14 November 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Respondent,*	)	ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
Airman First Class (E-3) DARREN N. HATHORNE, USAF, *Petitioner.*	)	USCA Dkt 12-6002/AF Crim. App. Misc. Dkt. No. 2011-02

ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER GOVERNMENT COUNSEL'S STRATEGIC WITHHOLDING OF THE CONVENING AUTHORITY'S GRANT OF IMMUNITY MAKES APPELLANT'S STATEMENT TO GOVERNMENT COUNSEL NON-IMMUNIZED.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ). However, the United States respectfully asserts that notwithstanding this Court's holding in United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008), Article 67 jurisdiction does not currently extend to the unique circumstances of this case as the Article 62 appeal in this case was initiated during trial on the merits, the case was then remanded to trial by AFCCA after granting the government appeal, this Court denied Petitioner's request to stay the trial, trial

on the merits resumed and has now been concluded, and Article 64, UCMJ review is now pending.

STATEMENT OF THE CASE

On 9 March 2011, a single charge was preferred against Petitioner alleging that he "did, at or near Alamogordo, New Mexico, between on or about 1 April 2010 and on or about 30 August 2010, wrongfully use cocaine" in violation of Article 112a, UCMJ. (R. at 9.1.) The charge was referred to special court-martial the same day. (R. at 9.2.) On 9 April 2011, Petitioner filed a motion to dismiss the charge, or in the alternative, to suppress Petitioner's confession and any derivative evidence. (App. Ex. IV.) The government responded on the same day. (App. Ex. V.)

On 11 April 2011, trial began. (R. at 1.) Following a two-day motions' hearing, the military judge granted the defense motion to dismiss the charge and specification with prejudice. (R. at 578-606.) Pursuant to R.C.M. 908(b)(2), the United States filed notice of its intent to appeal with the judge on 15 April. (R.O.T., Vol. 1.)

On 28 July 2011, AFCCA heard oral argument, and on 4 October 2011, AFCCA granted the United States' Article 62 appeal and remanded the case back to trial. United States v. Hathorne, Misc. Dkt. 2011-02 (A.F. Ct. Crim. App. 4 October 2011) (unpub. op.)). On 19 October 2011, the defense petitioned this Court to

review AFCCA's decision. Nine days after they filed their petition and just days before trial was scheduled to resume, Petitioner filed a motion to stay the trial on 28 October 2011. On 1 November 2011, this Court denied the stay.

The next day, 2 November 2011, trial resumed, Petitioner pled not guilty at a judge-alone special court-martial, was convicted, and received an adjudged sentence that will require appellate review under Article 64, UCMJ: 7 days confinement, 30 days hard labor without confinement, 30 days restriction, and reduction to E-1. (Appendix.)

STATEMENT OF FACTS

During motions, the military judge made the following findings of fact, in part, which AFCCA concluded were supported by the record and not clearly erroneous:

> On 3 November 2010, AFOSI . . . were notified a random urinalysis sample taken from Airman Basic Joseph Foley had tested positive for illegal drugs. As part of the investigation into Airman Basic Foley, his active duty roommates, Senior Airman Alexander Flanner and A1C Darren Hathorne, the accused in this matter, were interviewed, as witnesses by AFOSI.
>
> The accused was interviewed on 5 November 2010, and accomplished two AF IMT 1168s. He was interviewed again on 4 January 2011, and again provided a witness statement on an AF IMT 1168. In each of these interviews, the accused was not questioned about any criminal activity relating directly to himself, but was instead questioned solely about Airman Foley. The accused was

considered as a witness and was not under any suspicion. Accordingly, he was not advised of his rights under Article 31, UCMJ.

On 20 January 2011, Staff Sergeant Rachel Bryant, 49 Wing/JAM, interviewed the accused at the wing legal office in preparation for trial in the case of *US v. Foley*. It had been expected that Captain Phillip Countryman, 49 Wing/JAM, would be present at the interview, but he was unavailable due to other duties. During the interview, Staff Sergeant Bryant told the accused that he would probably testify at trial and should be available for more interviews by members of the legal office. Staff Sergeant Bryant also provided the accused general information on the trial process. She also told him that she understood that testifying would be difficult for him, but he should be honest about what he was saying and that he shouldn't hold anything back. In this interview and in all other interviews, the accused was very cooperative and indicated that he would do anything that was necessary.

On 21 January 2011, Captain Countryman and Staff Sergeant Bryant interviewed Mr. Michael Roberti as part of the continuing investigation into Airman Foley. . . .

Mr. Roberti was concerned about incriminating himself and indicated that he would invoke his 5th Amendment rights unless he received testimonial immunity from the local prosecutors. On 28 January 2011, the Senior Trial Prosecutor, 12th Judicial District Attorney's Office for Otero and Lincoln Counties issued a grant of use immunity. . . . Mr. Roberti confirmed drug use by Airman Foley and also stated he had witnessed the accused, as well as Senior Airman Flanner, use cocaine.

Following the Roberti interview, Captain Countryman was concerned that his two key witnesses in the case of *US v. Foley* might invoke their 5th Amendment and Article 31 rights and effectively be unavailable to testify. . . . After discussing this case with the 49 Wing/SJA, Lieutenant Colonel Dawn Hankins, Captain Countryman drafted a request for an order to testify and grant of immunity for the accused. . . .

. . . .

Approval was granted and the Grant and Order signed by the General Court Martial Convening Authority or GCMCA, Lieutenant General Glenn Spears, 12 Air Force Commander, on 3 February 2011. The order to testify and grant of immunity was sent via electronic mail to 49 Wing/JA after close of business on 3 February 2011.

In issuing the grant, the GCMCA used the following language: ". . . I hereby grant you testimonial immunity . . . [.]" There was no other language governing the point at which the grant of immunity would be effective, although the request had asked that the immunity be effective upon receipt of the accused. The GCMCA's memo also followed the grant with the words ". . . and order you to answer any questions . . . [.]"

. . . .

When the accused arrived at the legal office, after waiting briefly, he was sent to Captain Dean Korsak, 49 Wing/JAM's, office. The other individuals present were Staff Sergeant Bryant, who had been at the previous interview of the accused, and Captain Countryman. At the outset of the interview, Captain Korsak identified himself as one of the prosecutors in the *Foley* case and introduced Captain Countryman, who was the other prosecutor detailed to the *Foley* case.

Captain Korsak was also the Chief of Military Justice for the 49th Wing and was concerned with preserving the ability to prosecute the accused in a future court-martial. He was also aware of the GCMCA's grant of immunity and the order to cooperate. Captain Korsak decided not to inform the accused of the grant of immunity and order. Instead, he chose to read the accused his Article 31 rights in an effort to gain additional evidence against the accused. . . .

. . . Captain Korsak informed the accused that he had knowledge that the accused had used cocaine and was, therefore, required to read him his rights. This was the first time the accused had been advised of Article 31 and the first time anyone associated with the government had questioned the accused about his own illegal drug use.

Captain Korsak . . . referred to a rights advisement card that he had on his note pad. . . . Captain Korsak accurately provided the information contained on the card. As part of the advisement, he informed the accused that he had the right to remain silent, although Captain Korsak was aware that the GCMCA had issued an order to the accused that he was to answer any questions posed to him by investigators and counsel in the case of *US v. Foley*.

At the end of the advisement, the accused was asked whether he was willing to answer questions or wished to consult an attorney. The accused indicated that he had no problem answering questions and would cooperate. He also did not wish to consult a lawyer because he didn't think one was necessary because the interview was about the *Foley* case. The accused provided information regarding a single use of cocaine in the summer of 2010. He then responded to questions by counsel regarding his

> relationship with Airman Foley, Airman Flanner, and Mr. Roberti. Throughout the interview, the accused was calm and cooperative. . . .
>
> . . . the accused returned to the residence he shared with Airman Foley and Airman Flanner. Airman Foley was present and he and the accused discussed the interview. The accused stated that he had not made an official statement. When Airman Foley asked the accused about immunity, the accused informed him that the accused didn't get immunity because he had not said anything incriminating against or about Airman Foley in the interview.
>
> . . . .
>
> The trial of Airman Foley occurred on 9 February 2011. The accused was not required to testify because a plea agreement was negotiated in that case. As part of the negotiated agreement, Airman Foley was required to cooperate in the prosecution of Airman Flanner and the accused.
>
> The legal office then turned to the cases against Airman Flanner and the accused. Because the grant of immunity had not been provided to the accused before he made his confession, no "Chinese wall" was set up to safeguard against improper use of immunized statements. The *Foley* trial counsel provided all notes and case information to the attorneys detailed to prosecute the accused. Additionally, the confession was considered in determining to prefer and refer this case to trial. A grant of immunity for now Airman Basic Foley was obtained from the GCMCA on the basis that his testimony was needed to corroborate the accused's confession.

(R. at 579-89.)

SUMMARY OF THE ARGUMENT

Initially, Petitioner has failed to allege any specific circumstances constituting "good cause" as defined by this Court's Rule 21(b)(5) for why the extraordinary measure of a post-trial interlocutory appeal is necessary in his case. The fact that Petitioner is serving his very brief term of confinement for the crime of which he stands convicted does not put him in any different position than ***any*** *potential* appellant who ultimately reaches the appellate process following his trial. Accordingly, this Court should deny review without prejudice to Petitioner's rights to renew his claims at the appropriate time during the Article 64, UCMJ review of his case.

More to the point, Petitioner twice suggests the primary reason this Court should grant review is because he is not satisfied with his appellate rights as provided by Article 64, UCMJ. (Pet. Br. at 2, 10.) Petitioner's claim does not establish good cause for this Court to grant review. Article 64 affords Petitioner appropriate appellate rights as provided by Congress for cases not including a sentence meeting the jurisdictional requirements of Article 66. Not that the United States needs to defend the Congressionally-provided appellate rights conveyed under Article 64, the statute provides Petitioner the opportunity to submit allegations of error that must be responded to by the appropriate appellate authority, and

it includes a provision for further appellate review under certain circumstances. Congress has provided Petitioner an appropriate appellate avenue, and his claim that he cannot seek redress is neither accurate nor good cause for granting review. If Petitioner's concern is with the adequacy of Article 64 as provided by Congress, his remedy should be to seek legislative change and relief, not unwarranted judicial intervention.

Substantively, further review is not required or appropriate because the Air Force Court of Criminal Appeals was not in error in their decision. The military judge profoundly misapplied the law concerning immunity and voluntary confessions. In correcting the errors during the Article 62 appeal, AFCCA in a very thoughtful and thorough opinion correctly abided by jurisprudence concerning immunity and self-incrimination.

ARGUMENT

AFCCA CORRECTLY CONCLUDED THAT THE MILITARY JUDGE WAS INCORRECT AS A MATTER OF LAW IN FINDING PETITIONER'S CONFESSION WAS INVOLUNTARY AND OBTAINED UNDER A GRANT OF IMMUNITY.

Standard of Review

In ruling on an appeal under Article 62, UCMJ, this Court conducts a de novo review on matters of law. Article 62(b), UCMJ; R.C.M. 908(c) (2); United States v. Cossio, 64 M.J. 254, 256 (C.A.A.F. 2007). The military judge's ruling on the admission or

exclusion of evidence is reviewed for an abuse of discretion. United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004).

Law and Analysis

As an initial matter, as noted above, the United States respectfully asserts that jurisdiction for the review of this post-trial interlocutory appeal should not lie under the unique posture of this case. However, in the event this Court does not perceive a jurisdictional obstacle, the United States offers the following analysis.

The Fifth Amendment's provision that no person "shall be compelled in any criminal case to be a witness against himself" is at the core of the two issues presented in the case *sub judice*. That is, when an accused makes an incriminating statement at the behest of the government, the law affords him a variety of protections to ensure that the statement was the product of his own choice, and not the result of coercion. The case before this Court is unique in that the military judge invoked the Fifth Amendment and its protections without any finding of coercion.

Specifically, the facts of this case involve two separate issues to which the military judge applied the Fifth Amendment protections. The first issue is whether statements by an accused can be considered immunized when the accused is unaware of the grant of immunity and has not invoked his right against

self-incrimination. The second issue is whether the accused's unawareness of the grant of immunity renders his confession involuntary. The military judge, of course, answered both questions in the affirmative and dismissed the case with prejudice. The United States respectfully asserts that the military judge's ruling was an abuse of discretion that had to be reversed by AFCCA.

A. Petitioner's statements, made prior to his receipt of the grant of immunity and after a proper rights advisement, were not immunized.

While there are countless cases, both in the civilian and military context, addressing the impact of a grant of immunity on an accused's confession, all of those cases turn on the accused's *reliance* upon and awareness of a promise of immunity *prior* to making the statements at issue. *See, e.g.,* United States v. Churnovic, 22 M.J. 401 (C.M.A. 1986) (holding that where investigators promised an accused immunity from prosecution, the accused was entitled to rely upon that promise); United States v. Zupkofska, 34 M.J. 537, 540 (A.F.C.M.R. 1991) (finding no official with even "apparent authority" ever indorsed any offer of immunity upon which the appellant detrimentally relied); *see also* R. at 537-38).

What the law makes clear through these cases is that **one must be aware of a promise in order to be compelled by it**. Yet, the military judge took a different approach in her analysis.

> I have considered whether the concept of immunity applies only to statements that are compelled and not willingly given. In this case, I find that it does not. The grant of immunity does not require an invocation of rights to become effective. It merely provides that, under this immunity, statements, as well as information derived there from, may not be used against the accused in a later trial by court-martial.

(R. at 601-02.)

The above presents one of the most significant flaws in the military judge's conclusions of law. Though it is true an accused need not invoke his rights, he must at a minimum be aware that an order of immunity exists for it to be effective. Immunized testimony includes statements induced by a promise of immunity. Therefore, being aware of the immunity is a prerequisite to the creation of such protected statements.

At the outset, the military judge's conclusion that immunity can exist without an awareness, is counterintuitive since a grant of immunity is typically the government's recourse for obtaining information to overcome an individual's Fifth Amendment invocation. Indeed, the military judge recognized this concept in noting that "[t]he tension between the governmental power to compel testimony and a citizen's right to protection against self-incrimination is reconciled in immunity statutes." (R. at 592.) The military immunity statute, R.C.M. 704, and its federal counterpart, 18 U.S.C. §6001, authorize the

use of immunity for the very purpose of "compelling a witness who has invoked the privilege to testify." In this case, however, Petitioner never invoked his privilege, thus removing the need for the United States to compel his testimony. More importantly, Petitioner was not made aware of the immunity and therefore never made statements in reliance on that immunity. Nevertheless, the military judge erroneously concluded that the statements were immunized.

Notwithstanding the Fifth Amendment roots of immunity protections, the military judge used as her authority the effective date of the letter granting immunity. She compounded her error in doing so by further relying upon trial counsel's awareness of the immunity as a fact to consider in determining whether the statement was immunized.

> The accused did not receive either the grant or the order until 8 February. Although an order cannot be enforced until an individual has knowledge of the order, the order is nonetheless valid on the date of its issue. Trial counsel was aware of that order and the grant of immunity when he advised the accused of his rights on 4 February 2011.

(R. at 602.)

How the military judge concluded that trial counsel's awareness, *but not Petitioner's awareness*, was a significant factor in her decision is without explanation and cannot be defended. What is clear is that she conflated the question of

immunity with the question of voluntariness.[1] In specifically addressing whether Petitioner's statements were immunized, she failed to give due weight to the fact that Petitioner made his confession unaware of any immunity and thus did not rely upon it. The question is not whether trial counsel was aware of the immunity, but whether trial counsel did anything that gave Petitioner "a legitimate and reasonable expectation that he would not be subjected to punitive action or constituted an agreement upon which the appellant reasonably relied to his detriment." United States v. Martindale, 36 M.J. 870, 882 (N.M.C.M.R. 1993), *rev. aff'd by* 40 M.J. 348 (C.M.A. 1994), *cert. den. by* 513 U.S. 1113 (1995) (citing Churnovic, 22 M.J. 401) (additional citations omitted).

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[1] Despite her acknowledgement that different analyses are required (R. at 539), the military judge's opinion does not in any real sense separately address the issue of immunity and voluntariness. Instead, she finds the two inextricably linked, noting:

> Ultimately, the issues in this case resemble the snake that swallowed its tail. Immunity was effective, but the accused was not aware of the immunity or the order. He provided a confession after being advised of his Constitutional and Article 31 rights, but without being told that he had been ordered to answer. That raises questions as to whether his statement was made under a grant of immunity or whether his statement was voluntary because of the advisement, which was inadequate. If the statement was involuntary, it in essence becomes a compelled statement which brings the issue back to the question of immunity.

(R. at 603-04.) While the United States agrees that the facts raise both questions, we respectfully disagree with the military judge that the questions are themselves intertwined. Understanding that there are overlapping Constitutional principles, the analysis for determining whether Petitioner's statement was immunized is different than the analysis this Court should conduct to determine whether his confession was voluntary.

In addition to ignoring the Constitutional parameters of the Fifth Amendment, the military judge also disregarded parts of R.C.M. 704 and its provisions regarding the processing and handling of immunity.[2] R.C.M. 704(d) states, "[a] grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends." Notably, the rule does not require an effective date. However, the discussion following the rule provides useful information for this Court's analysis. "A person who has **received** a valid grant of immunity from a proper authority may be ordered to testify. In addition, a servicemember who has **received** a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant." R.C.M. 704(d), Discussion.

Receipt of the grant of immunity is critical in determining whether the statement was compelled. Here, of course, Petitioner did not receive the grant of immunity prior to waiving his rights and making his confession. Yet, the military judge essentially sidestepped this critical point in the analysis and afforded Petitioner the protections of the Fifth Amendment without ever finding that his statements were

[2] The military judge does discuss R.C.M. 704, but in the context of the convening authority's power to grant immunity and compel a witness, not regarding the processing and handling of such grants. (R. at 593.)

compelled. She then compounded her error by applying another unprecedented standard to determine the effective date.

In determining an effective date, the military judge relied the convening authority's use of the word "hereby" in the Grant and Order. She stated "[t]here was no other language governing the point at which the grant of immunity would be effective, although the request had asked that the immunity would be effective upon receipt of the accused." (R. at 583.) It is unclear how the military judge concluded that the term "hereby" was temporal in nature, despite it being defined as "by this document." (R. at 507-08; App. Ex. X (citing Black's Law Dictionary (7th ed. 2009))). In doing so, the military judge adopted an unprecedented pen-to-paper effectiveness standard.

Assume for argument's sake, for instance, that the convening authority signed the immunity letter just before trial counsel questioned Petitioner, but trial counsel had not yet received a copy. Consider whether the analysis would change if law enforcement had questioned Petitioner, unaware of the immunity letter. Applying the judge's new standard, each of these scenarios would necessarily result in a finding that Petitioner's statements were immunized simply because the convening authority had signed the letter granting immunity. Under the judge's rationale, immunity would be effective when the convening authority signed the order even if he changed his

mind before the order ever left his desk. The United States is unaware of any authority that would support the Fifth Amendment's protections being applied so broadly.[3]

The military judge clearly misunderstood the underlying Fifth Amendment principles protecting immunized statements. That is, to protect individuals from being *compelled* to make incriminating statements. Even if this Court finds that the grant of immunity was effective on 3 February 2011, there is no evidence that Petitioner detrimentally relied upon it. Her finding that an accused need not be aware of immunity to be protected by it takes the Fifth Amendment into unchartered and no doubt unintended territory. Her unsupported conclusion was an abuse of discretion and AFCCA correctly reversed the judge.

B. Examining the totality of the circumstances, Petitioner's confession was knowingly and voluntarily given.

We must next turn to whether the grant of immunity rendered Petitioner's confession involuntary. Whether a confession is voluntary requires an examination of the "totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation." United States v. Ellis, 57 M.J. 375, 378 (C.A.A.F. 2002) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) and United States v. Ford,

[3] Likewise, the United States is unaware of any authority that would support trial counsel's awareness of the immunity as a standard determining whether a statement is immunized.

51 M.J. 445, 451 (C.A.A.F. 1999)); Mil. R. Evid. 304(e). "The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker" or if, instead, "the maker's will was overborne and his capacity for self-determination was critically impaired." United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996) (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

The military judge made the following conclusions based on her "look at the totality of the circumstances":

> Those circumstances include the fact the accused had been cooperative throughout the investigation of Airman Foley. He also understood that he was to be completely honest in that investigation and that he would be interviewed again by legal office personnel. He believed that to be the reason he was called to the legal office on 4 February 2011, even though the interview was also to serve as an attempt by the government to obtain[] admissible evidence against the accused at this court-martial. I also find that neither Airman Basic Foley, Airman Flanner, or the accused were providing evidence based on a personal agenda. It was clear that none were comfortable providing evidence against the other, but that all were operating under a feeling that they were obligated or had a duty to do so.

(R. at 604.)

Once again, the United States is at a loss in its attempt to determine the source of the military judge's analysis when virtually none of the facts she identified fall under the well-

established test for examining the totality of the circumstances to determine the voluntariness of a confession. In Ellis, this Court set out some of the factors appellate courts should consider in determining whether a confession is voluntary. Ellis, 57 M.J. at 379. The totality of the circumstances includes the appellant's condition, health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights advisement; and the manner of the interrogation, including its length and whether the investigators used force, threats, promises, or deceptions. Id.

Although not included in her analysis of voluntariness, the military judge noted that "[t]hroughout the interview, the accused was calm and cooperative" making no mention of undue stress or anxiety. (R. at 587.) The interview was very brief, lasting only 15-20 minutes. (R. at 321.) Despite his rank as an E-2, Petitioner was very intelligent, earning top scores on his entrance exams. (Personal Data Sheet, R.O.T., Vol. 1.) There is no evidence of any physical coercion or threats of any kind. Interestingly, however, the military judge points to Petitioner's perspective as a witness and his cooperation with law enforcement personnel. In actuality, Petitioner's prior relationship with the government only served to clarify the significance of the interview as compared to the others. Having

had two previous interviews regarding his knowledge in the case against Airman Foley, Petitioner was clearly on notice that something was different about this interview when Capt Korsak properly advised him of his rights under Article 31.

Despite her discussion regarding the prohibition against using trickery to obtain a waiver, the military judge did not conclude that Petitioner was tricked into waiving his rights. (*See* R. at 598-99.) In fact, she repeatedly emphasized her findings that the government acted reasonably and without malice. (R. at 599-600, 605.) Nevertheless, she found that Petitioner's waiver was involuntary based on his lack of awareness that the convening authority had signed paperwork to grant him immunity.

> While technically the rights advisement was correct under the Constitution and Article 31, it did not truly provide the accused with an understanding of his situation and prevented him from making an informed choice as to his decision to waive those rights. He had neither a full awareness of the right being waived or of the consequences of waiving that right.

(R. at 602.)

The military judge's ruling is at odds with well-established principles of voluntariness. As a starting point, Mil. R. Evid. 304(c)(3) defines involuntary as a statement "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of

the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Here, the military judge found Petitioner's confession involuntary notwithstanding the proper rights advisement because "it did not truly provide the accused with an understanding of his situation and prevented him from making an informed choice as to his decision to waive those rights." (R. at 602.)

A choice may be intelligent and voluntary even though made without potentially-important information. Moran v. Burbine, 475 U.S. 412 (1986). Burbine had been arrested and was under interrogation. The police knew, but did not tell Burbine, that a lawyer retained by his sister was trying to get in touch with him. Burbine confessed, and the Court concluded that the confession was voluntary because he understood his entitlements and what it means to confess.

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might

> have affected his decision to confess. **But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.** Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Id. at 422; emphasis added.

To require the government to inform Petitioner of its strategic and logistical undertakings in order for him to make an informed choice would serve only to limit otherwise validly obtained voluntary confession. The Supreme Court recently addressed this danger, albeit in the context of the Sixth Amendment. Their analysis is nonetheless useful in this Court's review of this case:

> Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law.
>
> The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation—and barring some purely arbitrary time-limit—every *Edwards* prohibition of custodial interrogation of a particular suspect would be eternal. The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, when it is conducted by a

> different law enforcement authority, and even when the suspect has met with an attorney after the first interrogation. And it not only prevents questioning *ex ante*; it would render invalid *ex post,* confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction. In a country that harbors a large number of repeat offenders, this consequence is disastrous.

Maryland v. Shatzer, 130 S. Ct. 1213, 1222 (2010) (internal quotations, citations and footnotes omitted).

In evaluating the judicially-created rule prohibiting re-initiation of questioning following a suspect's request for counsel in Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court emphasized the importance of understanding a rule's purpose when seeking to enforce it. "A judicially crafted rule is 'justified only by reference to its prophylactic purpose, and applies only where its benefits outweigh its costs.'" (Shatzer, 130 S. Ct. at 1220) (quoting *Davis v. United States,* 512 U.S. 452, 458 (1994)).

To be sure, the military judge attempted to gain some further context by analogizing this case to the practice of asking for consent when a warrant has already been obtained, but mysteriously and incorrectly found it distinguishable.

> Informing the individual of the existence of the warrant is considered coercive because the accused is led to believe he truly has no choice; either way his property will be searched. The inducement to consent then

> becomes a desire to garner favor with prosecuting officials by agreeing to something that is going to inevitably occur. The courts have found that to be coercive. This case is not similar. Although the statements by the accused would be inevitable, his waiver of his rights and the consequences of that waiver were not inevitable. The accused's decision was not based on a full understanding of the circumstances.

(R. at 602-03.)

Notwithstanding the Supreme Court's guidance, the military judge focused her distinction on the impact Petitioner's awareness of the "inevitability" of the evidence would have had on his decision to confess. However, had the United States informed Petitioner of the letter prior to providing a rights advisement, there would be no question that his statement would be immunized and unavailable for use against him. The question of voluntariness would never be raised. By concluding that the government's failure to inform him of the letter rendered his statement involuntary places the government in an impossible and entirely unreasonable position.

The military judge failed to address the two aspects of the search warrant analogy. The first is whether law enforcement may *request* consent to search without informing the accused of the existence of a warrant. The second is the impact on the *validity* of the consent if, prior to the consent, an accused has been informed of the existence of the warrant. The military

judge's distinction erroneously compared "the request" in Petitioner's case with "the validity" in the search warrant scenario. Correctly applying these questions to the case at bar, there is no distinction. Just as informing an accused of the existence of a warrant *and then asking for consent* would be considered coerced, so too would informing the accused of his immunity *and then asking for a statement* would be considered an improper use of immunized testimony. That is not the case here. Rather, the analogy is rooted in the fact that law enforcement personnel may *request* consent without informing an accused of the existence of a warrant.

"A military judge abuses [her] discretion when [her] 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." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008). Here, the military judge's analysis, much like the defense motion (App. Ex. V), is fraught with personal notions of fairness rather than legal principles applicable to Petitioner's case. From the beginning of her analysis, she made her perspective clear.

> In over 26 years experience as a judge advocate, I have encountered exceptionally few commanders who wanted to exercise

> options at the expense of unfairly treating the individual. Fortunately, those individuals [sic] tenure as commanders was very limited often directly attributable to their treatment of an accused.

(R. at 600.)

Although the military judge is correct in pointing out the need for fairness in the military justice system, her use of this point as the sole basis for her ruling made clear that she *personally* believed Petitioner was being treated unfairly, notwithstanding the absence of any actual legal violations. As Burbine and Shatzer make clear, a judicial examination of Constitutional protections must serve some reasonable purpose consistent both with balancing the rights of an accused and the need for society to protect itself. The government action was completely appropriate and the military judge had no reasonable basis to dismiss this prosecution. The military judge's failure to properly apply these principles was an abuse of discretion and her ruling was properly reversed by her colleagues on AFCCA.

CONCLUSION

In sum, setting aside for a moment the legal soundness of AFCCA's ruling in this case, Petitioner has failed to demonstrate "good cause shown" why his petition should be heard now rather than in the course of standard post-trial appellate review in accordance with Article 64, UCMJ. Moreover, in this case there is no compelling reason to take the extraordinary

step of conducting “interlocutory appellate review” after the trial is completed. Thus, even if this Honorable Court should conclude that it possesses such expansive power to review, it should not do so in this case.

The government respectfully asserts that the same well-founded rationale utilized by this Court in denying Petitioner’s earlier request for a stay in this case applies with equal force to his Petition for Review now. Having already purposefully allowed trial to proceed, the government urges this Honorable Court to consider that it would serve only to unnecessarily undermine the finality of courts-martial, and create an illogical disincentive, contrary to the plain meaning of RCM 908(c)(3), for the government to recommence trial following any successful Article 62 appeal. In short, granting Petitioner’s petition in this case would set a very undesirable precedent where this Court is compelled to review ***every*** Article 62 appeal because the field will never consider any Article 62 ruling to be final (even where trial has recommenced, and findings and sentence have been adjudged) until this Court rules.

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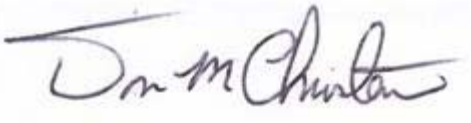

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 November 2011.

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

REPORT OF RESULT OF TRIAL

(This form may also be used for reporting the result of trial by summary court-martial)

Date (YYYYMMDD): 20111102

TO: (Address to immediate commander of accused)

849 AMXS/CC, Bldg 317, 744 Delaware Ave., Holloman AFB, NM 88330

NOTIFICATION UNDER R.C.M. 1101(a) IS HEREBY GIVEN IN THE CASE OF:

NAME (Last, First, Middle Initial)	*RANK*	*SSN*
HATHORNE, DARREN N.	A1C	633-22-4453

ORGANIZATION:

849th Aircraft Maintenance Squadron (ACC)
Holloman AFB, NM

TYPE OF COURT

☐ *GENERAL*	☒ *SPECIAL*	☐ *SUMMARY*
☐ *JUDGE ALONE*	☒ *JUDGE ALONE*	

SUMMARY OF CHARGES, SPECIFICATIONS, PLEAS AND FINDINGS

UCMJ ARTICLE	*NATURE OF OFFENSE*	*PLEAS*	*FINDINGS*
CHARGE:	Violation of the UCMJ, Article 112a	NOT GUILTY	GUILTY
Specification:	Did, at or near Alamogordo, New Mexico, between on or about 1 April 2010 and on or about 30 August 2010, wrongfully use cocaine.	NOT GUILTY	GUILTY

SENTENCE DNA PROCESSING REQUIRED

7 days confinement, 30 days hard labor without confinement, 30 days restriction, and reduction to E-1.

PRETRIAL CONFINEMENT CREDIT (Including military and civilian confinement) (in days)
N/A

DATE SENTENCE ADJUDGED (Or acquittal announced)
20111102

DISTRIBUTION (Prescribed by convening authority)
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CDO

(CHECK ONE)

☒ *TRIAL COUNSEL* ☐ *SUMMARY COURT OFFICER*

DETAILED BY
DAWN D. HANKINS, Lt Col, USAF

TYPED NAME AND GRADE
STEVEN L. SPENCER, II, Capt, USAF

SIGNATURE

COMPLIANCE WITH RULE 24(d)

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/s/

GERALD R. BRUCE, CAAF Bar No. 27428
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 14 November 2011