogation room[144] and allowed appellant to drive to the various locations without escort.[145] There is no evidence his mental state was impaired.

Appellant signed CID Form 87-R-E which clearly indicated he had the right to refuse consent to search his person, premises, or property.[146] The military judge noted that appellant was a "mature CPT with several years in the Army."[147]

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[140] *Wallace*, 66 M.J. at 9.
[141] *Schneckloth*, 412 U.S. at 227.
[142] *United States v. Roa*, 24 M.J. 297, 299 (C.M.A. 1987).
[143] R. at 49, 54, 98.
[144] R. at 48, 52.
[145] R. at 50-54.
[146] AE XXX; AE XXXI.
[147] AE LXXV. The Government pointed out in its Response to Defense Motion to Suppress 1 May 2008 Statements of CPT Gray and Derivative Evidence that appellant was a 38 year old Captain with more than 12 years active duty military service, had graduated from a 4-year university, and had been an officer and commander for more than 6 years. AE XIV at 2.

Based on the totality of the circumstances and the lack of any evidence or indication that appellant was coerced or suffering from a mental infirmity at the time, his consent to search his premises and seize the specific items was voluntary and is therefore admissible.

Appellant's primary argument against the voluntariness of his consent stems from his arguments in Assignment of Error I, and that the alleged failure to provide him with his Article 31 rights vitiated his consent. Regardless of voluntariness, a consent to search must also be "sufficiently an act of free will to purge the primary taint of the unlawful invasion" in cases where a court finds a prior constitutional violation.[148] Assuming, *arguendo*, this Court finds appellant's constitutional rights were violated under Assignment of Error I, appellant's consent to search was still an independent act of free will.

Courts look to three factors to determine whether consent is an act of free will purging the taint of a prior constitutional violation: (1) the temporal proximity of the arrest and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.[149] CAAF recognizes that the third factor is "particularly important" and "may be the most important

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[148] *United States v. Khamsouk*, 57 M.J. 282, 290 (C.A.A.F. 2002).
[149] *Khamsouk*, 57 M.J. at 291.

factor."[150] In *United States v. Khamsouk*, CAAF found that despite the first two factors weighing in favor of the appellant, the consent was sufficiently an act of free will because NCIS agents acted in good faith and not flagrantly.[151]

Here, the first two factors would arguably weigh in favor of appellant. However, even assuming CID did err in failing to advise appellant of his Article 31 rights on 25 April, it is clear from the context of events on that day that CID subjectively believed appellant was not a suspect and did not require rights warnings.[152] Because CID was acting in good faith and not simply attempting to avoid legal requirements, appellant's voluntary consent was an independent act of free will. Therefore, all evidence discovered and seized pursuant to appellant's consent was properly admissible.

Assignment of Error V

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE SUSTAINED THE TRIAL COUNSEL'S OBJECTION TO THE PROFFERED DEFENSE EXPERT WITNESS TESTIMONY REGARDING PROBLEMS WITH THE GOVERNMENT'S VIDEO EVIDENCE PRESENTED DURING THEIR CASE IN CHIEF.

Additional Facts

Appellant attempted to call [redacted] to testify as an expert regarding the video surveillance evidence the Government presented in Prosecution Exhibit 18. [redacted] was a

[150] *Id.*
[151] *Khamsouk*, 57 M.J. at 292-93.
[152] *See* discussion, Assignment of Error I.

Department of Defense civilian employee working for Armed Forces Network (AFN) Korea as a technical standards manager.[153] He had worked in the field of video and broadcasting engineering for twenty-nine years and was a certified broadcast television engineer and a certified broadcast networking technologist.[154]

Appellant retained [redacted] to review the video surveillance from [redacted] apartment building. [redacted] first reviewed the video evidence and equipment in January 2009 and had never seen or used the particular video equipment before.[155] He noted a number of concerns with the video: (1) it played back in fast forward;[156] (2) the video file was saved as an executable (.exe) file;[157] and (3) the video would skip frames for up to six seconds at a time.[158] He also noted two concerns with the equipment: (1) the camera's lens distorted certain images such as size and color;[159] and (2) the hard drive appeared ready to fail.[160]

As to the method of playback and the type of saved file, [redacted] noted that the manufacturer utilized proprietary software he could not access, and that it appeared normal for

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[153] R. at 1057-58.
[154] R. at 1058.
[155] R. at 1065.
[156] R. at 1060.
[157] R. at 1061.
[158] R. at 1063-65.
[159] R. at 1061-62.
[160] R. at 1064.

this software to playback in fast forward.[161] [redacted] also explained that the camera stops recording if there is no movement, and all of the skips he witnessed merely skipped certain floors of an individual's trip on the elevator.[162]

Appellant wanted [redacted] to be able to testify to: (1) the functionality of the video surveillance equipment;[163] and (2) the reliability of the actual video (skipping).[164] The military judge initially granted the request for [redacted] to testify.[165] However, the military judge reversed her decision the next morning and precluded [redacted] from testifying.[166] The military judge initially believed the Government provided [redacted] to appellant as an expert; however, when she learned the Government had not, her analysis changed.[167] The military judge therefore precluded [redacted] testimony because: (1) based on his lack of knowledge or experience with the specific system at issue, he was not an expert;[168] and (2)

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[161] R. at 1065-66.
[162] R. at 1069-1072. For example, he would see "somebody get on and it will skip floors, and the next you know [he sees] them leaving the elevator." (R. at 1071). However, he never saw "someone getting on the first floor and then suddenly [he saw] someone else getting off the fifth floor." (R. at 1071).
[163] R. at 1046-1052.
[164] R. at 1053.
[165] R. at 1076-77.
[166] R. at 1084.
[167] R. at 1084. The military judge assumed the Government conceded he was an expert by providing him to the defense. However, since the Government had not provided him as an expert, she reviewed whether he was in fact an expert.
[168] R. at 1084.

"the members can look at [the video] and decide for themselves whether they have any confidence in this video."[169]

Following the military judge's ruling, the Government showed the entire video footage to the panel upon defense request.[170] Appellant also called [redacted], an employee at the Camp George housing office familiar with the video surveillance equipment.[171] [redacted] testified to the skipping evident on the videos, and that some skips lasted ten and fifteen seconds.[172] She explained that the screen for the system had "gone black" for a period of time the previous summer and an engineer reset the monitor.[173] Further, the engineer recommended that the hard drive be separated to ensure capacity, which had not been completed.[174]

During closing argument, defense counsel argued that "there are times on the video that skip" and that there were issues with the hard drive and potential data corruption.[175] Defense counsel argued that based on the unreliability of the video evidence, and that there is no video footage of the staircase in the Camp George apartment building, it was possible that [redacted] left the building without being seen on the video.[176]

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[169] R. at 1084.
[170] R. at 1092-93.
[171] R. at 1124-25.
[172] R. at 1126.
[173] R. at 1129.
[174] R. at 1129-30.
[175] R. at 1171.
[176] R. at 1171-72.

Standard of Review

A military judge's evidentiary ruling is reviewed for an abuse of discretion.[177] Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed under a de novo standard.[178] Therefore, with a mixed question of law and fact, a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.[179]

Regarding expert testimony, "[a]buse of discretion is the proper standard by which to review a decision to admit or exclude expert evidence."[180] An appellate court "will not reverse unless the ruling is manifestly erroneous."[181] Further, the military judge "has broad discretion as the 'gatekeeper' to determine whether the party offering expert testimony has established an adequate foundation with respect to reliability and relevance."[182]

Law and Argument

Military Rule of Evidence (M.R.E) 702 provides that a "witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon

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[177] *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002).
[178] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[179] *Ayala*, 43 M.J. at 298.
[180] *United States v. Huberty*, 53 M.J. 369, 372 (C.A.A.F. 2000).
[181] *Huberty*, 53 M.J. at 372.
[182] *United States v. Allison*, 63 M.J. 365, 369 (C.A.A.F. 2006).

sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[183] The testimony must be able to "assist the trier of fact to understand the evidence or to determine a fact in issue."[184]

The military judge is the "gatekeeper" of expert testimony and must determine that the testimony both "rests on a reliable foundation and is relevant."[185] To determine the admissibility, this Court utilizes six factors:

> (1) The qualifications of the expert;
> (2) The subject matter of the expert testimony;
> (3) The basis for the expert testimony;
> (4) The legal relevance of the evidence;
> (5) The reliability of the evidence; and
> (6) That the probative value of the expert's testimony outweighs the other considerations of M.R.E. 403.[186]

However, "[t]he threshold question in determining admissibility of expert testimony is whether it would be helpful to the fact-finder in resolving the facts in issue."[187] As CAAF has noted,

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[183] Mil. R. Evid. 702.
[184] *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005) ("an expert witness may testify if he or she is qualified and testimony in his or her area of knowledge would be helpful.").
[185] *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007).
[186] *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). CAAF has noted that though *Houser* predated *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), its approach is consistent with those cases and CAAF continues to utilize the *Houser* factors. *See Billings*, 61 M.J. at 166. By way of comparison, the four *Daubert* factors are: (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Daubert*, 509 U.S. at 593-94.
[187] *United States v. Nelson*, 25 M.J. 110, 112 (C.M.A. 1987).

"[t]he test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject."[188]

In this case, the military judge found that [redacted] could not be considered an expert under M.R.E. 702 because he had never seen, worked with, or had any experience with the particular system.[189] Appellant failed to establish why [redacted] experience would make him an expert concerning that particular recording equipment.[190] The military judge did not abuse her discretion in finding that [redacted] did not meet the proper qualifications in this case.

Most importantly, however, expert testimony was not required in this case. Appellant made clear that he desired [redacted] to testify that the recording equipment was not functioning properly and that this led to missing time on the video.[191] As the military judge found, the skipping was clear

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[188] *Houser*, 36 M.J. at 398.
[189] R. at 1084.
[190] R. at 1058-59. [redacted] only noted he was a technical standards manager working for AFN in the field of video and broadcasting engineering, who was certified as a broadcast television engineer and a broadcast networking technologist. R. at 1058. As the military judge noted, his experience in broadcast engineering would not necessarily relate to an expertise in closed circuit video surveillance. R. at 1084-85.
[191] R. at 1045.

from the videos themselves.[192] [redacted] also testified regarding the skipping.[193] Further, the panel watched the entire video and witnessed the time skipping themselves.[194] [redacted] also confirmed that the system had problems the previous summer the hard drive had not been separated.[195]

[redacted] testimony was therefore not necessary for the panel to understand there was "time skipping" in the videos and was therefore not "helpful" under M.R.E. 702. Further, appellant was able to argue the deficiencies with the video equipment possibly resulted in a failure to record [redacted] going back downstairs.[196] Consequently, appellant has not established that he was prejudiced by the preclusion of [redacted] testimony.

Assignment of Error VI

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE OVERRULED DEFENSE COUNSEL'S OBJECTION TO THE GOVERNMENT EXPERT WITNESS'S OPINION TESTIMONY REGARDING THE MECHANISM BY WHICH THE ALLEGED MURDER WAS PURPORTEDLY COMMITTED BY APPELLANT.

Additional Facts

On 13 May 2008, [redacted], a board certified anatomic and forensic pathologist, conducted the autopsy of [redacted]

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[192] R. at 1084.
[193] R. at 1126.
[194] R. at 1092-93.
[195] R. at 1129-30.
[196] R. at 1171-72.

[redacted][197] [redacted] remains were in a severe state of decomposition.[198] [redacted] took samples of decomposition fluid from [redacted] chest cavity and liver tissue.[199] He was unable to obtain vitreous fluid (fluid from within the eye globe) or pure blood based on the decomposition of the body.[200] [redacted] sent the samples to the laboratory in Rockville, Maryland for testing.[201] Initially, [redacted] was not able to determine the cause of death.[202]

[redacted] of the Division of Forensic Toxicology with the Armed Forces Medical Examiner System at the Armed Forces Institute of Pathology (AFIP) tested the decomposition fluid from [redacted].[203] [redacted] is board certified in forensic toxicology with a Ph.D. in biophysical chemistry and has been practicing for twenty years, fourteen of which focused on postmortem forensic toxicology.[204] [redacted] has published more than eighty scientific articles related to this field, fourteen specifically involving postmortem toxicology.[205] He is a member of the Society of Forensic Toxicologists (previous board member and president), the American Academy of Forensic

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[197] R. at 326-28.
[198] R. at 335.
[199] R. at 328. Despite the state of decomposition of the organs, [redacted] was still able to identify the liver and which lobe he removed the sample from because the liver had maintained its normal shape. R. at 343.
[200] R. at 460-61.
[201] R. at 329.
[202] R. at 460.
[203] R. at 345.
[204] R. at 345-46.
[205] R. at 347.

Sciences, the American Association of Clinical Chemists, and the International Forensic Toxicology Society Association.[206] He has been certified as an expert in over sixty trials.[207]

During the examination of the decomposition fluid from the chest cavity and the liver, [redacted] discovered a concentration of the antihistamine diphenhydramine at the levels of ten milligrams per liter and twenty milligrams per liter, respectively.[208] The examination utilized the gas chromatography and full-scan mass spectrometry with selected ion monitoring for identification and quantification of the diphenhydramine.[209] These techniques are published in peer-reviewed literature and have published error rates of twenty percent and include control samples.[210] The error rate is standard within the field.[211]

[redacted] testified during the *Daubert* hearing that the difficulties in testing decomposition fluid stem both from its nature and the possibility of "postmortem distribution." Decomposition fluid is a heterogenous mixture containing a number of different substances resulting from the "body breaking down and turning into this, for lack of a better term, muck."[212]

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[206] R. at 348.
[207] R. at 349.
[208] R. at 351. [redacted] also discovered 120 milligrams per deciliter and 72 milligrams per deciliter of ethanol in the decomposition fluid from the chest cavity and liver, respectively, and 1400 milligrams per liter of acetaminophen in the decomposition fluid. R. at 351.
[209] R. at 354.
[210] R. at 354-55.
[211] R. at 355.
[212] R. at 366-67.

Therefore, it is impossible to create an exact "match" of decomposition fluid to serve as a control sample.[213] The laboratory has a "matrix" of controls for each substance, and the goal in testing is to match the matrix as closely as possible with the substance being tested because there is no such thing as "exact matrix matching."[214]

There are a number of methods utilized to ensure the control sample from the matrix matches closely to the substance being tested. The laboratory analyst utilizes analytical techniques that "separate out all of the junk."[215] The gas chromatography and mass spectrometry analysis will show the potential interference, which can then be separated.[216] The tested sample is diluted to more closely match the control.[217] These methods are the accepted standard of practice techniques within the field.[218]

Here, [redacted] separated out substances such as tertiary amines which generally interfere with assays.[219] [redacted] did not discover any additional substances that interfered with the testing.[220] Further, [redacted] diluted the sample to a 1 to 20 dilution for the decomposition fluid and 1 to 100 dilution for

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[213] R. at 363-64; 422.
[214] R. at 363; 391.
[215] R. at 393.
[216] R. at 396.
[217] R. at 393.
[218] R. at 393.
[219] R. at 394.
[220] R. at 398. [redacted] noted that had there been any known interferences within the assay, he would not have reported the result. R. at 394.

the liver.[221] This made the matrix as close as possible to the controls within the assay.[222]

[redacted] also accounted for the "postmortem distribution" effect. Postmortem distribution is where drugs ingested prior to death "spill into the surrounding blood areas and actually distribute to other locations in the body."[223] This can lead to higher quantities of a drug in a certain area at a certain point in time.[224] The lungs and liver may be "sponge-like" with certain basic drugs.[225] Diphenhydramine specifically is subject to postmortem distribution.[226] In this case, [redacted] found that the ratio of the concentration of diphenhydramine in the liver to the concentration in the decomposition fluid was consistent with what he would expect in blood to liver concentrations.[227] Further, [redacted] noted that had [redacted] ingested only a therapeutic amount of diphenhydramine, which is generally around one milligram per liter, there would not be a ten to twenty fold increase in the concentration of

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[221] R. at 393, 398.
[222] R. at 363, 393.
[223] R. at 373.
[224] R. at 373.
[225] R. at 374.
[226] R. at 376.
[227] R. at 361. Specifically, [redacted] noted "usually the liver value is about two to five times higher than what we see in a blood concentration," and that since the concentration in the decomposition fluid was roughly half that of the liver, it was consistent with the standard ratio. R. at 361.

diphenhydramine in the decomposition fluid due to postmortem distribution.[228]

[redacted] final opinion regarding the levels of diphenhydramine within the samples from [redacted] is that the amount is consistent with a lethal level.[229] [redacted] noted there is no absolute concentration to establish toxicity,[230] and to determine toxicity levels, the analyst compares amounts of the drug in persons known to have died of an overdose with those known to have died of other causes but who had taken a therapeutic amount.[231] This provides a general range of toxic or lethal levels for different drugs for postmortem cases.[232] This method of deduction is generally accepted in the field.[233] Here, [redacted] relied primarily on his own and [redacted] studies, both of which are published in peer-reviewed medical journals, as well as a textbook containing summaries of peer-reviewed cases of deaths from diphenhydramine overdoses.[234] [redacted] noted that therapeutic levels of diphenhydramine are generally less than six milligrams per liter in the liver, and blood concentrations are usually seen at the one milligram level.[235]

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[228] R. at 399.
[229] R. at 402.
[230] R. at 358.
[231] R. at 358.
[232] R. at 358.
[233] R. at 359.
[234] R. at 381.
[235] R. at 360, 400-01.

Therefore, the levels of diphenhydramine in this case were consistent with an individual who had overdosed.[236]

[redacted] explained that generally someone overdosing on diphenhydramine will die within a couple hours, but could potentially die in an hour if they had an extremely high dose.[237] [redacted] could not state what a lethal dose would be or how much [redacted] would have had to ingest to create the levels in the samples.[238] His sole conclusion was that the level within her body was consistent with a toxic level.[239] Based on [redacted] findings through the toxicology report, [redacted] opined that the cause of death was diphenydramine intoxication.[240]

During the *Daubert* hearing, appellant called [redacted], a clinical pharmacologist and toxicologist, to discredit [redacted] findings. [redacted] primary objections were that the control samples did not adequately match the tested sample,[241] and that postmortem distribution could have skewed the results.[242] In support, appellant admitted extracts from articles discussing potential concerns with

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[236] R. at 401.
[237] R. at 362.
[238] R. at 370.
[239] R. at 402.
[240] R. at 331. [redacted] noted the acetaminophen was not the cause of death because the diphenhydramine is a faster acting drug. R. at 458.
[241] R. at 418-19.
[242] R. at 426-27.

postmortem decomposition fluid testing.[243] When asked whether his opinion was merely a "matter of reasonable disagreement between different experts or different scientists within a community or is it something more," [redacted] responded that [redacted] "has his opinion that those results which came out of what he referred to as 'our laboratory' were sufficiently reliable. However, if I were asked to review this case I would have to say I am sorry the results are inconclusive."[244] [redacted] did agree that it is possible to use postmortem blood concentrations to determine cause of death.[245] Appellant did not call [redacted] to testify during its case-in-chief.

Standard of Review

This Honorable Court "reviews a military judge's decision to admit or exclude expert testimony over defense objection for an abuse of discretion."[246] The Court cannot set aside the military judge's decision unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[247] The ruling by the military judge will not

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[243] *See* AE's XLII to LI.
[244] R. at 448.
[245] R. at 451.
[246] *United States v. Sanchez*, 65 M.J. 145, 148 (C.A.A.F. 2007).
[247] *Id.*

be overturned for abuse of discretion "unless it was 'manifestly erroneous.'"[248]

This Court reviews de novo whether the military judge properly followed the *Daubert* framework.[249]

Law and Argument

Law

The test for the admissibility of expert testimony is contained in the discussion to Assignment of Error V.[250] The *Houser* factors are "flexible, and the factors do not constitute a definitive checklist or test."[251] It is not necessary to satisfy ever one.[252] "The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[253] The focus of the inquiry into reliability is "on the principles and methodology employed by the expert, without regard to the conclusions reached thereby."[254]

As CAAF has noted, "an appellate court of law is not an appropriate place to relitigate a motion to admit expert testimony under Mil. R. Evid. 702."[255]

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[248] *Id.* at 149.
[249] *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999).
[250] Appellee Brief, *infra* at 33-34.
[251] *Sanchez*, 65 M.J. at 149.
[252] *Id.*
[253] *Id.*
[254] *Id.* at 149-50.
[255] *United States v. Bush*, 47 M.J. 305, 311 (C.A.A.F. 1997).

Disagreement among experts as to the viability of a particular method of testing or analysis is not dispositive of whether an expert's testimony and opinion may be admissible.[256] As noted by CAAF when addressing hair analysis:

> That experts might dispute some particularities of the testing protocol or suggest ways that it could have been improved, or that different controls might be used, or that SOFT [Society of Forensic Toxicologists] might harbor policy concerns about the feasibility of hair analysis for workplace testing, or deem it prudent to have independent corroboration or hair analysis, even considered in the aggregate, are insufficient bases upon which to exclude the results.[257]

The Court in *Bush* agreed the military judge did not abuse his discretion because a "vigorous forensic dialogue" occurred between the Government and Defense experts, and the panel found the defense expert's reservations insufficient to raise reasonable doubt.[258]

Argument

In this case, the military judge did not abuse her discretion in allowing [redacted] to render his opinion regarding the level of diphenhydramine in [redacted] decomposition fluid and liver. The military judge conducted a lengthy *Daubert* hearing and rendered findings of fact and conclusions of law

[256] *Bush*, 47 M.J. at 311.
[257] *Bush*, 47 M.J. at 311-12.
[258] *Bush*, 47 M.J. at 312.

discussing all the relevant *Daubert/Houser* factors pertaining to the forensic analysis [redacted] performed.[259]

The military judge correctly found that the factors at issue were the legal relevance of the evidence and the reliability of the evidence (*Houser* factors four and five).[260] There is no question that [redacted] is an expert in his field.[261] There is also no dispute that the actual testing procedures, i.e., gas chromatography and full-scan mass spectrometry with selected ion monitoring for identification and quantification of the diphenhydramine, are reliable and widely accepted methods for determining identity and quantification of narcotics within the human body.[262] The sole dispute is whether the results generated from those accepted testing procedures from decomposition fluid are reliable based on the nature of decomposition fluid and the effect of postmortem distribution.

This is a classic case of two highly qualified experts[263] arriving at different conclusions from the same data. While [redacted] pointed out the difficulties inherent in testing

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[259] R. at 326-475; AE LXXVI.
[260] AE LXXVI, ¶1.e.
[261] Appellant did not object to [redacted] acceptance by the court as an expert in forensic toxicology. R. at 349.
[262] AE LXXVI, ¶1.f.
[263] [redacted] expertise is in clinical pharmacology and toxicology and pharmacokinetics, while [redacted] expertise is specifically in postmortem forensic toxicology. R. at 346, 409, 412. Further, [redacted] has not conducted actual laboratory field testing since 1998, but has focused primarily on teaching and consulting since that time. R. at 453.

decomposition fluid, [redacted] acknowledged those issues and discussed the steps taken to create adequate results.

To account for the lack of an identical control sample, [redacted] followed standard laboratory procedures in removing substances from the tested samples that generally interfere with assays and also diluted the samples to render them as close a match to the control blood sample as possible. While [redacted] may have disagreed, [redacted] testified this is an effective and field-supported method.[264] The military's judge's findings that there were sufficient standards controlling the technique's operation are not clearly erroneous as she reasonably relied on the testimony and expertise of [redacted].[265]

Further, [redacted] testified his findings were not affected by postmortem distribution. First, the ratio of concentration between the decomposition fluid in the chest cavity and the liver was consistent with what was to be expected, indicating there was not a higher level of concentration in either area. Secondly, the concentration of diphenhydramine was so high in the decomposition fluid and liver that it could not reasonably be explained by post-mortem distribution. It was therefore not clearly erroneous for the military judge to rely on this testimony in finding that [redacted] opinions were reliable.[266]

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[264] R. at 388-90.
[265] AE LXXVI, ¶1.i.
[266] AE LXXVI, ¶1.j.

It is also clear from the record that while there is dispute as to the reliability of conclusions derived from decomposition fluid, the matter has been subjected to peer review and is considered valid. It has a known error rate of twenty percent (less than the more realistic twenty-five to thirty percent error rate), and is accepted in the scientific community.[267]

[redacted] testimony was also not overly prejudicial. While [redacted] opined that [redacted] had a toxic level of diphenhydramine within her system, he could not opine as to whether that was the actual cause of death, how large a dosage she had ingested, or how she actually ingested the substance.[268]

Due to the high deference afforded to the military judge in conducting the *Daubert/Houser* analysis and evaluating the evidence, it cannot be manifestly erroneous for her to have found that [redacted] testimony and opinions met the standards for admissibility. The question as to the extent of the reliability of the data derived from decomposition fluid is more appropriately an issue of weight, not admissibility. As noted by the military judge, appellant could have called [redacted] to render his own opinion of [redacted] conclusions.[269]

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[267] AE LXXVI, ¶¶1g-k.
[268] AE LXXVI, ¶1.l.
[269] AE LXXVI, ¶1.k.

Based on the foregoing, the military judge did not abuse her discretion in allowing [redacted] to testify regarding the level of diphenhydramine found within the decomposition fluid and liver of [redacted].

Assignment of Error VII

APPELLANT SUFFERED PREJUDICE WHEN THE CONVENING AUTHORITY TOOK ACTION ON THE RECORD OF TRIAL BEFORE CONSIDERING CLEMENCY MATTERS SUBMITTED BY APPELLANT.

Standard of Review

"The standard of review for determining whether post-trial processing was properly completed is de novo."[270]

Law and Argument

The convening authority is required to consider any matters submitted by an accused under R.C.M. 1105 and 1106(f) prior to taking final action.[271] In this case the Action and Addendum to the Staff Judge Advocate Recommendation (Addendum) dated 31 August 2009 included within the current record of trial are not the final Action and Addendum. The true Action and Addendum were signed on 25 September 2009 and 18 September 2009, respectively, after R.C.M. 1105 matters were received by the Government on 9 September 2009.[272] The convening authority in

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[270] *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).
[271] R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989).
[272] Affidavit of [redacted] (filed contemporaneously herewith as Government Appellate Exhibit [GAE] A); GAE B, C; R.C.M. 1105 submissions.

this case therefore did consider appellant's R.C.M. 1105 submissions prior to taking final action on 25 September 2009.[273]

Assignment of Error VIII

APPELLANT SUFFERED PREJUDICE WHEN THE CONVENING AUTHORITY'S ACTION ON THE RECORD OF TRIAL FAILED TO REFLECT HIS PRIOR APPROVAL OF THE DEFENSE REQUEST TO DEFER AND WAIVE FORFEITURES OF PAY.

Standard of Review

"The standard of review for determining whether post-trial processing was properly completed is de novo."[274]

Law and Argument

The convening authority is required to show in the initial action if either adjudged or automatic forfeitures in accordance UCMJ, Art. 58b, were deferred or waived or both.[275] Here, the convening authority failed to show in the action that he had approved the deferral of adjudged forfeitures on 20 April 2009 and waiver of automatic forfeitures on 31 August 2009.[276] However, because the error by the convening authority to include this language within the action is merely a clerical error,[277]

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[273] GAE A, B.

[274] *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).

[275] Army Reg. 27-10, Legal Services: Military Justice, para. 5-32(a) (16 November 2005); R.C.M. 1101(c)(4).

[276] DAE C, D. The 31 August 2009 approval by the convening authority incorrectly refers to the waiver of automatic forfeitures for six months as being deferral of automatic forfeitures.

[277] *See United States v. Garza*, 61 M.J. 799, 806 (Army Ct. Crim. App. 2005)("a clerical error is one that results from inadvertence rather than the considered decision of the official authorized to take an action or make a judgment."). In *Garza*, the convening authority failed to include within the signed action any reference to the adjudged discharge. Because it was not

the Government requests this Honorable Court amend the final Action taken on 25 September 2009 to reflect the approval of deferral of adjudged forfeitures and waiver of automatic forfeitures without returning the record of trial to the general court-martial convening authority for a new Action.[278]

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the adjudged findings and sentence, substitute in the record the attached Action and Addendum dated 25 September 2009 and 18 September 2009, respectively, and amend the 25 September 2009 Action to reflect the approved deferral and waiver of forfeitures.

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the result of his considered decision, this Honorable Court found the omission to be a clerical error.

[278] *See, e.g., United States v. Williams*, 40 M.J. 809, 811-812 (A.C.M.R. 1994).