IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Brandon G. DARNALL Hospitalman (E-3) United States Navy, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201500010 USCA Dkt. No. 16-0729/NA

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

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Issue Granted

THE MILITARY JUDGE ERRED IN FALIING TO SUPPRESS EVIDENCE DIRECTLY FLOWING FROM THE ILLEGAL APPREHENSION OF HN DARNALL. THE NMCCA RULING UPHOLDING THIS DECISION CONFLATED REASONABLE SUSPICION WITH PROBABLE CAUSE. SHOULD THIS DECISION BE REVERSED?

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that includes a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] This Court therefore has jurisdiction under Article 67, UCMJ.[2]

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, convicted Hospitalman (HN) Brandon Darnall, U.S. Navy, contrary to his pleas of four specifications of conspiracy; one specification of making a false official statement; twelve specifications of importing, possessing with the intent to distribute, distributing, and manufacturing controlled substances; four specifications of possessing, distributing, and importing controlled substance analogues; and seven specifications of using a communication facility in

[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867 (2012).

furtherance of a conspiracy,[3] all in violation of Articles 81, 107, 112a, and 134, UCMJ,[4] respectively.[5] The court-martial sentenced HN Darnall to reduction to pay grade E-1, confinement for six years, and a dishonorable discharge.[6]

The Convening Authority (CA) approved the adjudged sentence, suspended confinement in excess of five years, and, except for the dishonorable discharge, ordered it executed.[7]

On June 29, 2016, the NMCCA held oral argument in this case and, on July12, it affirmed the findings and the sentence as approved by the convening authority.[8] HN Darnall timely petitioned this Court for review on September 9, 2016.

Statement of Facts

A. The seizure.

Sometime in November 2011, a package containing white powder entered the United States via airmail from China through San Francisco International

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[3] In these specifications, the Government incorporated 21 U.S.C. § 843(b), which makes it unlawful "for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of [The Controlled Substance Act]."
[4] 10 U.S.C. §§ 881, 907, 912a, 934 (2012).
[5] J.A. at 522-524.
[6] J.A. at 525.
[7] GCMO No. 02-2015 at 13.
[8] *United States v. Darnall*, 2016 CCA LEXIS 398 (N-M. Ct. Crim. App. Jul. 12, 2016).

Airport.[9] The powder was subsequently identified as dimethylone, which could be classified as a controlled substance analogue, but only if meant for human consumption.[10] The box was addressed to a "Brandon Darnall" at "5985 Mariposa Ave, 29 Palms, CA 92277, USA," a residential address in the Inland Empire area of San Bernardino County.[11] The label also contained the telephone number (760) 987-1813.[12]

Since Twentynine Palms is home to Marine Corps Air Ground Combat Center (MCAGCC), the DHS agents "suspect[ed]" that "Brandon Darnall" was in the military, so they contacted Marine CID.[13] Agent Pledger, who was subsequently assigned as the lead CID investigator, researched the name and determined that there was an HN Brandon Darnall assigned to MCAGCC, as well

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[9] J.A. at 226-27. Prior to this, in October 2011, another package addressed to "Brandon Darnall" arrived at San Francisco International Airport from China. J.A. at 252-59; 529, 530. A preliminary test identified the contents of the box as methylone, a Schedule I controlled substance. J.A. 252, 278, 289; 531-32. Due in part to their caseload at the time and the small amount of methylone involved, DHS declined to pursue an investigation, destroyed the methylone per department policy, and took no further action on the case at that time. J.A. at 259-61, 263, 289, 318, 324-25. After seizing the second package containing dimethylone and turning it over to CID, DHS agents ran the name Brandon Darnall through their database and found the entry for the initial seizure. J.A. at 321; 530 (showing the address on the shipping label as 4734 Roundup Rd., 29 Palms, CA 92277). However, this information was unknown to Agent Pledger at the time he apprehended HN Darnall and had no bearing on his probable cause determination.

[10] J.A. 308-13, 535.

[11] J.A. at 528.

[12] J.A. at 528.

[13] J.A. at 319.

as two other "Brandon Darnalls" who lived within San Bernadino County.[14]

However, HN Darnall never lived at 5985 Mariposa Ave., which is an off-base residence.[15] Instead, he lived on base.[16] Nor did Agent Pledger ever see HN Darnall at this address or have any information indicating he had ever even been there.[17] Rather, when he drove by the house, he found it vacant with a "for rent" sign in front.[18] As it turned out, 5985 Mariposa Ave. was the prior residence of Nathan Lafond, another corpsman assigned to MCAGCC.[19] It is unclear when exactly Agent Pledger discovered this fact, but the record strongly suggests it was after he apprehended HN Darnall.[20]

B. The apprehension, interrogations, and search.

At this point, Agent Pledger conducted no further investigation. He made no attempt to contact the previous resident of 5985 Mariposa Ave., nor did he make any effort to research the phone number that was on the shipping label.[21] Rather, he decided that he would put together a "special operation" by which he and his "takedown team" would apprehend HN Darnall.[22]

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[14] J.A. at 88, 108.
[15] J.A. at 108, 126.
[16] J.A. at 88, 108.
[17] J.A. at 453.
[18] J.A. at 409, 662.
[19] J.A. at 108, 465.
[20] *See* J.A. at 98, 409, 453; *Darnall*, 2016 CCA LEXIS 398, n.6; AE X.
[21] J.A. at 107.
[22] J.A. at 88, 409, 414.

Since, at the time, dimethylone was only considered illegal if it was meant for human consumption, the "primary objective" of the operation was "to apprehend HN Darnall and ascertain how he intended to utilize the substance" in order to determine if a crime had occurred.[23] Agent Pledger fashioned a powder-filled replica of the original package of dimethylone, delivered it to the regimental mailroom instead of 5985 Mariposa Ave., and had the unit mail clerk contact HN Darnall and instruct him to pick it up.[24]

According to Agent Pledger, another purpose of the apprehension was to find out if HN Darnall was the intended recipient of the package. At the motion to suppress hearing, he testified "Had we had gotten anything, or nothing, from HN Darnall [during the post-apprehension interrogation] that indicated that he was the person who was intended to receive this package, that investigation probably would have sunk at the time and not been continued."[25]

When HN Darnall arrived at the mailroom, Agent Pledger and his team watched him accept the package from another room via a hidden camera video feed.[26] As he left the building, and while Agent Pledger looked on with his Taser drawn, two of the agents detained HN Darnall outside the front entrance of the 7th

[23] J.A. at 88, 409, 414, 663.
[24] J.A. at 106, 110.
[25] J.A. at 109.
[26] J.A. at 88, 109-10.

Marine Regiment building.[27] Agent Pledger told him "Stop. Military police, federal agents. Keep your hands where I can see them."[28] The agents then placed HN Darnall in hand irons and took him to CID headquarters.[29] When asked if HN Darnall could have refused to go, Agent Pledger responded "No sir. He would've been taken to CID to be read his rights."[30]

Once in the interrogation room, Agent Pledger removed the handcuffs and attempted to take a statement.[31] He testified that he read HN Darnall his rights using the standard OPNAV form and had him sign it.[32] However, a base power outage prevented Agent Pledger from recording the interrogation or typing a statement.[33] He decided not to take a hand-written statement from HN Darnall, but still interviewed him for "45 minutes to an hour."[34] Agent Pledger testified that, during this time, HN Darnall admitted to importing methylone and providing it to local smoke shops.[35]

After the interview, HN Darnall consented to a search of his barracks room

[27] J.A. at 88-89, 445.
[28] J.A. at 111.
[29] J.A. at 89-90.
[30] J.A. at 111.
[31] J.A. at 90-92, 414.
[32] J.A. at 90-91.
[33] J.A. at 92.
[34] J.A. at 94, 114-15.
[35] J.A. at 94, 128.

during which no additional evidence was uncovered.[36] Agent Pledger then asked HN Darnall for permission to search his cell phone, which HN Darnall declined.[37] As a result, Agent Pledger seized the phone for "safekeeping" in anticipation of getting a search warrant later that night based on the information elicited from HN Darnall at the interrogation.[38] Agent Pledger instructed HN Darnall to return the next day when the power would be restored so he could record the interview and get everything down on paper, as well as to retrieve his phone if no evidence was recovered from it or if the search was not authorized.[39]

After this, Agent Pledger contacted HN Darnall's battalion commander to get verbal authorization to search the phone using the information gathered from the interrogation as his basis for probable cause.[40] Based on this, Agent Pledger got the authorization and proceeded to search HN Darnall's cell phone that same night.[41] He found text message conversations and photographs that allegedly suggest HN Darnall was importing and selling various steroids, as well as methylone and dimethylone.[42]

Per Agent Pledger's instructions, HN Darnall returned to CID the following

[36] J.A. at 94-95, 115.
[37] J.A. at 95-96.
[38] J.A. 95-96, 98, 130, 416-17.
[39] J.A. at 96-97.
[40] J.A. at 97-98.
[41] J.A. at 120.
[42] J.A. at 100, 420, 620-21.

day, was again advised of his rights, and agreed to give a statement.[43] Almost immediately, Agent Pledger asked him, "All right man, so what kind of things did I see on your phone that you might want to explain?"[44] They "talked about yesterday, cleared up any questions [Agent Pledger] had," HN Darnall "made a couple of other comments" and, in the words of Agent Pledger "gave a little bit better detailed answers to the questions I asked him."[45] Agent Pledger completed a typed statement and the interview was recorded.[46]

With the exception of the box of dimethylone and the lab report from the destroyed methylone package,[47] virtually all of the evidence in this case consisted of HN Darnall's statements to CID and the information recovered from his cell phone.

Summary of Argument

HN Darnall's name was written on a shipping label attached to a package containing possible contraband. The package was addressed to a vacant residence with which he had no apparent connection, other than its proximity to his on-base residence, and possibly the fact that it was the prior residence of another corpsman

[43] J.A. at 99-100.
[44] AE X at 11:29:57-11:30:06.
[45] J.A. at 100, 103.
[46] J.A. at 99-100.
[47] As discussed in n.9 *supra*, an earlier shipment of methylone had been destroyed by authorities. J.A. at 252-260, 529-32. Nonetheless, the Government used the test results showing the presence of methylone in its case against HN Darnall. J.A. at 529, 531-32.

in HN Darnall's unit. This meager evidence did not establish probable cause that a crime had been committed or that HN Darnall committed it. His apprehension was therefore illegal. Agent Pledger used this illegal apprehension, which was conducted in a particularly startling fashion, as a tool to investigate the case. Therefore, even though HN Darnall was given Article 31(b) rights, the statement he made minutes after this flowed directly from this initial illegality, and should have been suppressed.

Agent Pledger then conveyed the information he gathered from this illegally-obtained statement to the battalion commander as the probable cause basis for the search authorization for HN Darnall's cell phone. In addition, it appears Agent Pledger told him that 5985 Mariposa Ave. was HN Darnall's prior residence, which was not true. As the search authorization was based entirely on both illegally-obtained and false information, the results of the search of the phone must be suppressed as well.

The taint of the illegal apprehension remained when HN Darnall returned the next day for the second interrogation because its purpose was simply to memorialize the statement from the previous day. Therefore, those statements must also be suppressed. In sum, all of the evidence that flowed from the illegal apprehension is fruit of the poisonous tree and should not have been admitted at trial.

The military judge's ruling that the Government had probable cause to apprehend HN Darnall rested explicitly on his clearly erroneous finding that the address on the package was a prior residence of HN Darnall. The NMCCA excised this fact from its analysis, but nevertheless found that there was probable cause for the apprehension. But this decision was misguided.

Without admission of the evidence seized as a result of this error, the Government would not have been able to prove any of the charged specifications.

Argument

THE MILITARY JUDGE ERRED IN FALIING TO SUPPRESS EVIDENCE DIRECTLY FLOWING FROM THE ILLEGAL APPREHENSION OF HN DARNALL. THE NMCCA RULING UPHOLDING THIS DECISION CONFLATED REASONABLE SUSPICION WITH PROBABLE CAUSE. THE DECISION SHOULD BE REVERSED.

Standard of Review

This Court reviews a military judge's determinations of probable cause *de novo*.[48]

Discussion

At the time Agent Pledger apprehended HN Darnall, the record demonstrates that all he knew for sure was that: 1) a box containing dimethylone was shipped by someone in China to a "Brandon Darnall" at a vacant house at 5985 Mariposa

[48] *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

Ave., Twentynine Palms, CA, USA, and 2) of the three "Brandon Darnalls" in the San Bernadino County area, HN Darnall was the only one who lived near the town of Twentynine Palms (he was stationed on the base a few miles away from the house).[49]

A. Agent Pledger did not have probable cause to apprehend HN Darnall.

This was a good jumping-off point from which to launch an investigation, and it was certainly "reasonable to conclude" that someone named Brandon Darnall was attempting to receive what could be an illicit substance from China.[50] But, rather than using this evidence as the starting point for his investigation, Agent Pledger treated it as though it were the endpoint, simply filling in the gaps in his evidence with guesswork.

For instance, according to his "operation plan" which he submitted to his supervisor in order to get permission for his "special operation," 5985 Mariposa

[49] Although Agent Pledger testified at the Oct. 31 motion to suppress hearing that he knew 5985 Mariposa Ave. was the prior address of Nathan Lafond, another corpsman in HN Darnall's unit, before the apprehension, the evidence surrounding the "special operation" suggests otherwise. J.A. at 126. For instance, it does not appear that Agent Pledger mentioned this fact to the battalion commander when he applied for the search authorization. *See* J.A. at 98. Nor did he mention Nathan LaFond when he interrogated HN Darnall. AE X. As the CCA noted its opinion, "the CID agent never asked the appellant about the corpsman during the post-apprehension interviews, so it is likely [Agent Pledger] did not possess this information until sometime after the Appellant's arrest." *Darnall*, 2016 CCA LEXIS 398, n. 6.

[50] *See* R.C.M. 314(f) (2012).

Ave. was HN Darnall's prior address.[51] But, according to his own testimony, this was not true. Rather it was, as he later determined, the prior residence of Nathan LaFond, another corpsman in HN Darnall's unit. It seems he merely assumed 5985 Mariposa Ave. was HN Darnall's prior residence at the time he requested permission to apprehend him.

Agent Pledger reported a different understanding of the address at the motion to suppress.[52] There he testified that he had speculated that, since another corpsman previously lived at 5985 Mariposa Ave., it was "more likely that they, hey, [HN Darnall] probably had the package shipped to someone else's house."[53] When pressed by the military judge on whether he had a reasonable belief that HN Darnall had committed a crime, Agent Pledger responded, "After identifying that the corpsman who lived at the address was a prior-was, at one time, in HN Darnall's unit, I believe that he was the person who had the intent to receive that package. Yes sir."[54]

But, assuming he actually knew Nathan LaFond was the prior resident (*see supra* n. 49), this too was simply a guess. Agent Pledger's theory apparently was that HN Darnall used his real name and had the suspected contraband sent to someone else's address. But, with the information known to him at the time, it was

[51] J.A. at 662.
[52] J.A. at 108.
[53] J.A. at 108.
[54] J.A. at 126.

just as plausible that Nathan Lafond used his own address with HN Darnall's name in order to avoid detection. Or that someone else used a fake name and a fake address. Agent Pledger needed to investigate these leads further in order to develop probable cause that it was HN Darnall who intended to receive the package. If he had taken the time and effort to do so with the information at his disposal before the apprehension—*e.g.*, interview Nathan Lafond (which he did seven days later on 13 March),[55] or investigate the telephone number on the shipping label—he might have made the necessary connections. But, since he apparently guessed at what the facts were, his evidence never ripened into probable cause that "(1) an offense ha[d] been committed and (2) [HN Darnall] committed it."[56]

B. The military judge based his probable cause ruling on an erroneous finding of fact.

In his written ruling on the motion to suppress, the military judge found:

> While the address associated with the package was of a previous address of the accused, it was still an address the accused had at one time while assigned to MCAGCC, Twentynine Palms, California. Due to the fact that the accused was a corpsman stationed at the MCAGCC and it was sent to him, but at a different address, it was a reasonable inference that the package was meant for the accused. As a result, at the time the counterfeit package was picked up by the accused Agent Pledger had probable cause to apprehend the accused.[57]

[55] J.A. at 665-66.
[56] *See* R.C.M. 302(c) (2012).
[57] J.A. at 650.

However, as explained above, Agent Pledger's testimony during the motion hearing clearly indicated that 5985 Mariposa Ave. was *not* HN Darnall's prior address.[58] In its decision, the NMCCA found that "the military judge's finding that the appellant was a previous occupant of the Twentynine Palms address is clearly erroneous" and excised this fact from its probable cause analysis.[59]

C. The NMCCA upheld the military judge's ruling by conflating reasonable suspicion with probable cause.

The NMCCA found probable cause based on the following facts:

> (1) that Customs and Border Control agents seized a package mailed from China containing more than two pounds of dimethylone, a Schedule I controlled substance analogue; (2) that the package was addressed to "Brandon Darnall" at a rental property near MCAGCC, Twentynine Palms; (3) that there were only three "Brandon Darnalls" located in the entirety of San Bernadino County, California; (4) that the appellant was the only "Brandon Darnall" of the three who was a servicemember; and (5) that the appellant was stationed on board MCAGCC, Twentynine Palms."[60]

This decision is misguided. According the DHS lab report, at the time the

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[58] J.A. at 108, 126. This erroneous finding of fact was based on two factors. The first was trial counsel's erroneous statement during the motion argument that the package was "sent to his previous known address before he moved back into the barracks." The trial counsel later modified his position to "there is no reason for Pledger not to have thought that it was his [Darnall's] residence off-base at the time." But Agent Pledger did have reason to believe it was not HN Darnall's residence: he testified explicitly that it was the prior residence of someone else. J.A. at 126. The military judge failed to address this discrepancy or take any corrective action in his ruling on the motion to reconsider. J.A. at 220-22.

[59] *Darnall*, 2016 CCA LEXIS 398 at *8-10.

[60] *Id*. at *8.

apprehension occurred in 2012 it would only be "considered a controlled substance analogue if meant for human consumption," which is a determination made by law enforcement.[61]

Furthermore, the fact that HN Darnall was in the military, while the other two "Brandon Darnalls" were not, is not relevant to probable cause. While Twentynine Palms is near a military base, nothing on the package suggested the recipient was in the service.[62] Rather, the DHS agents were just "suspecting at that time" that the intended recipient was in the military.[63] And, unlike a factor such as presence in a high crime area, an individual's status as a servicemember does not

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[61] J.A. at 313, 341, 535. According to 21 U.S.C. 802 §32(A) the term controlled substance analogue means a substance (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

[62] This was a point of confusion at oral argument. The Court was under the impression that the shipping label indicated "USN" under HN Darnall's name. NMCCA Oral Argument, June 30, 2016, 6:15-26, 9:40-55, http://www.jag.navy.mil/nmcca.htm. However, the first line of the label under "To" reads Brandon Darnall. J.A. at 528. The letters "USA" (not USN) are written in the same handwriting under the "Country" portion of the label. J.A. at 528. Appellant filed a supplemental motion with the court clarifying this point. However, echoes of this misconception are present in the NMCCA's opinion as evidenced by its repeated emphasis on the fact that HN Darnall is a servicemember.

[63] J.A. at 319-20.

indicate potential drug activity. So it's not the fact that the rental address was near the *base* that's the compelling factor, but rather the fact that HN Darnall lived a few miles from the address on the package that was the potential lead. In other words, factors (4) and (5) of the NMCCA's opinion are irrelevant to the probable cause analysis.

What is left is that a box of ***possible*** contraband was sent to a vacant address a few miles from where HN Darnall actually lived. This is more akin to a reasonable conclusion "that criminal activity is afoot" rather than probable cause that HN Darnall committed a criminal offense. If Agent Pledger had observed HN Darnall in the area of 5985 Mariposa Ave., he could have perhaps detained him briefly to investigate pursuant to M.R.E. 314(f)(1). However, with the evidence he had at the time, he did not have the authority to apprehend him.

D. The evidence seized flowed directly from the illegal apprehension and should be suppressed.

1. The 6 March Interview was the source of virtually all evidence against HN Darnall.

Although HN Darnall agreed to be interviewed, an Article 31(b) rights waiver executed afterwards does not automatically cure the constitutional violation resulting from an illegal apprehension. The Government must demonstrate that this waiver was an independent act of free will, and did not merely result from

exploiting the initial illegality.[64] In other words, courts are concerned with a scenario in which a suspect is more likely to waive his right to remain silent after being softened up by a jarring illegal arrest than he would have otherwise been if the police had merely asked him to voluntarily come in and give a statement.

The Supreme Court outlined the test for whether the causal connection between the illegality of the arrest and the confession has been broken in *Brown v. Illinois*.[65] Courts must examine 1) the temporal proximity of the arrest and the confession, 2) the presence of intervening circumstances, and 3) "particularly, the purpose and flagrancy of the official misconduct."[66]

In *Brown*, detectives broke into the appellant's apartment, searched it, and waited for him to come home to arrest him, all without probable cause.[67] Later, as the appellant climbed the stairs to the apartment, a detective pointed a revolver at him through a window from inside the apartment and told him he was under arrest.[68] Another detective came up behind the appellant, also with his gun drawn, and reiterated that he was under arrest.[69]

Since the confession undisputedly occurred within hours of the arrest

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[64] *See Brown v. Illinois*, 422 U.S. 590, 603-04; *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).
[65] 422 U.S. at 603-04.
[66] *Id*. (citing *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972); *Wong Sun v. United States*, 371 U.S. at 491)).
[67] *Id*. at 592.
[68] *Id*.
[69] *Id*. at 593.

without intervening circumstances, the Court focused on the third prong of the causality test.[70] It was particularly concerned that the arrest had the "quality of purposefulness" because the detectives testified that the reason for their action was "for investigation" or for "questioning."[71] Therefore, the Court found that [t]he arrest, both in design and in execution, was investigatory."[72] The majority went on to note that "[t]he detectives embarked upon this expedition for evidence in the hope that something might turn up."[73]

In addition, the Court was troubled by the fact that "[t]he manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion."[74] Therefore, despite the fact that the appellant was properly advised of his Miranda rights, the Court ruled that the statements were inadmissible.

The Court of Appeals for the Armed forces applied the *Brown* test in *United States v. Conklin*, and likewise found that the causal chain from the Government misconduct to the consent search was not broken.[75] There, in the course of executing a routine cleanliness inspection, a staff sergeant inadvertently disturbed the appellant's computer keyboard revealing "wallpaper" consisting of a photo of a

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[70] *Brown*, at 604-05.
[71] *Id*. at 605.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *United States v. Conklin*, 63 M.J. 333, 340 (C.A.A.F. 2002).

partially-clad woman in violation of a base instruction.[76] Inspectors then proceeded to search files on the computer and uncovered child pornography.[77] They alerted agents from the Air Force Office of Special Investigations (AFOSI), who proceeded to locate the appellant in the dining facility and get his consent to search his room and the computer.[78]

The Court found the search unlawful, and looked at whether appellant's subsequent consent cured the initial illegality.[79] As in *Brown*, the Court quickly disposed of the first and second prongs in favor of the appellant and focused on the third part in deciding whether the subsequent consent to search cured the earlier constitutional violation.[80] Even absent "bad motive or intent on behalf of the Government," the Court nevertheless found the Government actions to be, if not flagrant, "unnecessary and unwise."[81]

The Court outlined several other investigative avenues the Government could have pursued including freezing the scene, petitioning the appellant's commander for a search warrant, and seeking advice from the Staff Judge Advocate.[82] The Court concluded that the illegal search was the only factor that

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[76] *Conklin*, 63 M.J. at 334-35.
[77] *Id*.
[78] *Id*. at 335.
[79] *Id*. at 337-38.
[80] *Id*. at 339.
[81] *Id*.
[82] *Id*.

directly led AFOSI agents to request consent from Appellant and the subsequent search of his computer was not "sufficiently attenuated from the taint of the search."[83]

a. The apprehension of HN Darnall was purposeful.

Here, as in *Brown* and *Conklin*, this Court can quickly dispose of the first (proximity in time) and second (intervening circumstances) prongs of the analysis in favor of HN Darnall. The 6 March interrogation began "less than ten minutes" after Agent Pledger brought him to the CID office following the apprehension and nothing of significance occurred during this time.[84]

Turning to the third prong, it is clear from Agent Pledger's testimony that his apprehension of HN Darnall had the "quality of purposefulness" because he was still investigating whether HN Darnall was the intended recipient of (and thus, whether he was criminally responsible for) the package of dimethylone.

> Agent Pledger: Had the controlled delivery been denied for any reason, we would've simply went to the -- to Brandon Darnall's place of work, apprehended him, and brought him back and did the **investigation – or the interrogation**.[85]

And lest this be construed as a mere slip of the tongue:

> DC: And the intent of the interrogation was to gain additional discovery before requesting to search his

[83] *Conklin*, 63 M.J. at 340 (citation omitted).
[84] J.A. at 127.
[85] J.A. at 108.

cell phone; correct?

Agent Pledger: The cell phone wasn't in play at the time, Sir. That was to gain information, find—pertinent to the investigation. **Had we had gotten anything, or nothing, from HN Darnall that indicated that he was the person who was intended to receive this package, that investigation probably would have sunk at the time and not been continued.**[86]

And, not only was he still investigating whether HN Darnall was the intended recipient of the package, he was also still investigating whether a crime had even been committed. Again, the "primary objective" of Agent Pledger's "special operation" was "to apprehend HN Darnall and ascertain how he intended to utilize the substance" in order to figure out if any laws had been broken.[87] Consider his motion testimony:

MJ: [W]hat crime did you think that he committed? What was your—

Agent Pledger: At the time, sir, we were,--we know—knew for sure that he was at least getting the importation of a substance. If we were to talk to him and he said "Hey, I rebuild motorcycles, I use this to clean the inside of the tank, Okay, fair enough. Let's not do that anymore, it doesn't look so good. Let's buy that from somewhere in the U.S.

So we know that the fact that if he was not using it for some type of industrial purpose, that we had him for importation. And then depending on the subsequent interview with HN Darnall, we either had distribution or use. And I believe on the initial rights advisement, I

[86] J.A. at 109.
[87] J.A. at 663.

> outlined all of that just in case, because that's everything I wanted to talk to him about and I didn't want to stop every ten minutes to readvise him.[88]

In other words, whether a substance is intended for human consumption is relevant to the determination of whether it is a controlled substance analogue under either the federal controlled substance analogue statute or SECNAVINST 5300.28E.[89] So Agent Pledger needed to use the apprehension as a means to conduct a preliminary interrogation of HN Darnall and find out how he intended to use the imported substance. Only then would he know whether a crime had been committed. If HN Darnall indicated that he intended to use the substance for human consumption, Agent Pledger planned to conduct a follow-up interrogation to narrow the charges down to either distribution or use.

But, as in *Conklin*, Agent Pledger had other investigatory avenues open to him that would have avoided the constitutional violation. To connect the address on the package to HN Darnall, he could have interviewed Nathan Lafond, the prior resident, which Agent Pledger did only after the apprehension.[90] He could have investigated the telephone number on the shipping label and tried to connect it to HN Darnall. To find out how he intended to use the substance, Agent Pledger

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[88] J.A. at 126.
[89] J.A. 585-94. SECNAVINST. 5300.28E outlines the Navy's drug policy and prohibits the use, possession, distribution, or importation of controlled substance analogues.
[90] J.A. at 109.

could have requested that HN Darnall come in for voluntary interview. Any one of these avenues could potentially have avoided a constitutional violation. But Agent Pledger didn't bother with any of them.

Further, the notion that Agent Pledger was using this as anything other than an investigative tool is belied by the fact that, after the interviews were over, he just let HN Darnall go. No action was taken by HN Darnall's command to initiate pretrial restraint or confinement pursuant to R.C.M. 304 or 305. So the question becomes, why did Agent Pledger apprehend HN Darnall? The answer is that Agent Pledger skipped the investigative steps that were necessary to establish probable cause, and simply unlawfully apprehended HN Darnall in an extremely startling fashion, "in the hope that something might turn up."

b. Agent Pledger's actions were flagrant.

"The manner in which" HN Darnall's "arrest was effected" also supports suppression of the evidence. The purpose of a controlled delivery is to leave a suspected drug distribution scheme undisturbed so police can observe its execution and thereby identify the participants.[91] But, Agent Pledger had another reason in mind for conducting his "special operation." According to him, this ruse was not necessary for him to apprehend HN Darnall.[92] He testified that it had no bearing on his probable cause analysis, but rather was executed "to gauge [HN Darnall's]

[91] *See United States v. Dickey-Bey*, 393 F.3d 449 (4th Cir. 2004).
[92] J.A. at 437.

physical reaction."[93]

It was for this reason that he constructed a fake package, delivered it to the regimental mail room, had the clerk instruct HN Darnall to pick it up, and then surrounded him in the middle of the day in front of the entrance of 7th Battalion with taser drawn yelling "Stop. Military police, federal agents. Keep your hands where I can see them." As in *Brown*, this ploy certainly appears to "hav[e] been calculated to cause surprise, fright, and confusion."

Using the power of the federal government to subject someone to a farcical ruse solely for the purpose of seeing how he will react, while knowing that the exercise has no evidentiary value, is simply not an acceptable law enforcement tactic. It is precisely this sort of misconduct that the exclusionary rule is meant to deter, that the Supreme Court proscribed for civilian police in *Brown*, and which this Court should likewise discourage in the military.

2. <u>The Search Authorization</u>

According to Agent Pledger, he did not have probable cause to search the

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[93] J.A. at 109-10, 437. But even Agent Pledger's "gauge" of HN Darnall's reaction was convoluted at best:

> Had [HN Darnall] walked in there and been like, "Oh, yeah, I've been waiting on this," or been completely confused – which the suspect did not seem to be, he was more of like "That's weird, I don't remember ordering this," took it and left; which was a line of concern for us on, "Okay, why didn't he have a normal reaction to getting a package"; especially a package that was delivered out of place from where it was intended to." J.A. at 410.

phone at the time he apprehended HN Darnall:

> Did I have any indication that -- based on my training experience that, yes, more than likely there are -- there's going to be evidence on the cell phone? Absolutely. That comes from experience as a -- as an agent. **However, did I have all the probable cause I needed to be able to search that cell phone? Absolutely not.**[94]
>
> . . . .
>
> DC: So if you hadn't interviewed Hospitalman Darnall on 6 March 2012, you would've illegally gotten a search authorization; right?
>
> Agent Pledger: Correct.[95]

So Agent Pledger used the information he gleaned from the illegal interrogation, along with, it seems, the incorrect fact that 5985 Mariposa Ave. was HN Darnall's prior address, as his basis for probable cause.[96] The battalion commander relied on this illegally-obtained and false information when he authorized the search. Therefore, the evidence seized from the search of HN Darnall's cell phone should be suppressed pursuant to M.R.E. 311.[97]

3. <u>The 7 March Interrogation</u>

But for the illegal apprehension of HN Darnall on 6 March, Agent Pledger

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[94] J.A. at 109.
[95] J.A. at 162-63.
[96] J.A. at 98, 162-63, 184-85, 216, 218-19.
[97] *See Riley v. California*, 134 S. Ct. 2473 (2015) (finding that the immense storage capacity of modern cell phones implicate privacy concerns with regard to the extent of information that could be accessed on the phones).

would not have obtained any statements tying him to the package of dimethylone or indicating that he was involved in the illegal distribution of controlled substances and controlled substance analogues. Without these statements, Agent Pledger would not have had sufficient probable cause for the search authorization.

There would have been no second interrogation without the first because Agent Pledger told HN Darnall that "he needed to come back" in order to "obtain the written statement with everything that had been said the day prior."[98] Further, but for the illegal search of the phone, Agent Pledger would not have had a basis to ask HN Darnall, "So what kind of things did I see on your phone that you might want to explain?"[99] At that second interrogation, they "talked about yesterday, cleared up any questions [Agent Pledger] had" and then HN Darnall "made a couple of other comments" and, in the words of Agent Pledger "gave a little bit better detailed answers to the questions I asked him."[100]

And HN Darnall had no choice but to come back; Agent Pledger took his phone, telling him that it would be returned to him if the search authorization was denied. Therefore, the taint from the illegal apprehension remained, and the results of the second interrogation must be suppressed.

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[98] J.A. at 115.
[99] AE X at 11:29:57-11:30:06.
[100] J.A. at 100, 102.

Conclusion

"It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct . . . to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principal lies at the heart of the Fourth Amendment: Two wrongs don't make a right."[101]

The purposefully-imprecise definition of probable cause provides police the flexibility they need to effectively deal with the variety of complex situations they face on the streets. But here it's clear from Agent Pledger's testimony that he thought the apprehension was part of the investigation. He could have made the necessary connection between HN Darnall and the box of dimethylone if he had properly investigated the case. But he chose not to do the legwork and decided to just illegally apprehend HN Darnall to get the evidence he needed to establish probable cause. It turns out his instincts were correct, but that, of course, is of no consequence. Just as in the civilian criminal justice system law enforcement cannot justify an unconstitutional search after-the-fact because it uncovered incriminating evidence, neither can the Government be rewarded in this case because Agent Pledger happened to have guessed right.

Therefore, HN Darnall respectfully requests that this Court reverse the decision of the lower court.

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[101] *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, S., dissenting).

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I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on April 3, 2017.

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