IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

STATUTES, RULES, BRIEFS, OTHER SOURCES

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS EVIDENCE DIRECTLY FLOWING FROM THE ILLEGAL APPREHENSION OF APPELLANT, WHETHER THE NMCCA RULING UPHOLDING THIS DECISION CONFLATED REASONABLE SUSPICION WITH PROBABLE CAUSE, AND WHETHER THIS DECISION SHOULD BE REVERSED.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of four specifications of conspiracy, one specification of making a false official statement, twelve specifications of importing, possessing with intent to distribute, distributing, and manufacturing controlled substances, and seven specifications of using a communication facility in furtherance of a conspiracy, in violation of Articles 81, 107, 112a, and 134, UCMJ, 10 U.S.C. §§ 881, 907, 912a, 934 (2012). The

Members sentenced Appellant to six years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged. As an act of clemency, he suspended confinement in excess of five years for a period of twelve months, and, except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed with the lower court on January 12, 2015. On June 29, 2016, the lower court held oral argument. On July 12, 2016, the lower court merged Specifications 3 and 4 under Charge I as an unreasonable multiplication of charges, and then affirmed the findings and sentence. *United States v. Darnall*, No. 201500010, 2016 CCA LEXIS 398, at *21-22 (N-M. Ct. Crim. App. Jul. 12, 2016). On September 9, 2016, Appellant filed a certificate for review of the lower court decision.

Statement of Facts

A. Customs and Border Protection seized a package from China containing dimethylone ("bath salts"). The intended recipient was "Brandon Darnall," at Twentynine Palms.

On December 28, 2011, Officer Novoa with Customs and Border Protection in San Francisco, California, whose task it was to "look at packages coming through X-rays," detained a suspicious package arriving from China (J.A. 227-228, 235-36), addressed to "Brandon Darnall" at an address in "29 Palms, California." (J.A. 530).

Officer Novoa seized the package after discovering it contained "almost three pounds" of dimethylone—street named "bath salts" (J.A. 373)—an analogue to methylone, a Schedule I controlled substance with effects similar to MDMA, "ecstasy" (J.A. 226, 228, 246, 310-12, 336, 337-39, 373-74, 379, 535-36.) These drugs are sold as "bath salts" "to suggest some sort of legitimacy" but that is a "guise." (J.A. 373.) At times, the drugs are mislabeled as "rust remover, glass cleaner, detergent." (J.A. 373.) "[B]esides human consumptions for their stimulant or other effects," there are no known uses for methylone or dimethylone. (J.A. 374, 379.)

Officer Novoa turned over the investigation to Immigration and Customs Enforcement (ICE) agents and Department of Homeland Security Special Agent Rabadi. (J.A. 240, 250, 316, 319.)

As the address on the package was for Twentynine Palms—an isolated city mostly made up of residents affiliated with a Marine Corps Installation (J.A. 319)—Special Agent Rabadi believed the intended recipient was in the military and turned the investigation and the package over to the Criminal Investigation Division (CID). (J.A. 319, 403-04.) A CID agent confirmed that "Brandon Darnall" was in the military. (J.A. 319-20, 323, 525-26.)

B. CID Agent Pledger began investigating Appellant.

1. CID Agent Pledger identified Appellant as the intended recipient.

CID Agent Pledger, a criminal investigator assigned to the CID office at Twentynine Palms, began the investigation by first identifying only one "Brandon Darnall assigned to Twentynine Palms or living within the immediate area . . . who [he] found out was a corpsman with Fleet Marine Force." (J.A. 87-88, 409.)

Second, Agent Pledger identified the address on the package as "being local and being a rental," and, after driving to the house, discovered it was vacant with a "for rent" sign in the front yard. (J.A. 409.) He did "an online query" to find out who had previously lived in the house and discovered the name, "LaFond," identified as a Sailor and corpsman stationed at Twentynine Palms.[1] (J.A. 108, 343, 452-53, 665-66.) Based on his initial investigation—the name and address on the package—Agent Pledger mistakenly believed Appellant used to live at the residence. (J.A. 219.)

[1] At an Article 39a session, which preceded his trial testimony, Agent Pledger stated that prior to the controlled delivery, he "had identified that another corpsman had lived at [the address on the package] who was stationed aboard Twentynine Palms, therefore, making it more likely that . . . [Appellant] probably had the package shipped to someone else's house." (J.A. 108, 126.) At trial, when Agent Pledger was asked whether he was aware, prior to the interview with Appellant, that Mr. Lafond was the tenant of the residence, he responded that he "believe[d] so" but was not sure because the investigation "was done a very long time ago." (J.A. 452-53.)

Finally, as to the crime, Agent Pledger believed Appellant "had imported a controlled substance analogue for his own personal use or distribution of the substance."[2] (J.A. 126.) He suspected him of "use/possession/distribution . . . of controlled/illicit substances and failure to obey lawful orders." (J.A. 583.) SECNAVINST 5300.28E 5.c. states:

> The wrongful use, possession, manufacture, distribution, importation into the customs territory of the United States . . . by persons in the DON of controlled substance analogues (designer drugs) . . . with the intent to induce or enable intoxication, excitement, or stupefaction of the central nervous system, is prohibited . . . .

(J.A. 588-89.) "[B]esides human consumptions for their stimulant or other effects," there are no known uses for dimethylone. (J.A. 374, 379.)

2. CID Agent Pledger set up a "controlled delivery" to gauge Appellant's reaction to receiving the package.

Agent Pledger set up a "controlled delivery"—"deliver a suspected package" to "the intended recipient . . . to gauge their [sic] reaction." (J.A. 410, 536.) At that point, Agent Pledger believed "[i]t was not necessary" to execute the "controlled delivery," to apprehend Appellant. (J.A. 410, 437.)

[2] At an Article 39a session, on cross-examination, Agent Pledger added: "we . . . knew for sure that he was at least getting the importation of a substance." (J.A. 126.) Agent Pledger further stated that if Appellant used the substance for industrial purposes, he would have advised him, "Let's not do that anymore, it doesn't look so good. Let's buy that from somewhere in the U.S." (J.A. 126.) However, "besides human consumptions for their stimulant or other effects," there are no known uses for dimethylone. (J.A. 374, 379.)

On March 6, 2012, Agent Pledger created a "counterfeit package" identical to the original (J.A. 411-412, 416), placed it in the Command's "mail room" (J.A. 413), and then had the mail clerk—a corporal (J.A. 150)—contact Appellant via telephone to inform him that he had a package. (J.A. 170, 413, 438.) Agent Pledger monitored the "controlled delivery" via a live video feed to gauge Appellant's reaction to receiving the package. (J.A. 413-14.)

After Appellant picked up the package, Agent Pledger and other agents followed Appellant into the parking lot and "stopped" him. (J.A. 169, 414, 446.) Agent Pledger drew his taser in case Appellant resisted, but did not point it at Appellant, and then placed him in "hand irons." (J.A. 169, 414, 446.) He then "transported [Appellant] down to CID for further processing." (J.A. 414.)

C. Appellant waived his rights and provided an initial statement wherein he admitted to purchasing and selling methylone and dimethylone to "smoke shops."

After Appellant's apprehension, Agent Pledger "placed [Appellant] in a monitored room, and proceeded to advise him of his rights," both his rights under Article 31(b) and *Miranda*, using the "standard OPNAV form for military suspects acknowledgement and waiver of rights." (J.A. 414-15.) After each right advisement, Agent Pledger asked Appellant if he understood, to which Appellant stated that he did and initialed next to each right. (J.A. 414.) Appellant then

affirmatively waived his rights both verbally and by signing the bottom of the rights advisement form. (J.A. 415, 579-84.)

Thereafter, Appellant provided a verbal statement to Agent Pledger admitting "that he had ordered stuff from China in the past—however, he failed to claim ownership of [the] package—[and] that he had been using the substance and selling it to local smoke shops for the manufacture of spice and bath salts." (J.A. 173, 416.) He admitted that the substances were "[m]ethylone and dimethylone." (J.A. 416.)

Appellant's first statement was not recorded due to a power outage. (J.A. 135, 415, 443.) Agent Pledger told Appellant, "I would like for you to come back tomorrow so we can talk again and we can get a formal statement from you." (J.A. 96-97, 429.) Appellant agreed. (J.A. 96-97.)

D. Pursuant to a search authorization, Agent Pledger searched Appellant's cellular phone, discovering inculpatory photographs of drugs and money, and several texts wherein Appellant discussed importing and distributing controlled substances.

Agent Pledger turned Appellant over to the duty non-commissioned officer (NCO). (J.A. 97, 416.) Appellant's Command elected not to place him in pretrial confinement. (J.A. 149, 172, 429, 459.) Agent Pledger kept Appellant's cell phone "for safekeeping only as it [was] perishable evidence." (J.A. 96, 164, 176, 417.)

Agent Pledger spoke with the Battalion Commander via telephone (J.A. 182), briefed him regarding Appellant's admissions in his initial statement (J.A. 165), "walked [him] through exactly what he was looking for" in Appellant's phone (J.A. 187), and "demonstrate[d] to [him] that he was looking for various things" in relation to "illicit drug sale activities." (J.A. 174, 187, 470.) "[I]t wasn't just a quick conversation." (J.A. 187.) The Commander provided verbal authorization to search the phone because he was confident that "there was absolute probable cause" to seize and search Appellant's phone in relation to drug activity and transactions. (J.A. 182, 185-87.)

Agent Pledger next used a "Cellebrite machine" to extract and search Appellant's cellular phone. (J.A. 173, 417.) He viewed call logs, SMS text messages, picture messages, photos, videos, browser history, contacts, IMBI data, and the Voxer app—similar to text messages (J.A. 514-15)—which "had audio messages back and forth to another individual discussing the exchange and sale of illicit items." (J.A. 173-74.) Agent Pledger did not access anything that required him "to connect to the internet." (J.A. 174.)

The cellular phone contained photographs of steroids (vials) (J.A. 419, 537-42); white powder (J.A. 421); other vials (J.A. 545-46); and money. (J.A. 423, 543.) The geo tags—showing the latitude and longitude of where the photographs

were taken—confirmed the photographs were taken within "the Marine Air Ground Combat Center" at Twentynine Palms. (J.A. 173, 473, 545.)

The cellular phone also contained multiple text messages between Appellant and several individuals wherein Appellant communicated about importing and distributing controlled substances. (J.A. 484-520.)

E. Appellant voluntarily returned to speak with Agent Pledger, again waived his rights, and provided a typed statement admitting to importing methylone from China and selling it to local smoke shops.

After Appellant was released to the duty NCO, he did not seek legal counsel. (J.A. 153.) The next day, on March 7, 2012, Appellant drove his own vehicle back to the CID building to speak again with Agent Pledger. (J.A. 149, 172, 429, 459.)

At the beginning of the second interrogation, Agent Pledger followed the same procedures as the previous day: he informed Appellant of his Article 31(b) rights and Appellant again waived his rights and, this time, provided a recorded statement. (J.A. 429, 544-78.) Agent Pledger and Appellant "covered everything that was covered on [6 March] and any clarifying question [sic] that [Agent Pledger] had after reviewing [his] notes." (J.A. 172.)

Appellant admitted that he ordered methylone from China in the past and supplied it "to approximately 100 smoke shops." (J.A. 576, 579.) He also admitted to ordering "dimethylone." (J.A. 571.) He confirmed that the money in the photograph, found in his cellular phone, was earned from his sales to the STC

Smoke Shop. (J.A. 581.) He also affirmatively stated that: (1) he was at the CID building "upon [his] own freewill," (2) he did not "feel forced to provide th[e] statement," and, (3) he understood his rights "as read to [him] previously." (J.A. 580.) Appellant read the statement in its entirety, initialed and signed it, swearing that "it was true to the best of his knowledge and belief." (J.A. 436, 579-84.)

F. Investigators interviewed Mr. Lafond, the Sailor identified from the search of the address.

CID continued to investigate Appellant's misconduct. Mr. Lafond, a former Sailor and corpsman who was identified from the search of the address on the package, was interviewed by CID on March 13, 2012. (J.A. 343, 346, 665-66.) At the time of the interception of the package, Mr. Lafond lived at the residence reflected on the address label of the package and was stationed at Twentynine Palms. (J.A. 343, 530.) Mr. Lafond confirmed that prior to the interception of the package, Appellant had asked for and received permission to have a package sent to his address. (J.A. 344, 665-66.)

G. The Military Judge admitted Appellant's two statements and the results of the search of the cellular phone.

In the original proceedings, a military judge found probable cause to apprehend, and therefore, denied Appellant's original motion to suppress. (J.A. 636-37.) After the charges were dismissed and then re-preferred and referred to general court-martial, Trial Defense Counsel again moved to suppress Appellant's

two statements and the evidence found on his cellular phone. (J.A. 636-37.) The United States opposed the motions. (J.A. 636-37.)

After hearing testimony from Agent Pledger, Appellant's Commander, and Appellant, and after reviewing the previous evidence from the original proceedings (J.A. 636-64), the Military Judge denied the Defense's motions, ruling that Appellant's two statements and the evidence found on Appellant's cellular phone were admissible. (J.A. 661.)

In his ruling, after assessing the credibility of both Agent Pledger and Appellant, the Military Judge resolved any inconsistencies between their testimonies in favor of Agent Pledger, "f[inding] Agent Pledger more credible." (J.A. 642.)

The Military Judge also found, *inter alia*, that: (1) the seized package, addressed to Appellant, contained dimethylone; (2) the address on the package was of a corpsman, not Appellant, who was stationed at Twentynine Palms, California; and (3) Agent Pledger "was able to determine, along with his fellow agents working the case with him, that the address on the package was to a residence previously occupied by the accused, but had since been vacated."[3] (J.A. 638-40.)

[3] Although Appellant never lived at the address, Agent Pledger erroneously believed that he had. During an Article 39a session to address the Motion for Reconsideration on the suppression issue, Trial Counsel stated:

1. The Military Judge ruled that there was probable cause for the apprehension.

The Military Judge found that there was probable cause for the apprehension: (1) the package contained a controlled substance analogue, in violation of SECNAVINST 5300.28E (J.A. 650), (2) Appellant's name was on the package, the only servicemember with that name living in Twentynine Palms (J.A. 409, 650), and (3) the address on the package was Appellant's previous address. (J.A. 650.)

2. The Military Judge ruled that the two statements—Appellant's admissions on both March 6 and 7, 2012—were admissible.

With regard to Appellant's statements, the Military Judge further found that on both March 6 and 7: (1) Agent Pledger "properly advised the accused of his rights pursuant to Art. 31, UCMJ and R.C.M. 305"; and (2) Appellant waived his rights and agreed to speak with Agent Pledger. (J.A. 640-43.)

The Military Judge ruled that Appellant's statements admitting to ordering and receiving methylone and dimethylone were admissible. (J.A. 641, 657.)

> We have every reason to believe that [Agent Pledger] is telling us the truth when he says, he thought it was Darnall's residence, because the package says "Brandon Darnall" at X and such address. And Hospitalman Darnall's cellphone number is present on the shipping label. . . . So there is no reason for Pledger not to have thought that it was his residence off base at the time.

(J.A. 219.) The Military Judge denied the motion, relying on the same facts as his original ruling. (J.A. 220-22.)

3. The Military Judge ruled that the evidence found on Appellant's cellular phone was admissible.

As to Appellant's cellular phone, the Military Judge found that Agent Pledger informed Appellant's Commander "what had transpired to include the . . . testing[,] . . . the controlled delivery, and the admissions of the accused to importing methylone . . . and selling it to smoke shops." (J.A. 644.) He told the Commander that "he had probable cause to believe the cell phone . . . would have information pertaining to these transactions." (J.A. 644.)

Relying on Mil. R. Evid. 315 and 316, *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992), and *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999), the Military Judge found that: (1) Agent Pledger, at the time of the seizure of the phone, "had a reasonable belief . . . that if he did not seize it, then and there, that the accused would remove, destroy or conceal the electronic evidence of the transactions"; (2) the manner in which Appellant described the transactions—"placing orders electronically"—linked Appellant's smart phone to the suspected misconduct; (3) there was probable cause for the search authorization of the phone; (4) the search authorization was valid; and (5) "the search was conducted in a reasonable manner and stayed within the confines of the authority given." (J.A. 653-55.) Accordingly, the Military Judge ruled the evidence found on the phone admissible. (J.A. 655.)

Argument

APPELLANT'S APPREHENSION WAS REASONABLE AND PURSUANT TO PROBABLE CAUSE. REGARDLESS, UNDER THE *BROWN* FACTORS, APPELLANT'S INITIAL AND SECOND STATEMENTS WERE ADMISSIBLE BECAUSE THEY WERE SUFFICIENTLY VOLUNTARY TO ATTENUATE THE TAINT OF ANY ALLEGED ILLEGAL APPREHENSION. THE EVIDENCE ON THE PHONE WAS ALSO PROPERLY ADMITTED BECAUSE IT WAS FOUND PURSUANT TO A VALID SEARCH AUTHORIZATION.

A. The standard of review is an abuse of discretion.

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). This court "review[s] the legal question of sufficiency for finding probable cause de novo using the totality of the circumstance test." *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007).

B. Excising the erroneous fact, Appellant's apprehension was based on probable cause.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An arrest is considered a

seizure within the meaning of the Fourth Amendment and therefore must be supported by probable cause. *California v. Hodari*, 499 U.S. 621 (1991); *Wong Sun v. United States*, 371 U.S. 471 (1963). "Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it." R.C.M. 302(c).

Probable cause to apprehend is based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Hall*, 50 M.J. 247, 250 (C.A.A.F. 1999) (citation omitted). "'Probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense." *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Schneider*, 14 M.J. 189, 194 (C.M.A. 1982).

"Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence." *Leedy*, 65 M.J. at 213. It "does not demand any showing that such a belief be correct or more likely true than false" nor "a showing that an event is more than 50% likely." *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) (internal quotation and citations omitted).

When there are misstatements or improperly obtained information in support of probable cause, appellate courts excise those and then examine the remainder to determine if probable cause still exists. *Cf. United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001) ("[W]hen there are misstatements or improperly obtained information, we sever those from the affidavit and examine the remainder to determine if probable cause still exists.") (citation omitted).

Although Agent Pledger here believed that the address on the package was Appellant's former address, that belief was erroneous. (J.A. 219, 452-53.) Although the erroneous fact was clarified by the Trial Counsel in an Article 39a session to address Defense's Motion for Reconsideration (J.A. 219), the Military Judge relied on that erroneous fact, in part, in his initial ruling. (J.A. 650.) After excising the erroneous fact, there was still probable cause to apprehend.

First, the package contained "almost three pounds" of dimethylone, a Schedule I controlled substance analogue affecting the central nervous system with similar effects to MDMA, "ecstasy." (J.A. 226, 228, 246, 310-12, 336, 337-39, 373-74, 379, 535-36.) As there are no uses of dimethylone "[b]esides for human consumption[] for their stimulant or other effects," probable cause existed that the importation and possession of the dimethylone violated SECNAVINST 5300.28E. (J.A. 374, 379, 588-89.) Based on the quantity of dimethylone, probable cause also existed as to an intent to distribute the substance.

Second, the package was intended for "Brandon Darnall." (J.A. 528, 530.)

Third, the package included an address in Twentynine Palms, California. (J.A. 528, 530.)

Finally, as Appellant conceded in oral argument in front of the lower court,[4] the Record establishes that only one "Brandon Darnall"—Appellant—lived in the immediate area of Twentynine Palms. (J.A. 87-88, 219, 409.) Based on that information, there were reasonable grounds to apprehend Appellant.

C. Even assuming no probable cause, under *Brown*, Appellant's two statements were admissible.

The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Leon*, 468 U.S. 897, 906 (1984). The exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id*. at 918-19.

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[4] At oral argument, as to the other two "Brandon Darnall's" in the "large area" of San Bernardino, Appellant conceded: "I'm not going down that road" and "I'm not saying that those . . . two other names play into this analysis." NMCCA Oral Argument, June 30, 2016, at 8:57-9:43. Appellant further conceded that (1) Agent Pledger had "Appellant's name on a box" at a Twentynine Palms address, and (2) there was only one "Brandon Darnall," Appellant, in the immediate area of the address. NMCCA Oral Argument, at 6:30-59. http://www.jag.navy.mil/courts/documents/archive/audio/Darnall%20OA_20160630-1000_01d1d2b64072ef10.mp3. This Court should dismiss Appellant's attempt to resurrect an argument that he conceded before the lower court.

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135 (2009); *see Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (exclusion "has always been our last resort, not our first impulse."); *see also Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) ("[T]he deterrent value of the exclusionary rule is most likely to be effective" when "official conduct was flagrantly abusive of Fourth Amendment rights").

"An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns" giving rise to the exclusionary rule and should not be applied "where the police conduct was no more intentional or culpable than this." *Herring*, 555 U.S. at 144. Indeed, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." *Id*. at 147; *see Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (exclusionary rule applicable only where its deterrence benefits outweighs its substantial social costs).

When statements follow an illegality, not only must the statements meet the Fifth Amendment, U.S. Const. amend. V, standard of voluntariness, but they also must be sufficiently voluntary to attenuate the taint. *Brown*, 422 U.S. at 602; *Wong Sun*, 371 U.S. at 486; *United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F.

2006). This "doctrine applies as well when the fruit of the Fourth Amendment violation is a confession." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

Having met the Fifth Amendment's standard of voluntariness when Agent Pledger informed Appellant of his Article 31(b) and *Miranda* rights[5] prior to both interviews (J.A. 161-62, 167, 414-15, 429, 579-84), the issue then becomes whether Appellant's initial and second statements were "sufficiently voluntary to attenuate the taint" based on all the facts—"[n]o single fact is dispositive." *Brown*, 422 U.S. at 602-03. The factors include: "[1] the temporal proximity of the unlawful police activity and the subsequent confession, [2] the presence of intervening circumstances, and [3] the purpose and flagrancy of the official misconduct." *Id*. at 603-04.

In *Brown*, the Supreme Court found that the appellant's confession was inadmissible as the fruit of the illegal arrest that occurred without probable cause or a warrant. 422 U.S. at 591. There, without probable cause or a search warrant, officers held the appellant at gunpoint, illegally broke into his apartment, searched it, obtained evidence, left, and then arrested the appellant. *Id*. at 592. After only a

[5] The Military Judge found as fact that after Appellant's apprehension, Appellant did not request an attorney, he waived his rights, and he voluntarily provided an oral statement. (J.A. 161-62, 167, 414-15, 638-49.) The Military Judge properly found Agent Pledger more credible than Appellant and adopted his testimony; his finding is not clearly erroneous. (J.A. 642.)

couple hours, and after advising the appellant of his rights under *Miranda*, the appellant confessed. *Id*. at 593-94.

In finding the confession inadmissible, the Supreme Court emphasized (1) the short temporal proximity of the arrest to the confession, (2) the *Miranda* warnings alone were not sufficient as intervening circumstances, and, more importantly, (3) the flagrancy of the detectives' actions—a "quality of purposefulness . . . virtually conceded" by the detectives. *Id*. at 603-05.

Contrary to Appellant's assertion here (Appellant's Br. at 21), the flagrancy in *Brown* had more to do with the fact that the detectives, having no evidence, probable cause, or a warrant, held the appellant at gunpoint in order to illegally search his home for incriminating evidence to justify the arrest. *Id*. at 592, 605.

The detectives conceded that the purpose was to find evidence, to investigate, and to question the appellant. *Id*. at 605. Indeed, the investigators had no evidence linking the appellant to the murder and therefore they decided to illegally enter the appellant's home to create probable cause for the subsequent arrest. *Id*. at 592, 605. In other words, it was a suspicionless fishing expedition in the hope that something would turn up. *See Strieff*, 136 S. Ct. at 2064.

In *United States v. Conklin*, 63 M.J. 333 (2006), this Court found that a consent to search was not sufficiently voluntary to attenuate the taint of an earlier illegal search of the appellant's laptop which contained child pornography. *Id*. at

334-35. There, as part of a routine inspection, the appellant's command illegally searched his laptop. *Id*. at 334-37. Like in *Brown*, prior to the illegal search, no evidence existed linking the appellant to the possession of child pornography. *Id*. In other words, but for the violation of the appellant's Fourth Amendment rights, no evidence existed. *Id*. The Court reasoned that all three *Brown* factors favored suppression. *Id*. at 339.

As to the agents flagrant misconduct in *Conklin*, this Court emphasized that because the agents exploited the illegal search, with no independent evidence or investigation linking child pornography to the appellant, the third *Brown* factor weighed in favor of suppression.

The facts here are inapposite to *Brown* and *Conklin*. Agent Pledger legally obtained evidence linking the crime to Appellant. He did not violate Appellant's rights in obtaining the evidence in support of the probable cause to apprehend; there was no supicionless fishing expedition. As the Supreme Court recently reiterated in *Strieff*, "[f]or the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." 136 S. Ct. at 2064.

In *Strieff*, the Supreme Court found that an illegal detention was sufficiently voluntary to attenuate the taint even though there was a close temporal proximity

between the illegal detention and the discovery of narcotics on the appellant's person. *Id*. at 2062.

There, the police received an anonymous tip about possible narcotics activity at a particular residence. *Id*. at 2059-60. A detective observed visitors coming and going from the residence, staying only a few minutes. *Id*. After the appellant exited the residence, the detective, without probable cause, illegally detained him. *Id*. In finding that the exclusionary rule did not apply to the subsequent discovery of narcotics, the Court focused on the second and third *Brown* factors. *Id*. at 2062.

As to intervening circumstances, the Court found that the detective's subsequent discovery of a warrant was an intervening circumstance favoring the state because it broke the causal chain. *Id*. at 2062-63.

As to the third *Brown* factor, the Supreme Court found that the detective's misconduct was negligent, not flagrant, based on good-faith mistakes—e.g., the detective was unaware whether the appellant "was a short-term visitor who may have been consummating a drug transaction," and, instead of simply asking the appellant whether he would speak with him, the detective illegally detained the appellant to demand to know what was going on in the house. *Id*. at 2063. The Court noted that "[n]othing prevented [the detective] from approaching [the appellant] simply to ask." *Id*.

In finding no flagrancy, the Supreme Court emphasized that: (1) the detective's conduct after the illegal detention "was lawful"; (2) there was "no indication that this unlawful stop was part of any systemic or recurrent police misconduct"; and (3) the negligent conduct "occurred in connection with a bona fide investigation of a suspected drug house"—it was "not a suspicionless fishing expedition in the hope that something would turn up." *Id*. at 2063-64.

In *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002), this Court determined—after applying the *Brown* factors—that the evidence derived from the appellant's consent was admissible even where the appellant was illegally apprehended within a civilian residence without a warrant. *Id*. at 289. There, immediately following the illegal apprehension, investigators obtained consent to search the appellant's bags. 57 M.J. at 292. This Court found that the first two *Brown* factors weighed in the appellant's favor—there was a short temporal proximity between the illegal arrest and consent and the only intervening circumstance was the administration of the appellant's Article 31(b) rights and the signed acknowledgement of the appellant's right to refuse consent. *Id*. But this Court emphasized the third factor—that unlike *Brown*, there was an "absence of purposeful or flagrant conduct on the part of the NCIS agents." *Id*. This Court relied on the fact that (1) the investigators sought and obtained written consent to search, which advised the appellant of his right to refuse, (2) the decision to

apprehend was taken in "good faith," and (3) the investigators, although erroneous, believed that they could apprehend the appellant in the house belonging to another. *Id*. at 293.

1. Appellant's initial statement is admissible; Appellant was advised of and waived his rights; no flagrant misconduct exists.

Although there was a close temporal proximity between Appellant's apprehension and his initial statement, there were some intervening circumstances that weigh in favor of admissibility. First, Agent Pledger properly advised Appellant of his Article 31(b) rights, ensured that he understood, and sought and received a waiver of those rights. (J.A. 414-16.) Second, Appellant proclaimed his innocence. In his statement, Appellant asserted that he did nothing wrong, justifying his actions as legal, and denying the package was his. (J.A. 416, 544-84.) He was not "confessing" to a crime in his mind, showing that his statement was sufficiently voluntary to attenuate the taint of the illegal apprehension.

As to the third *Brown* factor, Agent Pledger acted in "good faith," believing he had probable cause to apprehend.[6] Indeed, two trial judges and the lower court found that there was probable cause to apprehend based on the legally obtained evidence. (J.A. 641-44, 661); *Darnall*, 2016 CCA LEXIS 398, at *2, *6-11.

[6] Appellant speculates, with no support or reason, that because Agent Pledger turned Appellant over to the command, that he must have believed that he did not have probable cause. (Appellant's Br. at 24.) Just as unsupported is Appellant's wholly speculative argument that since the command did not pursue pretrial restraint, that there was no probable cause. (Appellant's Br. at 24.)

Moreover, probable cause was based on evidence linking the misconduct to Appellant. Like *Strieff* and unlike the egregious violations in *Brown*, the evidence in support of probable cause here was not derived from a suspicionless fishing expedition, but rather the evidence was already-known and legally obtained. (J.A. 319-20, 323, 373, 409, 525-26, 530.)

Further, as in *Strieff*, (1) Agent Pledger's conduct after the illegal apprehension was lawful, (2) there is no indication that this unlawful apprehension was part of any systemic or recurrent police misconduct, nor can appellant point to any, and (3) the negligent conduct was part of a bona fide investigation—investigating the importation and distribution of a controlled substance analogue. As such, the lack of flagrant conduct weighs in favor of admissibility.

Appellant misconstrues *Brown* and mistakenly equates a desire to investigate with flagrancy or purposefulness. (Appellant's Br. at 21.) But *Brown* does not support that proposition. There, the issue was the flagrancy of the detectives' misconduct: holding the appellant at gunpoint while they illegally entered and obtained evidence in support of the arrest. *Brown*, 422 U.S. at 592, 605.

Further, it is axiomatic that interrogations are properly part of the investigation to establish an accused's guilt beyond a reasonable doubt, a much higher standard than probable cause. Agent Pledger's desire to interrogate Appellant to further the investigation does not mean he did not believe he had

probable cause to apprehend Appellant based on the legally derived evidence, it simply means that he was building a case against Appellant to prove beyond a reasonable doubt. To conclude otherwise would incorrectly equate the desire of an investigator to be thorough with a recognition that earlier steps in the investigation are somehow tainted or inadequate. In addition to this being unsupported by any precedent, this is illogical, as it would discourage subsequent investigatory steps in similar situations. The purpose of the exclusionary rule is to encourage proper and professional police conduct. Appellant's argument would do the opposite.

Considering Appellant's state of mind and the non-flagrant violation, Appellant's initial statement was sufficiently voluntary to attenuate the taint.

2. Regardless, Appellant voluntarily returned to provide a second statement to Agent Pledger; his second statement is admissible.

Applying the three *Brown* factors to Appellant's second statement, admission was proper. The temporal proximity favors admission. Appellant's voluntary return—where he drove himself to the CID building to provide his second statement—took place a day after the apprehension. (J.A. 149, 172, 429, 459.)

Moreover, the additional intervening circumstances also favor admission. After being turned over to his Command, Appellant could have sought legal counsel or conducted research regarding his actions. Moreover, he voluntarily

returned and was not in custody at the time of the interrogation. (J.A. 149, 153, 172, 429, 459)

Further, as in *Khamsouk*, Agent Pledger again advised Appellant of his Article 31(b) rights, ensured that Appellant understood, and sought and received a waiver of those rights. (J.A. 429, 544-78.) Appellant recognizes that Agent Pledger could have asked to interview Appellant in lieu of the apprehension (Appellant's Br. at 24), which is ultimately what took place when Agent Pledger invited Appellant back to the CID building to provide the written statement.

Appellant affirmed that (1) he was at the CID building "upon [his] own freewill," (2) he was not promised or threatened, and did not "feel forced to provide th[e] statement," and (3) he understood his rights "as read to [him] previously." (J.A. 580.)

Like in his first statement, Appellant proclaimed his innocence. He maintained that he believed his actions—ordering "spice" and "bath salts" from China and selling them to smoke shops—were legal, he provided justifications for what he was doing, and he refused to acknowledge that the package was his. (J.A. 544-78.) He was not "confessing" to a crime in his mind, showing that his statement was sufficiently voluntary to attenuate the taint of the illegal apprehension.

As to the third *Brown* factor, like Appellant's initial statement, and in line

with *Strieff* and *Khamsouk*, there was no flagrant official misconduct or evidence of an intentional disregard for Appellant's constitutional rights: Agent Pledger continued to act lawfully.

Accordingly, Appellant's second statement was sufficiently voluntary to attenuate any taint. Suppression is not warranted.

D. Appellant's phone was searched pursuant to a valid search authorization. Regardless, both the inevitable discovery doctrine and good faith exception apply.

For a search to be reasonable there must be probable cause, based on the totality of the circumstances, that (1) "the person, property, or evidence sought is located in the place or on the person to be searched," and (2) the evidence in question is evidence of a crime. *Gates*, 462 U.S. at 238; Mil. R. Evid. 315(f)(2).

Reviewing courts look to whether the commander had a "substantial basis" for concluding that probable cause existed based on the totality of the circumstances. *United States v. Owens*, 51 M.J. 204, 211 (C.A.A.F. 1999); *Gates*, 462 U.S. at 238. If probable cause is based on improper evidence, the improper evidence should be excised and this Court then examines the remainder to determine if probable cause still exists. *Gallo*, 55 M.J. at 421.

Here, the Commander had a substantial basis for finding probable cause because: (1) the package contained dimethylone (J.A. 226, 228, 246, 310-12, 373); (2) the intended recipient was "Brandon Darnall," the only "Brandon Darnall" in

Twentynine Palms (J.A. 528, 530); and (3) Appellant admitted to ordering the substances from China to sell to smoke shops. (J.A. 173, 416.)

1. If there was insufficient probable cause, the inevitable discovery doctrine applies.

"The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means." *United States v. Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008). Mil. R. Evid. 311(c)(2) states:

> Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

In order to establish this exception, the United States must, by a preponderance of the evidence, establish that "when the illegality occurred, the government agents possessed, or were actively pursuing evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012) (quoting *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982)).

Even if no parallel investigation exists at the time of the allegedly illegal search, the exception applies "[w]hen the routine procedures of a law enforcement agency would inevitably find the same evidence." *Owens*, 51 M.J. at 210. In *Owens*, this Court found that even where a police officer conducted a search after

the appellant revoked consent, there was no reasonable probability that the officer would abandon his efforts to search because there was probable cause to continue investigating—the evidence at the time pointed to the appellant as the assailant. *Id*. at 210-11.

As in *Owens*, there was no reasonable likelihood here that Agent Pledger would have abandoned his efforts to investigate Appellant, leading to the eventual seizure and search of Appellant's cellular phone. Indeed, prior to the initial statement, Agent Pledger was independently aware of and searching for Mr. Lafond, the resident of the address reflected on the package. (J.A. 346, 452-53, 665-66.)

Appellant points to a statement Agent Pledger made, within the context of questions regarding Appellant's cellular phone and the search of it, as evidence that the investigation would have stopped if Appellant refused to provide a statement. (Appellant's Br. at 6.) But his argument ignores (1) the context of Agent Pledger's answers,[7] and (2) the fact that although Appellant's statement never mentioned Mr. Lafond, Agent Pledger nevertheless independently found and

[7] Within the context of answering questions related to the search of the cellular phone, Agent Pledger stated, "The cell phone wasn't in play at the time . . . . That was to gain information . . . pertinent to the investigation. Had we . . . gotten anything, or nothing, from [Appellant] that indicated that he was the person who was intended to receive this package, that investigation probably would have sunk at that time and not been continued." (J.A. 109.) This is based on Agent Pledger's belief that prior to the initial statement he did not have probable cause to search the cellular phone. (J.A. 109.)

interviewed him.

After Agent Pledger interviewed Mr. Lafond, Mr. Lafond provided a statement wherein he explained that Appellant asked him for and received permission to have a package sent to his address. (J.A. 344, 665-66.)

Based on Mr. Lafond's statement, the already-seized dimethylone, and Agent Pledger's experience, probable cause was sufficient to obtain a command authorization to seize and search Appellant's cellular phone for communications related to the purchase and sale of the dimethylone.

As such, the incriminating texts and photographs found on Appellant's phone "would have been obtained even if such unlawful search or seizure had not been made" (Mil. R. Evid. 311(b)(2)), because Agent Pledger was "actively pursuing evidence or leads that would have inevitably led to the discovery of the evidence." *Dease*, 71 M.J. at 122.

2. Even if there was insufficient probable cause, the good faith exception applies.

Evidence obtained as a result of an unlawful search or seizure may be used if:

> [1] the search or seizure resulted from an authorization . . . issued by an individual competent to issue the authorization . . . [2] the individual issuing the authorization . . . had a substantial basis for determining the existence of probable cause; and [3] the officials . . . reasonably and with good faith relied on the issuance of the authorization or warrant . . . using an objective standard.

Mil. R. Evid. 311(c)(3). In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. *Leon*, 468 U.S. at 926. Appellant here does not allege that the Commander abandoned his detached and neutral role in authorizing the search.

Agent Pledger reasonably and with good faith believed that probable cause existed to search Appellant's phone based on Appellant's admissions, the dimethylone in the package with Appellant's name, and the shipping address. (J.A. 173, 226, 228, 246, 310-12, 373, 416.)

Moreover, Agent Pledger was not dishonest in the affidavit. He also followed the law throughout by properly reading Appellant the rights advisement before both statements and properly allowing Appellant to elect or refuse to make the statement. As such, the good faith exception applies.

E. If the initial statement is inadmissible, no prejudice exists because it did not have a substantial influence on the findings—Appellant provided a more detailed written explanation in his second statement and the United States' case was strong.

"For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003) (citation omitted).

"This Court evaluates claims of prejudice from an evidentiary ruling by weighing four factors: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *United States v. Hall*, 66 M.J. 53 (C.A.A.F. 2008) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citation omitted)).

Although Agent Pledger testified briefly regarding Appellant's unrecorded and unwritten initial statement, it was cumulative and insignificant when compared to the strength of the United States' case: (1) Mr. Lafond's testimony tied Appellant to the package, which also bore Appellant's name (J.A. 346, 665-66); (2) in Appellant's second statement, which was written, recorded, and played for the Members at trial, Appellant admitted to buying methylone and dimethylone from China and selling the controlled substances to smoke shops (J.A. 570-72, 576, 579-84); and (3) Mr. Rubio admitted that he arranged to purchase "steroid supplements" from Appellant that came in "vials" and were used to inject into the body. (J.A. 368.) As such, even assuming error in admitting the initial statement, the error did not have a substantial influence on the findings.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the decision of the lower court.

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