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(f rev)

USCA Dkt. No. 23-0165/MC

Colin W. Hotard
Captain, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St., SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7291
colin.hotard1@navy.mil
USCAAF Bar Number: 37736

INDEX OF BRIEF

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

ARGUMENT

I.

The Military Judge erred by denying the Defense motion to suppress Appellant's unwarned statements and all derivative evidence. The error was not harmless beyond a reasonable doubt.

A. The Military Judge failed to consider relevant facts in concluding Appellant was not a suspect.

Appellant challenges the Military Judge's ultimate conclusion that Appellant was not a suspect when the agents first questioned him as well as the Military Judge's findings in reaching that conclusion. In his ruling, the Military Judge only found two facts relevant to the analysis. He found that SSgt Stewart told Agent Perry that Appellant was a "problem child" and that he had recently been disciplined.[1] But the findings overlooked other facts showing Appellant was in fact a suspect.

First, not only was Appellant a problem child, but he held a "bad grudge" against the shop.[2] Agent Perry wrote exactly that in his investigation notes.[3] This fact distinguishes the holding in *United States v. Davis*, where agents were aware that Davis had similar disciplinary issues, but those issues were not related to a

---

[1] J.A. at 686.
[2] J.A. at 70.
[3] J.A. at 683.

motive to commit the crime being investigated.[4] The agents knew Davis had threatened to shoot a police officer.[5] But the investigation did not involve the murder of a police officer and, as the agent testified, he "was not looking at a victim of a shooting."[6] There was no nexus between the known motive and the crime committed. But here there was. Agent Perry knew Appellant had a bad grudge against the shop and the shop was set on fire. The Military Judge failed to consider this fact.

Second, not only did SSgt Stewart say Appellant was a problem child, but he also said he suspected Appellant of committing the arson.[7] Indisputably, Article 31(b) would have required SSgt Stewart to administer a rights advisement had he asked Appellant questions.[8] The agents cannot circumvent Article 31(b) by conducting the questioning then subsequently denying they held SSgt Stewart's suspicion.

Lastly, the Military Judge failed to consider—and the Government failed to address—the agents' erroneous view concerning when a rights advisement was

---

[4] *United States v. Davis*, 36 M.J. 337, 340 (C.M.A. 1993).
[5] *Id.* at 139.
[6] *Id.* at 138-39.
[7] J.A. at 62.
[8] *See United States v. Gilbreath*, No. 201200427, 2014 CAAF LEXIS 1206, at *20 (C.A.A.F. Dec. 18, 2014) (holding a sergeant who suspected an individual stole a firearm because he was the armory custodian at the time the firearm went missing was required to administer a rights advisement before questioning).

required. Although the agents repeatedly denied classifying Appellant as a suspect, that conclusion was based on whether they had *probable cause* to believe Appellant committed the arson. After being asked when Article 31(b) warnings are required, Agent Thompson responded, "When we suspect that we have probable cause to believe that he committed the crime."[9]

Additionally, Agent Perry's initial arrest of Appellant (under the guise of a *Terry* stop) further shows the agent's willful disregard or ignorance of the appropriate investigative standards. He claimed that he was *not* suspicious that Appellant committed the arson even though (1) he believed a Marine assigned to the shop was the arsonist; (2) he knew Appellant was one of only a few Marines who had keys to the shop; and (3) he knew Appellant had a grudge against the shop, that Appellant was a problem child, that he was recently disciplined, and that if anyone would be the arsonist it would be Appellant.[10] Yet at the same time, Agent Perry claimed he was suspicious that Appellant was armed simply because Appellant was slow to remove his hands from his pockets.[11]

The Government cannot have it both ways; it cannot credibly argue Appellant was not a suspect while also arguing Agent Perry was justified to stop-and-frisk

---

[9] J.A. at 82. Agent Thompson also distinguished "suspicion" from "suspect." J.A. at 86. The appropriate standard is a reasonable suspicion that a person committed an offense. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000).
[10] J.A. at 70, 667.
[11] J.A. at 100.

Appellant.[12] If Agent Perry held a reasonable suspicion that Appellant was armed because he was slow to remove his hands from his pockets then Agent Perry also held a reasonable suspicion that Appellant was the arsonist.

Agent Thompson was just as oblivious regarding the appropriate standards. She testified that Appellant was still not a suspect when he was handcuffed and brought back to his room for the search.[13] So even after discovering evidence that gave Appellant a motive to commit the arson, knowing Appellant had an opportunity to commit the arson, and now knowing that Appellant had recently laundered his shoes that smelled like gasoline, Agent Thompson still did not believe Appellant was entitled to a rights advisement. This testimony is incredible.

Furthering the violation, and contrary to the Government's argument, the agents questioned Appellant after he was handcuffed and brought to his room.[14] Agent Thompson admitted it was at this point that Appellant was asked about his keys to the shop.[15] And the interrogation reveals that further questioning occurred during the ride to the NCIS station.[16] This questioning violated Article 31(b).

---

[12] *Compare* Government's Answer at 17-19 *with* Government's Answer at 31-32.
[13] J.A. at 65.
[14] Government's Answer at 35-36 ("The agents did not ask questions, but only asked Appellant for consent to search his room"); Government's Answer at 37 ("[Agent Perry] only asked further questions after warning Appellant of his Article 31(b) rights.").
[15] J.A. at 89.
[16] *See, e.g.*, J.A. at 597 at 7:46:10 ("That's not what you said *in the car*. *In the car*, you said you hated [the Marine Corps] and can't wait to be out of the Marines.")

Appellant's position is that he was entitled to an advisement from the get-go. But even assuming arguendo that Appellant was not a suspect when the agents first arrived at his barracks room, at some point during that interaction he became a suspect entitled to an advisement. Because he was not provided one, the agents violated Article 31(b), and the Military Judge erred in concluding otherwise.

B. The prejudice analysis encompasses the evidence derived from Appellant's involuntary statements.

Appellant agrees with the Government that the initial Article 31(b) violation is a non-constitutional violation.[17] But few of Appellant's unadvised statements were admitted into evidence.[18] Instead, the prejudice to Appellant comes from the evidence derived from the Article 31(b) violation: the physical evidence and the incriminating statements encompassed within the admitted interrogation video.[19]

1. The physical evidence was derived from an unadvised statement.

The Government argues that Agent Perry's question to search Appellant's shoes was not in violation of Article 31(b) because it was a request to search.[20] But

(emphasis added); J.A. at 597 at 8:15:20 ("*In the car*, you said the Marines, kind of, took away everything you liked.") (emphasis added).

[17] Government's Answer at 24.

[18] J.A. at 200-01 (providing that Agent Perry testified that Appellant said he was unaware of the incident and that Appellant said he lost his keys to facility).

[19] *See* Mil. R. Evid. 304(b).

[20] Government's Answer at 23.

this argument fails to address that Agent Perry's preceding question to ascertain ownership of the shoes was itself an Article 31(b) violation.[21]

In *United States v. Byers*, the Court of Military Appeals (CMA) wrote that Article 31(b) is construed "broadly."[22] The Court clarified that "a single question may constitute interrogation or a request for a statement" and that a "statement may include identification of clothing."[23]

In *United States v. Taylor*, investigators received a tip that a soldier possessed marijuana.[24] When the investigators went to the soldier's room, they noticed clothing articles belonging to various soldiers hanging on pegs.[25] The investigators then asked Taylor "to point out the clothing items which were his property."[26]

This CMA rejected the argument that the investigator's question was simply a "generalized question[]."[27] The Court wrote that the broad sweep of Article 31(b) "goes well beyond the provision that an accused or suspect may be required to answer only those questions which do not tend to incriminate him."[28] Rather, the Court wrote, "it may not be demanded that he make *any* statement regarding the

---

[21] J.A. at 73.
[22] *United States v. Byers*, 26 M.J. 132, 134 (C.M.A. 1988).
[23] *Id*. (citing *United States v. Taylor*, 5 U.S.C.M.A. 178 (1954)).
[24] *Taylor*, 5 U.S.C.M.A. at 180.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id*. at 181.

offense of which he is accused or suspected . . . ."[29] The CMA agreed that a question—even seemingly innocent—relates to an offense where a truthful response "might have incriminated" the soldier.[30]

Here, Agent Perry's question about the shoes was similar to that in *Taylor*. Seeing the shoes on towel hooks while investigating the arson "caused [Agent Perry] to believe the shoes had been placed there to dry subsequent to being laundered."[31] Only then did he ask Appellant: "Hey, are those Nikes?"[32] And, like the agent's question to the accused in *Taylor*, the lower court found Agent Perry's question was designed to learn if Appellant owned the shoes.[33]

In short, if the shoes turned out to have evidentiary value, Appellant's answer signifying he owned them would implicate him. As this Court recognized in *Taylor*, those who enacted Article 31(b) recognized that "[t]he best criminal investigator will take the *least little thing* and sometimes develop something from it."[34]

---

[29] *Taylor*, 5 U.S.C.M.A. at 181 (emphasis in original) (citation and internal quotations omitted).
[30] *Id*. (citation omitted).
[31] J.A. at 606.
[32] J.A. at 73.
[33] J.A. at 19 (stating that Agent Perry's question "was properly structured to establish that Appellant was someone who was authorized to grant consent" to search the shoes).
[34] *Taylor*, 5 U.S.C.M.A. at 182 (citation and internal quotations omitted) (emphasis added).

So too with Agent Perry's question. Although it may have seemed like a "little thing," it was a question regarding the arson. All evidence derived from Appellant's response should have been suppressed.[35]

2. The agents obtained Appellant's statements during the interrogation by using the unadvised statements.

Following an Article 31(b) violation, "the totality of the circumstances" determines whether follow-on statements preceded by a proper rights advisement are admissible.[36] To this end, the Government must show that "the improper influences of the preceding interrogation had ceased to operate on the mind of the accused."[37]

This the Government cannot do. In *United States v. Cuento*, this Court considered a host of factors in determining whether a statement, given after an unadvised statement, was voluntary.[38] Those factors included whether (1) the interrogator administered a cleansing warning, (2) the interrogator referenced the involuntary statement, (3) the suspect voluntarily went to the interrogation, (4) the

---

[35] MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 304(b) (2016).
[36] *United States v. Cuento*, 60 M.J. 106, 108-09 (C.A.A.F. 2004).
[37] *United States v. Ravenel*, 26 M.J. 344, 350 (C.M.A. 1988) (quoting Drafter's Analysis of the former Mil. R. Evid. 304(c)(3)).
[38] *Cuento*, 60 M.J. at 109.

suspect was in custody, and (5) there was time between the involuntary statement and the interrogation to reflect and consult with an attorney.[39]

Here, the same agents that committed the initial Article 31(b) violation conducted the interrogation without providing a cleansing warning (first *Cuento* factor). Agent Thompson continuously referred to Appellant's unadvised statements. She pressed him about these previous statements, highlighting inconsistencies (second *Cuento* factor).[40]

He had been twice handcuffed and driven to the NCIS station (third *Cuento* factor). By the time of the interrogation, Appellant had been in continuous custody for hours (fourth *Cuento* factor). Appellant, 21 years-old with less than four years of military experience, had yet to speak to an attorney—there was no break in the chain of events that would have allowed him to reflect and consult with an attorney (fifth *Cuento* factor).[41] He answered questions for nearly four hours as the NCIS agents pulled as many interrogation techniques "out of the box as [they] could."[42] The improper influence from the unadvised statement rendered the interrogation involuntary.

---

[39] *Id.* at 109-10.
[40] *See* Appellant's Br. at 31-32 for further discussion of the agents' reference to unadvised statements during the interrogation.
[41] J.A. at 597 at 7:06:35.
[42] J.A. at 287.

Lastly, the erroneously admitted interrogation was not harmless beyond a reasonable doubt. An involuntary statement custodial in nature is a constitutional violation, and the error must be proven to be harmless beyond a reasonable doubt.[43]

This burden the Government cannot shoulder. It heavily relied on Appellant's interrogation admissions.[44] The admissions permitted the false exculpatory instruction and for the members to infer his consciousness of guilt.[45] The Government zeroed in on Appellant's "deception" during the interrogation and argued it proved his guilt.[46] The error was not harmless beyond a reasonable doubt.[47]

Conclusion

At the time of the initial interaction, Appellant was a suspect and entitled to a rights advisement. Evidence subsequently derived from the unadvised statement was erroneously admitted. Appellant respectfully asks the findings and sentence be set aside.

---

[43] *See Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Evans*, 75 M.J. 302, 305-06 (C.A.A.F. 2016).
[44] *See generally* J.A. at 538-50.
[45] J.A. at 537.
[46] *See generally* J.A. at 538-50.
[47] *See* Appellant's Br. at 33-34 for further prejudice discussion.

II.

Counsel was ineffective for not moving to suppress evidence derived from an illegal arrest, and there was reasonable probability of a different outcome had counsel filed the motion.

A. Agent Perry's purpose for arresting Appellant was investigatory.

The Government agrees that the third factor in the *Brown* analysis is "particularly important" but then whitewashes Agent Perry's purpose for arresting Appellant.[48] Contrary to the Government's argument, Agent Perry's purpose was investigatory, hoping "that something might turn up."[49] The unlawful arrest was "designed to achieve an investigatory advantage [Agent Perry] would not have otherwise achieved."[50]

He handcuffed Appellant and kept him handcuffed while asking Appellant whether "he would be [willing] to go up and discuss things" with the agents.[51] Agent Thompson was waiting with a consent to search form.[52] This occurred only moments after Agent Perry determined he was "zeroing in, potentially, on some information pertinent to [the] investigation."[53] He brought Appellant to the room to seize that information.

---

[48] Government's Answer at 34.
[49] *Brown v. Illinois*, 422 U.S. 590, 605 (1975).
[50] *United States v. Khamsouk*, 57 M.J. 282, 293 (C.A.A.F. 2002).
[51] J.A. at 126.
[52] J.A. at 75.
[53] J.A. at 98.

1. Officer safety did not justify the constitutional violation.

First, Appellant maintains that the initial arrest was flagrant because Agent Perry detained him in a clearly unconstitutional manner.[54] Agent Perry, admittedly, lacked probable cause, and he lacked "specific and articulable facts" to justify a stop-and-frisk.[55] His hindsight, self-serving testimony that "officer safety" justified the arrest proves to be incredulous.

Agent Perry's attempt to hide the arrest further magnifies the skepticism of his hindsight justification. Although the record shows numerous NCIS reports of the investigation, all elude the fact that Appellant was arrested. Not one states that Appellant had his hands in his pockets, which caused Agent Perry to believe Appellant was armed and dangerous.[56] Not one claims the initial arrest was for officer safety. Instead, these claims were only formulated after Appellant challenged the admissibility of his statements.

Second, the Government conflates Agent Perry's claimed justification for the initial arrest with the justification for prolonging the arrest. The Government argues

---

[54] *See* Appellant's Br. at 40-43.

[55] *United States v. Terry*, 392 U.S. 1, 21 (1968).

[56] The Government states as fact that "Agent Thompson had to ask Appellant multiple times to remove his hands from his pockets before he complied." Government's Answer at 4, 10. This is inaccurate. Although Agent Perry claimed that Agent Thompson told Appellant to keep his hands out of his pockets "a couple times" (J.A. at 100), Agent Perry changed his testimony on cross-examination and testified that Agent Thompson told Appellant once to keep his hands out his pockets. J.A. at 125.

officer safety motivated the prolonged arrest.[57] But zero evidence in the record supports that argument. Instead, the record simply shows that Appellant was frisked *then* handcuffed and then brought back to his barracks room.[58] Even if the initial arrest was a lawful *Terry* stop conducted for officer safety, no evidence supports the Government's argument that Agent Perry's purpose for prolonging the arrest was his safety.

2. The attenuation analysis is distinct from a voluntariness analysis.

The Government argues the agents' demeanor demonstrates that they did not exploit the original illegality during the interrogation—that they did not pressure or threaten Appellant into waiving his rights.[59] But the argument is irrelevant to an attenuation analysis. As the Supreme Court stated, this type of argument "betrays a lingering confusion between voluntariness for purposes of the Fifth Amendment and the casual connection test established in *Brown*."[60]

[57] Government's Answer at 36.
[58] Although the Government states as fact that Appellant was handcuffed before he was frisked (Government's Answer at 4), this is not supported by the record. To the contrary, Appellant swears he was handcuffed *after* being frisked. J.A. at 709.
[59] Government's Answer at 42.
[60] *Dunaway v. New York*, 443 U.S. 200, 218-19 (1979).

3. The constitutional violations were not "extremely brief."[61]

The Government's repeated argument that the apprehension was "extremely brief" overlooks the sequence of events after Appellant was brought to his room.[62] He remained with the agents as they took turns searching his room.[63] After the agents completed the search, they again handcuffed Appellant and brought him to the NCIS station to be interrogated.[64] Only after the four-hour interrogation was Appellant released to a command representative.[65] The next day, the NCIS agents coordinated with Appellant's command to have him escorted back to the NCIS station.[66] Without authorization, NCIS agents seized his phone and smartwatch.[67]

Whether this sequence is considered a continuous unlawful seizure or multiple unlawful seizures, the Government's description of an extremely brief constitutional violation is unavailing.

---

[61] Government's Answer at 38-39, 43.
[62] Government's Answer at 38-39, 43.
[63] J.A. at 78, 585 (image showing Appellant standing outside his door while the agents conducted the search).
[64] J.A. at 79.
[65] J.A. at 597 at 10:42:55.
[66] J.A. at 681.
[67] J.A. at 689.

B. The Government's inevitable discovery argument is built on "speculation and conjecture."[68]

1. The Government fails to show, with practical certainty, what evidence would have been discovered.

The theory of inevitable discovery requires the Government to prove each individual piece of evidence reasonably would have been discovered, absent the unlawful law enforcement activity.[69] Such proof is based on "demonstrated historical facts capable of ready verification and impeachment."[70] "Mere speculation and conjecture as to the inevitable discovery of evidence is not sufficient when applying this exception."[71]

This Court has applied the exception when the record supports that "the imminent and inevitable lawful discovery of the evidence has been so closely tied to the ongoing investigation its occurrence has been *practically certain*."[72] In fact, 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.[73] Moreover, the Government must demonstrate that "*when the illegality*

---

[68] *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014).
[69] *See Nix v. Williams*, 467 U.S. 431, 444 (1984).
[70] *Id.* at 444 n.5.
[71] *Wick*, 73 M.J. at 103 (citation and internal quotations omitted).
[72] *United States v. Eppes*, 77 M.J. 339, 36 n.7 (C.A.A.F. 2018) (emphasis added).
[73] *United States v. Mitchell*, 76 M.J. 413, 420 (C.A.A.F. 2017) (stating, "But the record discloses no guarantee that the procedure would have succeeded, and the Government therefore cannot demonstrate inevitability.").

occurred, the government agents possessed, or were *actively pursuing*, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner."[74] A could-have would-have approach fails to meet the demands of the inevitable discovery doctrine.

Although the Government cites *United States v. Watkins*[75] in its endeavor to prove the inevitable discovery of the evidence,[76] a critical analysis of the case shows how the exception is inapplicable here. There, agents intercepted a package containing cocaine.[77] The agents inserted a GPS tracker inside the package and sent it on to its prescribed destination, a post office.[78] After the package arrived at the post office, it went missing as the GPS unexpectedly stopped working.[79] Along with the fact that the package did not have a post office box number, the agents became suspicious that Watkins, the supervisory postal worker, was the intended recipient.[80] They then spoke to Watkins and her visual reaction only deepened their suspicion that she was involved in smuggling cocaine.[81]

---

[74] *Wicks*, 73 M.J. at 103 (citation and internal quotations omitted) (emphasis added).
[75] 981 F.3d 1224, 1236 (11th Cir. 2020).
[76] Government's Answer at 51-55.
[77] *Watkins*, 981 F.3d at 1227.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1228.
[81] *Id.* (noting that Watkins appeared "anxious, nervous, and scared").

A few hours later, the tracker started working again and indicated the package was at Watkins' house (the GPS device inside Watkins' home created the constitutional violation).[82] The agents went there and asked her, "Do you know why were are here?" In response, she "just put her head down" and answered words to the effect of "Yes, the boxes."[83] The agents subsequently seized the boxes and took other incriminating statements from Watkins.[84]

At a suppression hearing, the agents testified to these facts and their suspicion towards Watkins.[85] Even if the package tracker had not indicated that the package was at Watkins' house, the agents testified that their intended course of action was to conduct a "knock and talk" at the house as she was the "prime suspect."[86] One agent testified that while the package was missing, a knock and talk "was the plan being discussed," and "that was the plan they had begun to formulate" before the tracking device began to function again.[87] Another agent testified "that if the device had not come back on they would have done the knock and talk that night anyway . . . instead of waiting until the next morning to do it."[88] The trial judge's findings

[82] *Watkins*, 981 F.3d at 1228.
[83] *Id.* at 1229.
[84] *Id.*
[85] *Id.*
[86] *Watkins*, 981 F.3d at 1228.
[87] *Id.* at 1229.
[88] *Id.*

credited the testimony and the fact that the agents had already secured Watkins' address before the GPS reregistered, corroborating their testimony.[89]

The Eleventh Circuit held the incriminating statements and the physical evidence would have been inevitably discovered irrespective of the constitutional violation: "the law enforcement officers would have conducted the knock and announce and the events would have unfolded in the same way."[90] This conclusion was based on the agents' testimony and the judge's findings, rather than speculation.[91]

Here, the Government's argument is built on pure speculation. Contrary to *Watkins* where there were findings of fact and testimony that the agents had zeroed-in on Watkins, had planned to conduct a knock and talk, and had already secured her address—*all before the constitutional violation*—the record here is devoid of similar facts. Just the opposite. Even after discovering the shoes that smelled like gasoline, the agents admitted they were not pursuing a search warrant.[92] Both stated they

---

[89] *Id.* at 1228.
[90] *Watkins*, 981 F.3d at 1234-35.
[91] *Id.* at 1235. Specifically, the court highlighted the three agents' "without dispute" testimony "that even if the tracking device had not come back to life and let them know where the package was, they probably still would have gone to Watkins' house and done the knock and talk just like they did after the tracking device reactivated. They had, after all, already obtained Watkins' address before they knew they would hear the device again." *Id.*
[92] J.A. at 77, 134.

lacked probable cause.[93] The record fails to support "demonstrated historical facts capable of ready verification and impeachment," and the lower court failed to pursue such facts.

2. The Government fails to show what evidence the agents were actively pursuing when the illegality occurred.

The speculative could-have would-have argument also confuses the facts. The Government claims the keycard reader would have disputed Appellant's whereabouts the previous evening.[94] But Appellant did not provide an alibi until after the agents searched his room and seized items from it.[95] When the agents first questioned him, he said he was around the barracks area the previous night.[96] Not until the interrogation did Appellant claim he was with Cpl Taylor and doing laundry in his room until around 0100.[97] After this claim, during the interrogation, an agent told Appellant that he was going to check the keycard reader.[98] Notably, the agent who made that comment was not Agent Perry or Agent Thompson.[99] There is no evidence that they, the case agents, would have checked the keycard reader, let alone evidence that they were pursuing the keycard reader at the time of the illegality.

---

[93] J.A. at 77, 134.
[94] Government's Answer at 27.
[95] J.A. at 597 at 7:22:50; J.A. at 688.
[96] J.A. at 615.
[97] J.A. at 597 at 7:22:50.
[98] J.A. at 597 at 8:38:30.
[99] J.A. at 597 at 8:38:30.

The Government argues, without support from the record, that Appellant made incriminating statements during the interrogation before being confronted with the incriminating evidence seized in his room.[100] This argument overlooks the fact that Agent Perry asked Appellant, or at least commented, about the clothes that smelled like gasoline *while he was conducting the search*.[101] Additionally, Agent Thompson told Appellant *before the interrogation* she "had some suspicion within the clothing that [they] found."[102] Appellant saw the fruits of search firsthand as he stood-by throughout the search.[103]

As this Court explained, "Unlike real or documentary evidence, live-witness testimony is the product of will, perception, memory, and volition."[104] There is no support for the Government's argument that Appellant would have made the same admissions regardless of the illegality. And no support that the agents were even planning to interrogate Appellant at the time of the illegality.

The most crucial evidence that developed from the interrogation was Appellant's alibi that he was with Cpl Taylor the previous night.[105] After locking Appellant into that alibi, the agents eventually obtained statements from Cpl Taylor

---

[100] Government's Answer at 55.
[101] J.A. at 655.
[102] J.A. at 79.
[103] J.A. at 585.
[104] *United States v. Kaliski*, 37 M.J. 105, 109 (C.M.A. 1993) (citation and internal quotations omitted).
[105] J.A. at 597 at 7:21:00.

disputing Appellant's timeline.[106] Indisputably, the Government would have been without this pivotal testimony. And consequently, the Government would have been without its theme of "destruction and deception" and the backing of the false exculpatory statement instruction.[107]

In short, it is a guessing game as to what evidence would have been discovered. What specific evidence would have been inevitably discovered, if any? How would Agent Perry have collected the wet clothes that smelled like gasoline? When would he have collected them? Would the items still have been wet? Would they still have smelled like gasoline? Would the interrogation have occurred at all? Would Appellant have driven himself to the station? Would the command have ordered him to the station? When would the interrogation have occurred?

These questions, the Government cannot answer. No "practical[] certain[ty]" exists to support the evidence would have been discovered had Agent Perry not diverted Appellant to his room in handcuffs and then handcuffed Appellant again to interrogate him.[108] There is no support that the agents were pursuing evidence "when the illegality occurred."[109] The record fails to support the Government's speculative argument, and the inevitable discovery exception is inapplicable.

---

[106] J.A. at 507-11.
[107] J.A. at 550, 537.
[108] *Eppes*, 77 M.J. at 336 n.7.
[109] Wicks, 73 M.J. at 103.

C. There is a reasonable probability the members would have harbored a reasonable doubt had the evidence been excluded.

The Government's case was not "overwhelming"[110] and had the interrogation been suppressed, reasonable doubt would have existed. The Government claims that the interrogation was not necessary to its case and that five other pieces of evidence would have proved its burden.[111] First, Appellant's position is that the five pieces of evidence do not prove beyond a reasonable doubt that Appellant committed the arson. Even if all five were admitted, Appellant would have been acquitted.

But second, the record only supports the admissibility of two of the five: (1) testimony that the fire was started intentionally with fuel and (2) circumstantial evidence that Appellant was discontent with his coworkers. The admissibility of a third piece of evidence, that Agent Perry's testimony that Appellant's shoes smelled like fuel, would be contingent on the Government proving the agents did not violate Article 31(b). The other two pieces of evidence would have been admissible only if the Government prevailed on inevitable discovery.

The Government's unproved theory and exposed gaps in the investigation further illustrate the reasonable probability of reasonable doubt. First, the Government theorized that Appellant set fire to the facility around 0324.[112] He then

[110] Government's Answer at 56.
[111] Government's Answer at 57-58.
[112] J.A. at 405, 437.

"admir[ed]" the fire, locked the facility's gate, walked back to his barracks room, and swiped in at 0336.[113] This twelve-minute timeline was based on the time of the smoke alarm alert and the barracks' keycard reader.[114]

But the evidence failed to substantiate the Government's theory. The emergency dispatcher testified that the time of the alarm alert was not accurate.[115] The system was off by eleven minutes.[116] Although the system registered the alert at 0324, the smoke alarm actually detected the fire at 0335.[117] Consequently, the Government's twelve-minute opportunity for Appellant to start and admire the fire, lock the gate, and walk back to the barracks at 0336 was reduced to one minute.

Additionally, at least one unidentified person was at the scene minutes after the fire started, when Appellant was in his barracks room. Around 0337, a duty Marine was outside the facility.[118] As he looked at the fire and called 911, a "drunk Marine" was also there.[119] But this Marine was never identified.

Even more suspicious, an unidentified person was likely in the facility at 0338. The emergency dispatcher testified that the system detected "AA-Alarm Accessed"

---

[113] J.A. at 405, 539.
[114] J.A. at 437, 604-05.
[115] J.A. at 437.
[116] J.A. at 437.
[117] J.A. at 437.
[118] J.A. at 563, 605; R. at 1029.
[119] J.A. at 563, 437; R. at 1029.

at 0338.[120] This alert indicated that someone was attempting to turn off the alarm.[121] The emergency dispatcher testified to his belief that someone was inside the facility manipulating or disarming the alarm at 0338.[122] Although this person was also never identified, it was not Appellant as he was in his barracks room.[123]

But the Appellant's interrogation allowed the members to look past these holes in the Government's case. It provided a motive to commit the offense, numerous admissions of guilt, and factual claims refuted at trial. The false exculpatory statement instruction enhanced the interrogation's probative value. And the Government belabored the evidence from the interrogation in summation, arguing the "deception" proved Appellant's guilt.[124] Without the interrogation, there is a reasonable probability the members would have harbored a reasonable doubt.

Conclusion

Appellant's civilian defense counsel was ineffective for failing to move to suppress evidence derived from the illegal arrest. The errors were prejudicial to Appellant. Appellant respectfully asks this Court to set aside the findings and sentence.

---

[120] J.A. at 605; R. at 1017.
[121] R. at 1017.
[122] J.A. at 563, 605; R. at 1017.
[123] J.A. at 604.
[124] *See generally* J.A. at 541-50.

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on January 4, 2024.

Colin W. Hotard

Colin W. Hotard
Captain, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St., SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7291
colin.hotard1@navy.mil
USCAAF Bar Number: 37736

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 7,000 words and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Colin W. Hotard

Colin W. Hotard
Captain, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St., SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7291
colin.hotard1@navy.mil
USCAAF Bar Number: 37736