IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Bradley M. METZ,** Corporal (E-4) U.S. Marine Corps Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 201900089 USCA Dkt. No. 21-0059/MC

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

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UNITED STATES CIRCUIT COURT OF APPEALS

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I.

THE ADMISSIBILITY OF EVIDENCE SEIZED AFTER AN ILLEGAL APPREHENSION IS GOVERNED BY *BROWN V. ILLINOIS*.[1] DID THE LOWER COURT ERR BY FAILING TO APPLY *BROWN* DESPITE FINDING APPELLANT WAS ILLEGALLY APPREHENDED?

A. Ineffective assistance of counsel is inextricably tied to the granted issue.

As this Court's predecessor court once explained, it "has never considered the scope of its review to be limited by the wording of a particular grant of review."[2] Yet the Government's literalistic reading of the grant of review would impose precisely such a limitation in this case.

The Government claims "the question of ineffective assistance falls outside the scope of the Granted Issue."[3] But ineffective assistance is inextricably tied to the lower court's failure to apply *Brown*. As Appellant wrote in his supplement, the lower court erred "[b]y failing to apply *Brown* in resolving the prejudice to Appellant's rights from the illegal apprehension,"[4] and there could only be

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[1] 422 U.S. 590 (1975).
[2] *United States v. Kemp*, 22 U.S.C.M.A. 152, 154 (1973).
[3] Ans. at 14, n.1.
[4] *See* Suppl. Pet. for Grant of Review (Dec. 14, 2020) at 30 ("By failing to apply *Brown* in resolving *the prejudice to Appellant's rights from the illegal apprehension*, the lower court decided a legal question 'in conflict with the applicable decisions of . . . the Supreme Court of the United States.") (emphasis added).

prejudice if counsel were deemed ineffective for failing to move to suppress the evidence due to the illegal apprehension.

Appellant's supplement illustrated the connection between the lower court's failure to apply *Brown* and ineffective assistance of counsel:

> But in assessing whether defense counsel were deficient for failing to file a motion to suppress based on the apprehension, the lower court only addressed whether Appellant's consent on the search form was voluntary.[5]

Additionally, Appellant directed this Court to "the second assigned error" he raised before the lower court.[6] This issue was whether "Appellant's trial defense counsel [TDC] were ineffective by failing to move to suppress derivative evidence of an unlawful apprehension."[7] Indeed, *Brown* only arose in the assignment of error in which Appellant alleged that counsel were deficient for failing to file a proper motion based on the illegal apprehension.

The Government compares this case to *United States v. Simpson*[8] and *United States v. Bodoh*.[9] But both cases are distinguishable.

In *Simpson*, the appellant briefed an issue he had raised in his supplement

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[5] *Id*. at 28-29.
[6] *Id*. at 2.
[7] *United States v. Metz*, No. 201900089, 2020 CCA LEXIS 334, at *1-2 (N-M. Ct. Crim. App. Sept. 23, 2020).
[8] *Id*. (citing 81 M.J. 33, 37 (C.A.A.F. 2021)).
[9] *Id*. (citing 78 M.J. 231, 233 n.1 (C.A.A.F. 2019)).

but which this Court "did not grant."[10] Thus, unsurprisingly, this Court declined to consider the issue, explaining: "we did not grant review of the issue."[11]

Similarly, in *Bodoh*, the appellant briefed an issue that had no relation to the granted issue. Though this Court granted review on whether the military judge erred by allowing trial counsel to discuss the Army sexual harassment policy,[12] the appellant also chose to complain about unrelated arguments trial counsel made.[13]

A review of other cases in which this Court has deemed an argument outside the scope of the granted issue shows that this Court has so concluded where the appellant advanced arguments on issues not tied to the granted issue.[14]

In short, unlike the cases in which the appellants raised issues this Court did

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[10] *See* Ans. on Behalf of Appellee, *United States v. Simpson* (Oct. 16, 2020) at 20 n.4, https://www.armfor.uscourts.gov/newcaaf/briefs/2020Term/Simpson200268AppelleeBrief.pdf.

[11] *Simpson*, 81 M.J. at 37.

[12] 78 M.J. at 233.

[13] *See* Final Br. on Behalf of Appellant, *United States v. Bodoh*, (Sept. 16, 2018) at 22, https://www.armfor.uscourts.gov/newcaaf/briefs/2018Term/Bodoh180201AppellantBrief.pdf.

[14] *See, e.g.*, *United States v. King*, 78 M.J. 218, 219 (C.A.A.F. 2019) (declining to consider legal sufficiency of *attempt* convictions where granted issue was limited only to *completed* offenses); *United States v. Furth*, No. 20-0289, 2021 CAAF LEXIS 395, at *2, n.6 (C.A.A.F. Apr. 26, 2021) (declining to consider if counsel were deficient for failing to move for a continuance where granted issue concerned only whether counsel were deficient for telling appellant he would not be prosecuted if his resignation were accepted).

not grant or were unrelated to the granted issue, here, ineffective assistance is interwoven with the granted issue.[15]

B. Unlike in *United States v. Melson*, there is no need to remand for factfinding to determine whether civilian defense counsel was deficient since (1) counsel explained his actions on the record; and (2) like in *United States v. Holt*, this Court can conclude there is no reasonable explanation for counsel's inaction without looking to any declaration or affidavit.

The Government cites *United States v. Melson* in asserting that even if this Court finds the presumption of competence overcome based on counsel's failure to file a motion to suppress due to the illegal apprehension, "Civilian Defense Counsel must be given an opportunity to rebut the alleged deficiency."[16] The Government seizes upon language from *Melson* in which this Court explained that if the presumption of competence is overcome, "the appellate court then must compel the defense counsel to explain his actions."[17]

But *Melson* involved a problem not present in this case. In *Melson*, the appellant's allegation of deficient performance was supported only by claims in his

[15] This Court should also decline the Government's invitation to remand the case with instructions to apply the proper standard as it did in *United States v. Spurling*, 74 M.J. 261 (C.A.A.F. 2015). *See* Ans. at 12-13. In *Spurling*, this Court decided the case based on the appellant's supplement alone. But here, this Court ordered briefing. Similarly, in other cases the Government cites, the issue at hand dealt with matters only a CCA can resolve. *See, e.g.*, Ans. at 12 (citing *United States v. Baier*, 60 M.J. 382, 382-83 (C.A.A.F. 2005) (remanding for proper sentence appropriateness review under Article 66(c), UCMJ)).

[16] Ans. at 14 (citing 66 M.J. 346, 347, 351 (C.A.A.F. 2008)).

[17] *Melson*, 66 M.J. at 350.

post-trial declaration.[18] The issue was whether counsel was deficient for failing to seek relief for illegal pretrial confinement conditions—for which there was no evidence in the record.[19] As a result, this Court found that it was error for the lower court to credit Melson's assertions without giving defense counsel an opportunity to rebut them.[20]

This case is different. Unlike in *Melson*, the factual matters necessary to resolve the issue are already in the record. And while Appellant submitted a post-trial declaration, it largely repeats factual matters already in the record.[21] In fact, unlike in *Melson*, this Court can bypass Appellant's declaration entirely and still conclude that counsel was constitutionally deficient.

To illustrate, during the suppression hearing, Agent Perry admitted that he kept Appellant handcuffed knowing that he did not have probable cause.[22]

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[18] *Id*. at 348.
[19] *Id*. ("In response, the Government argued that there was nothing in the record to substantiate Melson's allegations.").
[20] *Id*. at 347 ("Here, while the lower court found that the presumption of competence was overcome, it did not subsequently provide the Government an opportunity to submit a statement or affidavit from Melson's defense counsel to rebut the allegations.").
[21] *See generally* J.A. 726-31. And the Government does not dispute any of the facts in the declaration that are *not* already in the record. To the contrary, it borrows some of them. *See, e.g.,* Ans. at 31-32 (relying on Appellant's assertion that he returned to his barracks room after his interrogation).
[22] J.A. 119 ("I definitely had some indicators that I was moving down the right direction, but as far as having enough to justify probable cause that Corporal Metz was indeed my arsonist in this case, no, I wasn't there yet.").

Following this testimony, the parties presented their positions on whether the evidence should be suppressed—and under which theory.[23]

Since the defense filed its motion to suppress under a theory that the evidence should be suppressed because the agents failed to advise Appellant of his Article 31(b), UCMJ, rights when they first entered his room, trial counsel responded to this argument first.

But tellingly, trial counsel also signaled there were other theories of suppression. Trial counsel told the military judge there were "several different, sort of, *Fourth Amendment* issues regarding the fact pattern" and asked whether the military judge wanted him to brief them.[24] In response, the military judge told trial counsel he only wanted counsel to respond to "the issues at bar" on the motion.[25]

When it became the defense's turn to argue, civilian defense counsel said nothing about an illegal apprehension.

At the end of the defense argument, the military judge stated: "So I do have a question."[26] He then asked defense counsel what his "theory" was for why "the

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[23] J.A. 132-47.
[24] J.A. 136 (emphasis added).
[25] J.A. 136 ("No. I think you've been [sic] sufficiently and thoroughly responded to the issues at bar, as I understand it, but you'll have an opportunity, as the one who holds the burden, to respond to the defense argument.").
[26] J.A. 142.

items that were seized during the search of the room" should be suppressed.[27] In response, counsel explained his theory was that the evidence was the fruit of the poisonous tree of the agent's failure to advise Appellant of his Article 31(b) rights earlier.[28] Again, he did not mention an illegal apprehension.

In short, this case does not present the "unfairness" problem of resolving a post-trial claim based on affidavits or declarations.[29] To the contrary, the military judge gave defense counsel an opportunity to explain his actions on the record, but counsel failed to argue the appropriate theory. Further, it is unclear what an affidavit would even clarify since there would seem to be only two explanations for counsel's inaction: (1) either he did not identify the issue, or (2) he mistakenly believed the evidence was not the fruit of an illegal apprehension. Either one constitutes constitutionally deficient performance.

In this way, this case is similar to *United States v. Holt*.[30] There, the Court of Military Appeals noted that it had "attempted to fathom some explanation" for civilian counsel's virtual failure to do anything during the sentencing phase of the

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[27] J.A. 142.
[28] J.A. 143 ("So when – so the [first consent search] comes about, essentially, connected to the agent smelling the shoes, and the smelling of the shoes occurs only as a result of the accused's willingness to speak.").
[29] *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997) (explaining that "[l]ong ago, Chief Judge Quinn commented on the problem of post-trial factual disputes and the unfairness of resolving them on the basis of post-trial affidavits").
[30] 33 M.J. 400 (C.M.A. 1991).

court-martial but was "unable to ascertain any logical reason for" counsel's inaction.[31] Thus, it found counsel ineffective—without asking for an affidavit.[32]

The same rationale should apply here. The same evidence counsel relied on to advance his motion to suppress based on counsel's unsuccessful Article 31(b) violation would have also supported a motion to suppress based on an illegal apprehension. Thus, like in *Holt*, since there cannot be a reasonable explanation for counsel's inaction, it should resolve the issue in Appellant's favor.

1. To the extent *Melson* prevents this Court from deciding an ineffective assistance claim in an appellant's favor simply because trial defense counsel has not been given an opportunity to rebut it, this Court should overrule it for the reasons Chief Judge Stucky explained in his dissenting opinion.

Finally, to the extent *Melson*—a 3-2 decision—prevents this Court from resolving Appellant's claim until civilian defense counsel has been given an opportunity to rebut the allegations, this Court should overrule it.

As now-Chief Judge Stucky explained in his dissent in *Melson*, the majority misread this Court's precedents in concluding the lower court erred by not giving the Government an opportunity to submit a sworn statement from counsel.[33]

As Chief Judge Stucky wrote, this Court had never before excused the

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[31] *Id*. at 412.
[32] *Id*.
[33] *Melson*, 66 M.J. at 353 (Stucky, J., dissenting).

Government's failure to request an affidavit from trial defense counsel when it had the opportunity to do so.[34] Rather, this Court's decisions stood for the more "subtle proposition" that the Government may seek an order from an appellate court "[i]f a defense counsel declines to submit an affidavit to the appellate government counsel who is trying to rebut an ineffective assistance of counsel claim[.]"[35]

Citing *United States v. Lewis*,[36] Chief Judge Stucky explained that this rule was not meant to give the Government a second bite at the apple. Rather, the rationale for waiting until it is necessary before having an appellate court order an affidavit from a trial defense counsel who is unwilling to provide one was "imposed because of our reluctance to intrude on the attorney-client relationship when it is unnecessary to resolve the case."[37]

Thus, in *Melson*, Chief Judge Stucky criticized the majority for giving the Government "a windfall for not timely seeking and moving the admission of the affidavit."[38] As he explained, the majority's decision "places on the Courts of Criminal Appeals the burden of gathering evidence that rightly belongs on the

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[34] *Id*. ("The Government had the opportunity to request an affidavit from the trial defense counsel without benefit of a court order – as it frequently does, and eventually did in this case – but it chose not to do so, or at least move its admission, until the Air Force Court ruled against it.").
[35] *Id*.
[36] 42 M.J. 1 (C.A.A.F. 1995).
[37] *Id*. (citing *Lewis*, 42 M.J. at 6).
[38] *Id*.

Government, and rewards Government negligence."[39]

Here, this Court should adopt Chief Judge Stucky's reasoning. For one, as stated above, it is unclear how an affidavit would even be useful. Regardless, because there is no indication the Government requested one—even after Appellant raised his allegation of ineffective assistance of counsel before the lower court—this Court should not treat the Government's failure to do so as a reason to delay the resolution of this claim.

C. The Government's claim that Agent Perry kept Appellant handcuffed for "officer safety" reasons is refuted by the record: Agent Perry asked a handcuffed Appellant to "discuss things" back at his room.

The Government concedes Agent Perry illegally apprehended Appellant but claims—six times—that Agent Perry was doing so for "officer safety" reasons.[40] It claims that he was not trying to gain an "'investigatory advantage'" by illegally apprehending Appellant.[41]

The evidence shows otherwise. As the lower court noted, Agent Perry kept Appellant handcuffed even after he "had determined there was no threat."[42] Indeed, he approached Appellant, handcuffed him, and kept him handcuffed while asking Appellant whether "he would be able willing [sic] to go up and discuss things

[39] *Id*.
[40] Ans. at 18, 22, 25, 28, 31.
[41] *Id*. at 22.
[42] *Metz*, 2020 CCA LEXIS 334, at *37.

with" the agents in his room.[43] Agent Thompson was waiting there with a consent search form.[44] This occurred only moments after Agent Perry "was a little bit more concerned that [the agents] were zeroing in, potentially, on some information pertinent to our investigation."[45]

This was no "officer safety" arrest. Rather, it was the type of illegal apprehension "designed to achieve an investigatory advantage [Agent Perry] would not have otherwise achieved."[46]

D. The Government's focus on the fact that Appellant consented to the search and agreed to be interrogated sidesteps important facts.

The Government claims there were "significant intervening circumstances" between the illegal apprehension and the searches and interrogation.[47] It points to Appellant's initialing and signing the rights waiver form before the agents searched his room.[48] It also claims that Appellant later indicated that he understood his *Miranda* rights and agreed to be interrogated.[49]

But Appellant initialed the search form only immediately after he was

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[43] J.A. 118.
[44] J.A. 118.
[45] J.A. 90.
[46] *United States v. Khamsouk*, 57 M.J. 282, 293 (C.A.A.F. 2002).
[47] Ans. at 26.
[48] *Id*. at 24.
[49] *Id*. at 26.

released from handcuffs.[50] In fact, the Government admits that "it is unclear" whether Appellant had even been released from handcuffs when the agents asked him verbally whether they could search his room.[51] Additionally, though Appellant waived his *Miranda* rights, this occurred after he was taken in handcuffs to the police station and right after the search.[52]

Likewise, though Appellant agreed to be interrogated right after being taken in handcuffs to the station following the search, he did so after Agent Thompson told him that the evidence the agents seized in his room raised their "suspicion" toward him.[53] Thus, the Government's claim that Appellant made incriminating statements at his interrogation even before being confronted with the incriminating evidence seized in his room is unsupported.[54]

The agents' actions were similar to what occurred in *United States v. Ceballos*, where agents illegally arrested the appellant by telling him to come in

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[50] J.A. 223 ("We advised him of our desire to search and the execution of that written search, which is a very short time after coming back up to the room on the second contact.").
[51] Ans. at 10.
[52] J.A. 228 (explaining that the agents took Appellant to be interrogated "shortly after" the search of his room was completed).
[53] J.A. 71 ("After we seized some of the clothing, you know, I informed him that we had suspicion within the clothing that we had found, that he may have more to do with the investigation. I told him that we'd like to talk to him, and in order to do so, we had to take him down to our office.").
[54] Ans. at 28.

their car; obtained his consent moments later to search an area leading to the discovery of incriminating evidence; and then took him to their field office for "prolonged interrogation" during which they talked about the evidence they found, leading to a confession.[55] Relying on Supreme Court precedent, the Second Circuit concluded that "the consents to search and the statements given were too closely connected in context and time to the illegal arrest to break the chain of illegality."[56]

E. Even factoring in Appellant's consent to the searches and interrogation, it is the third *Brown* factor—the flagrancy of the arrest—that is most controlling. Here, this factor weighs heavily in favor of suppression.

Regardless, the Government's focus on rights waivers and the brief amount of time between the search and interrogation overlooks that it is the *flagrancy of the arrest* that is most controlling. As the Supreme Court explained in *Dunaway v. New York*, the third *Brown* factor is concerned with whether the illegal apprehension "had a 'quality of purposefulness' in that it was an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.'"[57]

Indeed, in *United States v. Darnall*, this Court found that an appellant's voluntary statements made during an interrogation a *day* after an illegal apprehension still warranted suppression even where the arrest was merely "sloppy

[55] 812 F.2d 42, 45, 50 (2d Cir. 1987).
[56] *Id*. (citation omitted).
[57] 442 U.S. 200, 216 (1979) (quoting *Brown*, 422 U.S. at 605).

and apathetic."[58]

Only here, Agent Perry's arrest was not merely sloppy; it was purposeful and investigatory. He admitted he did not have probable cause to apprehend Appellant.[59] Yet he kept Appellant in handcuffs and escorted him to the room where he had just detected an odor of fuel on shoes.[60] He admitted that he asked Appellant whether he would be willing to "discuss things" up at his room as he held Appellant in handcuffs.[61]

The Government cites cases in which courts held that momentary illegal seizures did not justify suppression of derivative physical evidence.[62] But unlike here, in these cases, there was no quality of purposefulness or investigatory design behind the Fourth Amendment violations.[63] In other words, suppressing the

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[58] 76 M.J. 326, 328-29, 331-32 (C.A.A.F. 2017).
[59] J.A. 119 ("I definitely had some indicators that I was moving down the right direction, but as far as having enough to justify probable cause that Corporal Metz was indeed my arsonist in this case, no, I wasn't there yet.").
[60] J.A. 92.
[61] J.A. 118.
[62] Ans. at 25-26.
[63] *Id*. (citing *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980) (finding no flagrant misconduct following brief detention where it was "open question" whether police activity was even unlawful); *United States v. Whisenton*, 765 F.3d 938, 943 (8th Cir. 2014) (finding no flagrant misconduct after noting "at no time was [Whisenton] handcuffed, and the credible evidence reveals the interaction was cooperative and calm"); *United States v. Smith*, 919 F.3d 1, 11-12 (1st Cir. 2019) (observing that accused was not handcuffed and finding no flagrant misconduct since "agents were professional and polite" and "did not enter Smith's home" until he consented); *United States v. Greer*, 607 F.3d 559, 564 (8th Cir. 2010) (finding

evidence would not achieve the Fourth Amendment's goal of deterring unlawful police conduct.[64]

Here, by contrast, Agent Perry's conduct was of the sort that will result in appreciable deterrence as this Court explained in *Darnall*:

> Were we to determine that the exclusionary rule did not apply under such circumstances, excusing [the investigator's] actions because they were not sufficiently flagrant or purposeful, we 'might well be encouraging unlawful conduct rather than deterring it.'[65]

F. The inevitable discovery exception does not apply to the physical evidence because Agent Perry admitted he lacked probable cause to get a search authorization, and Appellant only consented to a search of his room after being diverted there in handcuffs.

The Government asks this Court to apply the inevitable discovery exception to the physical evidence.[66] It claims that at the time of the illegal apprehension, the agents were pursuing leads that would have "inevitably led to the evidence" in Appellant's room.[67] The Government offers little beyond "'speculation and

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no flagrant misconduct where officers entered home to apprehend "a fugitive in the residence" and their purpose was not to investigate accused, who was not handcuffed before granting consent to search)).

[64] *Khamsouk*, 57 M.J. at 291 ("The Supreme Court has identified this third [*Brown*] factor as 'particularly' important presumably because it comes closest to satisfying the deterrence rationale for applying the exclusionary rule.").

[65] 76 M.J. at 332 (citing *United States v. Conklin*, 63 M.J. 333, 340 (C.A.A.F. 2006)).

[66] Ans. at 37.

[67] *Id*.

conjecture'" for this claim.[68]

This Court has typically found inevitable discovery where "the imminent and inevitable lawful discovery of the evidence has been so closely tied to the ongoing investigation its occurrence has been *practically certain*."[69] In fact, in *United States v. Mitchell*, this Court went as far as to say that the exception did not apply where the Government offered "no guarantee" an assumed alternative search method would have been successful.[70]

This degree of near certainty required to apply the inevitable discovery exception in military courts is demonstrated by *United States v. Kozak*.[71] There, the appellant's commander told the agents to apprehend the appellant if he tried to open the locker.[72] Instead of waiting for the appellant to open the locker, the agents searched the locker first and found drugs within it.[73] Later, the agents witnessed the appellant open the locker and pound his fist in frustration when he learned most of

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[68] *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (explaining that "'[m]ere speculation and conjecture' as to the inevitable discovery of the evidence is not sufficient when applying this exception") (citation omitted).
[69] *United States v. Eppes*, 77 M.J. 339, 346 n.7 (C.A.A.F. 2018) (emphasis added).
[70] 76 M.J. 413, 420 (C.A.A.F. 2017) ("But the record discloses no *guarantee* that this procedure would have succeeded, and the Government therefore cannot demonstrate inevitability.") (emphasis added).
[71] 12 M.J. 389 (C.M.A. 1982).
[72] *Id*. at 390.
[73] *Id*.

the drugs were gone.[74] At that point, the agents apprehended him.[75]

The Court of Military Appeals applied the inevitable discovery doctrine to the agent's seizure of the drugs.[76] It reasoned that there was "no doubt" the appellant would have been arrested when he tried to open the locker.[77] It further reasoned that the agents would have been able to lawfully search the appellant's locker upon his apprehension since this was in the "immediate area" of the arrest.[78]

On the other hand, in *Darnall*, this Court found the exception inapplicable even where at the time of the illegal apprehension, the agents had information that someone sent a package containing drugs with the appellant's name to an address near a military base where the appellant was stationed.[79] This Court explained that while "there was further evidence against Appellant that may have arisen in the course of the investigation" apart from his suppressed statements, it was "not convinced" the agents "were actively pursuing this evidence."[80] In fact, an agent testified the investigation would have likely "sunk" had the appellant not admitted he was the intended recipient of the package during his interrogation.[81]

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[74] *Id*.
[75] *Id*.
[76] *Id*. at 393-94.
[77] *Id*. at 393.
[78] *Id*.
[79] 76 M.J. at 329-30.
[80] *Id*. at 332-33.
[81] *Id*. at 333.

Here, the situation is more closely analogous to *Darnall* than *Kozak*. Unlike in *Kozak*, at the time of his illegal apprehension, Appellant was not doing anything that would have led the agents to his room. In fact, what prompted Agent Perry to seek out Appellant is that he had *left* his room: Agent Perry literally had to bring Appellant back in handcuffs before getting his consent.

This explains why the Government's reliance on the Eleventh Circuit case of *United States v. Watkins* is inapposite.[82] There, unlike here, the appellant happened to be at her house to allow a search even after the illegality occurred.[83]

Additionally, unlike in *Kozak*, there is no reason to believe the agents would have been able to access Appellant's room without the illegal apprehension. Agent Perry admitted he did not have the evidence to lawfully apprehend Appellant or obtain a search authorization.[84]

Finally, there was "no other parallel chain of evidence"[85] apart from Appellant's grant of consent. The Government claims the agents would have eventually learned the keycard reader showed Appellant entered the room shortly

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[82] *See* Ans. at 36 (citing 981 F.3d 1224, 1228-29, 1236 (11th Cir. 2020)).
[83] *Watkins*, 981 F.3d. at 1235.
[84] J.A. 119 ("I definitely had some indicators that I was moving down the right direction, but as far as having enough to justify probable cause that Corporal Metz was indeed my arsonist in this case, no, I wasn't there yet.").
[85] *United States v. Gilbreath*, 74 M.J. 11, 23 (C.A.A.F. 2014).

after the fires began.[86] The Government claims this would have refuted Appellant's alibi that he was doing laundry around midnight and then went to bed.[87] It further claims this would have given the agents authority to search Appellant's room.[88]

This speculative argument also confuses the facts. Appellant did not provide an alibi until *after* the agents searched his room and seized items from it. It was not until Appellant's interrogation, which occurred over an hour after the search, that he claimed he was doing laundry in his room until around 0100.[89] It was in response to this claim *during the interrogation* that an agent told Appellant that he was going to check the keycard reader.[90] The agent stated: "Probably the last [entry] is not going to be at [0025] when you came back with your laundry, right?"[91] Indeed, at trial, the agent explained that he did not examine the keycard reader until the next day.[92] NCIS notes show the same thing.[93]

Additionally, the Government's claim that all of the other key holders "had

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[86] Ans. at 38.
[87] *Id*.
[88] *Id*.
[89] J.A. 674 at 7:22:50-7:23:02.
[90] J.A. 674 at 8:38:35.
[91] J.A. 674 at 8:40:00.
[92] J.A. 455 (explaining that on "Monday" he drove to Appellant's barracks and asked a barracks worker in "obtaining the information off the key card reader on [Appellant's] door").
[93] App. Ex. III at 4 (detailing chronological order of investigative steps and noting that the agents did not check the keycard reader until the day after the interrogation, or "21May18").

verifiable alibis"[94] incorrectly presumes there was a definitive list of people with keys. Agent Perry testified he was unable to obtain "a definitive list" of people with keys.[95] He also acknowledged that a Marine working in the shop told NCIS that some Marines made personal copies of the keys.[96]

In short, even granting the Government's claim that NCIS had begun to "focus" on Appellant[97] by the time of the illegal apprehension, it is still a guessing game as to whether they would have found the evidence in his room. At the very least, it is not "practically certain" that NCIS would have discovered the evidence had Agent Perry not diverted Appellant to his room in handcuffs.

G. Appellant's statements would not have been discovered inevitably: the agents questioned him because of what they found in his room, and there is no reason to believe he would have been interrogated otherwise.

The Government also argues Appellant's statements would have been discovered inevitably.[98] It claims he "had already expressed a willingness" to talk to the agents and deny his involvement.[99] It also claims: "By the time the illegality occurred, [the agents'] suspicion of him had been "raise[d]," and they had a

[94] Ans. at 38.
[95] J.A. 202.
[96] J.A. 331.
[97] Ans. at 40.
[98] *Id*. at 38.
[99] *Id*. at 38.

"hunch" he was involved" with the crime.[100] These arguments apply a mistaken view of the inevitable discovery exception as applied to statements.

As the Court of Military Appeals has explained, the Government must prove not only that law enforcement would have "focus[ed] on" the appellant.[101] As the Court explained, "[u]nlike real or documentary evidence, live-witness testimony is the product of 'will, perception, memory, and volition.'"[102] As a result, the Government must prove that "the witness' 'independent act of free will' broke the chain of causation and caused the witness to testify."[103]

In *United States v. Kaliski*, the Court of Military Appeals found the exception inapplicable where it concluded it was "unlikely" the police would have interviewed the witness had law enforcement not first illegally searched the appellant's home and seen the witness engaged in illicit sexual behavior with the appellant.[104] The Court also noted that the witness did not appear for questioning voluntarily but rather was "summoned to the police station" and "confronted" with

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[100] *Id*. at 39.
[101] *United States v. Campbell*, 41 M.J. 177, 185 (C.M.A. 1994) (concluding that the military judge erred in applying the inevitable discovery exception to the appellant's statements after the military judge determined that statements of another servicemember "would have inevitably lead [sic] the Government to focus on [the appellant] in a criminal investigation").
[102] *United States v. Kaliski*, 37 M.J. 105, 109 (C.M.A. 1993) (citation omitted).
[103] *Id*.
[104] *Id*.

evidence of her impropriety with the appellant.[105]

Similarly, in *United States v. Campbell*, the Court of Military Appeals found inevitable discovery inapplicable to statements even where the appellant waived his rights beforehand.[106] The Court noted the appellant made the statements the same day he was informed of his positive urinalysis later deemed improperly administered.[107] It also noted that the agent who questioned the appellant stated that he questioned him based solely on the positive urinalysis result.[108] The Court rejected the Government's argument that the agents would have questioned the appellant regardless simply because another servicemember implicated the appellant in illegal drug use in a separate interview.[109] The Court noted that the agent who questioned the appellant stated he was unaware of these allegations.[110]

This case is similar to *Kaliski* and *Campbell* in that the agents questioned Appellant in response to incriminating evidence they discovered, and there is no indication Appellant would have made the statements otherwise. As Agent Thompson testified, it was only after the search that she told Appellant they "had

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[105] *Id*.
[106] *Campbell*, 41 M.J. at 185-86.
[107] *Id*. at 184.
[108] *Id*. at 184-85 ("In the stipulation of expected testimony, then-Investigator Broker states . . . 'I interviewed him solely because he was reported to have come up positive in an urinalysis.'").
[109] *Id*. at 185.
[110] *Id*. at 184-85.

to take him down to our office" due to their "suspicion" he had "more to do with the investigation" based on what they found in his room.[111] And like the witness in *Kaliski*, Appellant did not go to his interrogation voluntarily. Rather, the agents put him in handcuffs and drove him to the station.[112]

As *Campbell* instructs, that Appellant agreed to be interrogated and that the agents had begun to focus on Appellant beforehand is not dispositive.[113] The relevant question is whether this Court can be convinced by a preponderance of the evidence that in agreeing to be interrogated, Appellant exercised an "'independent act of free will'" that "broke the chain of causation" of the events set in motion by the illegal apprehension.[114]

Because the Government has failed to satisfy its burden, the inevitable discovery exception is inapplicable to Appellant's interrogation statements.

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[111] J.A. 71 ("After we seized some of the clothing, you know, I informed him that we had suspicion within the clothing that we had found, that he may have more to do with the investigation. I told him that we'd like to talk to him, and in order to do so, *we had to take him down to our office*.") (emphasis added).
[112] J.A. 71.
[113] 41 M.J. at 185.
[114] 37 M.J. at 109 (citation omitted).

Conclusion

This Court should set aside the findings and sentence.

Respectfully submitted,

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