IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201900089(f rev)
Bradley M. METZ, Corporal (E-4) U.S. Marine Corps Appellant	)	USCA Dkt. No. 23-0165/MC

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

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Errors Assigned

I.

WAS APPELLANT A SUSPECT, TRIGGERING ARTICLE 31(b), UCMJ, WARNINGS?

II.

DESPITE FINDING APPELLANT WAS ILLEGALLY APPREHENDED, DID THE LOWER COURT ERRONEOUSLY APPLY *BROWN v. ILLINOIS*, 422 U.S. 590 (1975), AND FIND THE TRIAL DEFENSE COUNSEL'S ADMITTED FAILURE TO MOVE TO SUPPRESS EVIDENCE DERIVED AFTER THE APPREHENSION WAS NOT INEFFECTIVE?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge. The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

This Court conducted review under Article 67(a)(3), UCMJ, set aside the Findings and Sentence, and remanded the Record to the lower court for further review under Article 67(e), UCMJ.

This Court again has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of arson, housebreaking, and unlawful entry, in violation of Articles 126, 130, and 134, UCMJ, 10 U.S.C.

§§ 926, 930, 934 (2012). The Members sentenced Appellant to one year of confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The Navy-Marine Corps Court of Criminal Appeals affirmed the Findings and Sentence. *United States v. Metz*, No. 201900089, 2020 CCA LEXIS 334 (N-M. Ct. Crim. App. Sept. 23, 2020) (*Metz I*).

This Court then set aside the Findings and Sentence and remanded the Record to the lower court "to conduct the three-pronged approach of *Brown v. Illinois*, 422 U.S. 590 (1975) in examining the effects of an unlawful apprehension upon a subsequent search." *United States v. Metz*, 82 M.J. 45 (C.A.A.F. 2021) (*Metz II*).

On remand, the lower court applied *Brown v. Illinois* and again affirmed the Findings and Sentence. *United States v. Metz*, No. 201900089 (f rev), 2023 CCA LEXIS 117 (N-M. Ct. Crim. App. Mar. 3, 2023) (*Metz III*).

Statement of Facts

A. The United States charged Appellant with arson, housebreaking, and unlawful entry.

The United States charged Appellant with setting fire to a Facilities Building aboard Camp Pendleton, California, on May 20, 2018, as well as housebreaking and unlawful entry. (Charge Sheet, July 17, 2018.)

B. The Military Judge denied Appellant's Motion to Suppress statements he made and evidence seized from his barracks room.

1. Appellant moved to suppress his statements to law enforcement and the evidence found in his barracks room.

Before trial, Appellant moved to suppress statements he made to law enforcement when they interviewed him in his barracks room without providing Article 31(b) warnings. (J.A. 658–59.) He also sought suppression of "all derivative statements and evidence thereof," including two searches of his barracks room and statements made during an interrogation later that day. (J.A. 658–59.)

2. In response, the United States presented testimony of the investigating Agents and Appellant's consent forms.

The United States presented the testimony of Agents Thompson and Perry and consent forms signed by Appellant. (J.A. 66, 93, 672, 675, 678.)

a. The Agents began investigating a fire in the Facilities Building and learned who had been issued keys to the Building.

On May 20, 2018, the Agents began investigating a suspected arson at the Facilities Building. (J.A. 66–67, 94.) Because there was no sign of forced entry, Agent Thompson listed the four individuals, including Appellant, who had been issued keys. (J.A. 67–68, 94–95; 683–84.) A supervisory Marine told the Agents that the key holders—Appellant and the others—lived in a nearby barracks and Appellant was "kind of, a problem child within the shop." (J.A. 69, 71, 94–95.)

b. The Agents made contact with Appellant and conducted a screening interview.

The Agents travelled to the barracks to conduct screening interviews of all the key holders. (J.A. 70.) The first room they approached turned out to be Appellant's room, and he invited the Agents inside. (J.A. 71–72, 96.) Agent Thompson had to ask Appellant multiple times to remove his hands from his pockets before he complied. (J.A. 100, 125.) Agent Perry noticed Appellant's shoes, which appeared recently washed. (J.A. 74–75, 97–98.) Appellant gave Agent Perry consent to inspect the shoes and they smelled like fuel. (J.A. 74–75, 97–98.) The shoes made the Agents' "suspicion level . . . raise a little bit higher," (J.A. 86), and gave them a "hunch" Appellant was involved in the fire, (J.A. 74).

The Agents returned to their vehicle to "follow[] through with [their] investigative lead" by surveilling the area to see if Appellant would try to dispose of the shoes. (J.A. 74, 86, 98–99.)

c. The Agents re-engaged Appellant and frisked him for weapons. Appellant provided consent to search his barracks room.

After twenty to thirty minutes, the Agents returned to Appellant's room, but he did not answer. (J.A. 74–75, 99.) Agent Perry found Appellant near the smoke pit and told him to remove his hands from his pockets. (J.A. 75–76, 100.) Because Appellant was slow to do so, the Agent became nervous, placed Appellant in handcuffs, and frisked him for weapons. (J.A. 100, 125–26, 135.) The Agent

asked if Appellant would talk to them, and he agreed. (J.A. 100.) They walked to Appellant's room, which took "[s]econds, maybe a minute," and the Agent removed the handcuffs. (J.A. 88, 100, 125–26, 135.) Appellant then gave written consent to a search of his room. (J.A. 76, 101, 672.)

d. The Agents interrogated Appellant, and the next day he provided a second consent to search.

After the search, the Agents drove Appellant to their offices. (J.A. 79, 101.) They placed Appellant in handcuffs during the thirty-minute ride and removed them when they arrived. (J.A. 79.) Agent Thompson provided Appellant with a Rights Advisement Form and read each line aloud; Appellant confirmed he understood each right, asked clarifying questions, initialed the Form, and signed it. (J.A. 101, 675; Prosecution (Pros.) Ex. 9 at 7:14:38–7:18:55.)

After the interrogation, Appellant went home for the night and returned the next day, when he again gave written consent to search his room. (J.A. 103.)

3. The Military Judge denied Appellant's Motion.

The Military Judge found the Agents went to the barracks, found a door propped open, knocked, and Appellant invited them inside, where they saw a pair of damp shoes that smelled of "fuel or gasoline." (J.A. 686–87.) Later that day, Appellant consented in writing to a search of his barracks room. (J.A. 687–88.)

The next day, two other Agents attempted to interview Appellant, seizing his smartphone and smartwatch before the interview. (J.A. 689.) Appellant gave

written consent to a second search of his barracks room, as well as his financial records. (J.A. 689.) Appellant did not consent to search his cell phone and invoked his right to speak with an attorney. (J.A. 689.)

The Military Judge denied the Motion because Article 31(b) warnings were not required and the discovery of the evidence was inevitable. (J.A. 686.)

Appellant never challenged the legality of Appellant's apprehension from the smoke pit to the barracks room, or moved to suppress any evidence apart from the theory of a failure to provide Article 31(b) warnings.

C. At trial, the United States presented physical evidence from Appellant's room, logs establishing a timeline of Appellant's movements, testimony about Appellant's attempts to deceive law enforcement, and evidence no other key holder was the likely arsonist.

The United States presented thirty pieces of documentary and physical evidence, as well as the testimony of fifteen witnesses. (*See* J.A. 169, 172, 340, 355, 361, 365, 415, 435–36, 438, 499.)

1. An expert testified a fire was set in the Facilities Building using ignitable liquid and there was no sign of forced entry.

A fire began in the Facilities Building around 0335 on May 20, 2018. (J.A. 170, 513, 517, 519, 532.) An expert testified (1) there was no sign of forced entry, (2) the fire was not caused by an external source, (3) the fire was intentionally set using ignitable liquids, and (4) the fire could have been set by one person. (J.A. 341–44, 347–48, 352, 535–54.)

2. Law enforcement visited Appellant in his room and saw a pair of wet shoes that smelled of fuel.

The Agents went to the barracks building 0.35 miles away, where they made contact with Appellant and noticed a pair of shoes emitting an odor of fuel. (J.A. 188–89, 198, 202–03.) Appellant said he was unaware of any incident at the Facilities Building and had lost his keys. (J.A. 200–02.) Appellant gave the Agents permission to search his room, and they found clothes that smelled like fuel and a lighter. (J.A. 205–06, 212.) Outside Appellant's room, they found the same fuel-soaked shoes they saw earlier. (J.A. 204.)

3. In an interrogation, Appellant claimed he lost his keys, he hung out with a friend the night of the fire, and his clothes were fuel-stained from car maintenance.

The Agents interrogated Appellant on May 20, 2018, and before being confronted with any evidence from the search of his room, Appellant said that he spent the night of the fire with a friend, who dropped him off at the barracks at 0020, and Appellant fell asleep around 0100. (Pros. Ex. 9 at 7:19:15, 7:24:24, 7:27:05, 7:31:00.) Appellant denied entering the Facilities Building and claimed he previously reported his keys as lost. (Pros. Ex. 9 at 7:34:52, 7:55:45.) Appellant said his clothes smelled like gasoline because he recently worked on a fuel leak on his car. (Pros. Ex. 9 at 7:31:58, 7:32:25.)

4. The key reader from the barracks showed Appellant was lying about his movements.

The key reader showed Appellant accessed his barracks room at 2014 on May 19, 2018, and again at 0336 on May 20, 2018. (J.A. 363.) Appellant was the only one with a key to his room. (J.A. 362, 364.)

5. In a second search the next day, Agents found the keys hidden in Appellant's barracks room, along with fuel-soaked gloves.

Agents searched Appellant's room the next day and found a pair of gloves that smelled like fuel and keys hidden in a tissue box. (J.A. 266, 349–50, 370–71, 678.) The keys were to the Facilities Building, and a Marine confirmed they belonged to Appellant. (J.A. 378, 384–85, 420.) Appellant never reported his keys as missing. (J.A. 430.)

The other key holders testified about their whereabouts at the time of the fire; they all had verifiable alibis. (J.A. 405–35, 438–99.)

6. Appellant's friend testified Appellant asked him to lie about his whereabouts.

Appellant's friend, Corporal Taylor, testified he was with Appellant until 1900 on the evening of the fire. (J.A. 499–502.) After his interrogation, Appellant met with Corporal Taylor and asked him to lie and "tell [law enforcement] a specific story," including that they went to Corporal Taylor's hotel room. (J.A. 508–11.)

7. An Agent testified Appellant's car was not recently altered.

Agent Perry inspected Appellant's car but saw no signs of recent work. (J.A. 250–51.) He observed a uniform layer of "road grime" covering the entire undercarriage. (J.A. 333.)

8. The fuel on Appellant's clothing matched the fuel from the fire.

An expert testified a combination of fuels were found on Appellant's insoles, shoes, gloves, and clothes, as well as the burned debris from the fire. (J.A. 356, 358–59.) The Members were provided Appellant's clothing, gloves, and shoes to smell the still-present fuel odor. (J.A. 351.)

9. Appellant had several disciplinary issues before the arson.

A sergeant testified he counseled Appellant on multiple occasions. (J.A. 418.) That same sergeant's Marine Corps notebook and hard hat were found placed so that they would be burned in the fire. (J.A. 183, 429, 476.)

D. The Members convicted and sentenced Appellant.

The Members convicted Appellant of arson, housebreaking, and unlawful entry, and sentenced him to confinement for one year, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (J.A. 578–79.)

E. Appellant submitted a Declaration about the investigation.

On appeal, the lower court attached Appellant's Declaration to the Record. (J.A. 705.) Appellant claimed Agent Perry handcuffed him and asked him to walk

up to his room, to which Appellant responded, "Okay." (J.A. 709.) Appellant alleged the walk took three minutes. (J.A. 709.) Agent Thompson asked Appellant if he had "anything against" the Agents searching his room and he said he "did not." (J.A. 709.) The Agents removed the handcuffs and gave Appellant a Consent Form, which he signed. (J.A. 709.) They searched Appellant's room for about two hours, handcuffed him, and took him to "NCIS headquarters" for questioning. (J.A. 710.)

The Agents released Appellant around 2300, and he returned to his room. (J.A. 710.) The next morning, two Marines escorted him to "NCIS headquarters," where he refused to consent to a search of his phone. (J.A. 711–12.)

F. The Navy-Marine Corps Court of Criminal Appeals affirmed the Findings and Sentence, finding no Article 31(b) violation or ineffective assistance of counsel.

On appeal, Appellant alleged he received ineffective assistance of counsel because Civilian Defense Counsel failed to file a motion to suppress evidence derived from an illegal apprehension. *Metz I*, 2020 CCA LEXIS 334, at *1–2.

The lower court found that when Agent Perry approached Appellant, he "called out to him and asked him to take his hands out of his pockets." *Id.* at *6. "When [Appellant] was slow to comply," the Agent was reminded that during his initial encounter, Appellant had to be asked multiple times to remove his hands from his pockets. *Id.* at *6, *37. The Agent then handcuffed [Appellant] and

frisked him" and said, "Hey, you're making me real nervous right now, and we want to talk to you some more." *Id.* at *6. Agent Perry asked Appellant if he was willing to talk to the Agents in his room, and he agreed. *Id.*

At Appellant's room, he verbally consented to a search of his room—it is unclear whether this was before or after the handcuffs were removed. *Id.* at *38–39. After the handcuffs were removed, Appellant initialed the Search Authorization Form eight times and signed his name. *Id.* at *40.

The lower court found: (1) "it was lawful for [the Agent] to stop and frisk Appellant, and even to place handcuffs on him while doing so," but the extended handcuffing was an unlawful apprehension, *id.* at *37; (2) "Appellant's detention during the stop-and-frisk was minimal in nature and pertained to officer safety, and the ensuing unlawful apprehension was extremely brief and without incident," *id.* at *40; and (3) Appellant's illegal apprehension was "very limited in duration," lasting "seconds, maybe a minute, enough to go up the stairs," *id.* at *39.

The court held Appellant's consent to search following the illegal apprehension was voluntary, but it did not apply the attenuation test from *Brown v. Illinois*, 422 U.S. 590 (1975). *Metz I*, 2020 CCA LEXIS 334, at *38–40.

G. The Court of Appeals for the Armed Forces granted review and remanded the case.

Upon Appellant's Petition, this Court granted review of whether the Navy-Marine Corps court erred "by failing to apply *Brown* despite finding Appellant was illegally apprehended." *Metz*, 81 M.J. at 148.

The United States conceded error and requested remand. (Appellee Answer at 11–12, *United States v. Metz II*, 82 M.J. 45 (C.A.A.F. 2021) (No. 21-0059/MC).)

This Court agreed, set aside the lower court's decision, and remanded the case to the lower court "to conduct the three-pronged approach of *Brown v. Illinois*, 422 U.S. 590 (1975), in examining the effects of an unlawful apprehension upon a subsequent search." *Metz II*, 82 M.J. at 45. This Court authorized the lower court to "order affidavits or a factfinding hearing, if necessary." *Id.*

H. On remand, Appellant moved to attach a Declaration from Civilian Defense Counsel.

On remand, Appellant filed a Motion to Attach a Declaration from Civilian Defense Counsel. (J.A. 722.) In his Declaration, Civilian Defense Counsel recalled Appellant's treatment "entitled him to certain legal relief," but he did not identify the illegal apprehension issue with any corresponding suppression. (J.A. 729–30.) He declared, "There was no strategic purpose in avoiding citation to the [illegal apprehension issue] other than having not considered it as a valid basis to rely upon." (J.A. 730.)

The United States opposed, arguing the Declaration was irrelevant because the proper test was whether a motion to suppress would have been meritorious—not whether Civilian Defense Counsel had a strategic reason for not filing a motion. (Appellee Opp'n Mot. Attach at 2–5, May 25, 2022.) The court granted Appellant's Motion to Attach. (N-M. Ct. Crim. App. Order, Jan. 30, 2023.)

I. The Navy-Marine Corps Court of Criminal Appeals found Appellant's Civilian Defense Counsel was not ineffective and that Appellant voluntarily consented to the search.

On remand the lower court considered whether Civilian Defense Counsel was ineffective for failing to move to suppress evidence based on an illegal apprehension. (J.A. at 23.) The court found that Agent Perry illegally apprehended Appellant, but that Appellant's consent to search his barracks room was nonetheless voluntary and "an independent act of free will." (J.A. at 23.) Therefore, Appellant's Civilian Defense Counsel was not ineffective for failing to move to suppress the evidence derived from the search. (J.A. at 23.) The lower court applied the *Brown* factors, as directed by this Court, and further found that because "Appellant's subsequent consent to search his room [was voluntary, it] cured any constitutional violation resulting from law enforcement's unlawful detention." (J.A. at 26.)

Argument

I.

APPELLANT WAS NOT A SUSPECT WHEN INITIALLY SCREENED BY LAW ENFORCEMENT AGENTS BECAUSE ALTHOUGH THEY KNEW SOME NEGATIVE INFORMATION ABOUT HIM, NOTHING MADE HIM A SUSPECT UNTIL THE AGENT SMELLED THE FUEL-SOAKED SHOES.

A. Standard of review is clear error for findings of fact and de novo for conclusions of law.

A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). When a motion to suppress is based on a failure to give Article 31(b) warnings, the military judge's findings of fact are reviewed for clear error and his conclusions of law are reviewed de novo. *United States v. Ramos*, 76 M.J. 372, 375 (C.A.A.F. 2017) (citing *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)).

Here, Appellant does not directly challenge any of the Military Judge's Findings of Fact. Instead, Appellant engages in case comparison with *United States v. Muirhead*, 51 M.J. 94 (C.A.A.F. 1999) and *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993) in an attempt to justify why this Court should disregard the deference given to the Military Judge's Findings and come to a different conclusion. (Appellant Br. at 23–30, Oct. 16, 2023.)

The Military Judge's Findings of Fact are supported by the Record, are not clearly erroneous, and this Court should adopt those Findings. (J.A. 685–92.)

B. Article 31(b) warnings are only required when a person being interrogated is a "suspect" at the time of questioning.

Article 31(b) warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014).

"Whether a person being interviewed is a 'suspect' is a question of law." *Davis*, 36 M.J. at 340. "Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense." *Swift*, 53 M.J. at 446 (citation and quotation omitted); *see also Jones*, 73 M.J. at 361 (rejecting subjective test for whether questioner acted as law enforcement.)

Despite the objective test, a military judge need not ignore a questioner's subjective beliefs when determining whether a person was a suspect. *Muirhead*, 51 M.J. at 96 ("[I]n some cases, a subjective test may be appropriate; that is, we look at what the investigator, in fact, believed, and we decide if the investigator considered the interrogated person to be a suspect.") However, subjective belief is not dispositive: a military judge errs only when placing "great weight on the subjective opinions of the agents as to whether Article 31(b) rights were required"

and thereby fails to view the issue objectively. *Id*. at 97; *see also United States v. Lovely*, 73 M.J. 658, 668 (A.F. Ct. Crim. App. 2014) (subjective intent "somewhat relevant" to demonstrate what reasonable persons should have believed).

The standard of suspicion necessary to invoke Article 31(b) warnings involves a "relatively low quantum of evidence," but must amount to "more than a hunch" that the person committed an offense. *Swift*, 53 M.J. at 446. Listing someone as a "suspect" in an investigative report does not make that person a suspect for Article 31(b) purposes. *See United States v. Miller*, 48 M.J. 49, 53 (C.A.A.F. 1998) (not suspect despite police listing name in suspect line of report).

1. Appellant was not a suspect—neither objectively nor subjectively—when the Agents first contacted him.

In *Miller*, the court assessed whether an investigation was "sufficiently narrowed" such that the appellant was a suspect at the time of questioning. 48 M.J. at 54. During a robbery investigation, the investigator "knew only that the alleged assailants were black males in civilian clothing who, based on their short haircuts, probably were Marines" at the time he questioned the appellant. *Id.* Unlike an interrogation, the questioning "was no more than an attempt to find witnesses to the crime and a preliminary effort to screen out" those not involved. *Id.* The appellant's answers established an alibi and tended to exclude him as a suspect; accordingly, he was "not a suspect within the meaning of Article 31." *Id.*

In *Davis*, the court found a rights advisement was not required when "the investigation had not sufficiently narrowed to make appellant a suspect within the meaning of Article 31." 36 M.J. at 341. A sailor died from head injuries inflicted by a blunt object, likely a pool cue. *Id*. at 338. Law enforcement learned the appellant owned his own pool cue, was recently in trouble, and knew information about the death that was not public knowledge. *Id*. at 338–39. A rights advisement was still not required because law enforcement was conducting a screening interview: although they knew some negative information about the appellant, nothing was sufficient to make him a suspect. *Id*.

a. Appellant's case is similar to *Miller* and *Davis*: the Agents were conducting screening interviews and the investigation had not sufficiently narrowed to make Appellant a suspect.

Like *Miller*, the Agents were only narrowing leads through the use of "screening interviews" when they approached the barracks where Appellant lived. (J.A. 90, 134.) As in *Davis*, although the Agents knew some negative information about Appellant, nothing rose to the level to make him a suspect. (J.A. 67–69, 90, 134, 683, 686.)

Before the Agents went to Appellant's barracks, only two facts distinguished Appellant from any other Marine who worked in the Facilities Building: (1) his supervisor's statement that Appellant was a "problem child" and (2) Appellant's status as a key holder. (J.A. 67–69, 683, 686.) As in *Miller* and *Davis*, these facts

do not make Appellant a "suspect." First, the supervisor's "hunch" about Appellant did not arouse suspicion and "need not be imputed to [the Agents]." (J.A. 96, 691.) Second, the Marines commonly lent keys to each other, so Appellant's key holder status did not make him a "suspect"—a screening interview was necessary to determine the location of his keys. (J.A. 90, 96–97, 134.)

The Agents travelled to the barracks to conduct screening interviews of the key holders. (J.A. 70.) The first room they approached turned out to be Appellant's room, and he invited the Agents inside. (J.A. 71–72, 96.) However, that the Agents happened to approach Appellant's room first does not indicate they believed he was a suspect given that all the other possible key holders lived in the same barracks. Likewise, that the Agents only searched Appellant's room is irrelevant to his status as a suspect when they initially approached his room, because the entire investigation changed as soon as Agent Perry smelled the fuel-soaked shoes. (J.A. 74, 86.) Regardless, they did follow up with all other key holders to verify their alibis. (J.A. 405–35, 438–99.)

While inside Appellant's room, the Agents' questions show they meant to "find witnesses" and "screen out" those not involved with the fire, as in *Miller* and *Davis*. The Agents asked whether Appellant: was the only occupant, was aware of the incident, was a key holder, and was out the night before. (J.A. 686–87.) These screening questions are similar to those asked in *Davis*, where the agents were

trying to determine who had access to their own pool cues. 36 M.J. at 340. The Agents' third question to Appellant asking if he was a "key holder" to the Facilities Building shows the Agents were trying to determine who currently had access to keys to the Building. (J.A. 686–87.) Like *Miller*, Appellant's response that he lost his keys tended to exclude him as a suspect. *Compare* (J.A. 687) *and Miller*, 48 M.J. at 54. It was only Agent Perry's smelling of Appellant's fuel-soaked shoes that transformed him into a suspect. (J.A. 687.)

Contrary to Appellant's arguments, the fact that Appellant was on a list of people who may have possibly had access to the building does not rise to the level of making him a suspect. (Appellant Br. at 24–25.) In *Davis*, law enforcement was looking at individuals who had access to pool cues, after a crime was committed using a pool cue. 36 M.J. at 338–40. If having possession of an item that may have possibly been used in a crime, such as a pool cue, does not render one a suspect, then possibly having a building key giving access to a building where a crime was committed similarly does not render one a suspect. *Id*. at 340.

Appellant also alleges that the investigation was sufficiently narrowed for him to be considered a suspect because the Agents knew Appellant was a "problem child" who had recent disciplinary action and had a grudge against his shop and its personnel. (Appellant Br. at 26.) However, Appellant's status as a "problem child" did not transform him into a suspect, considering that in *Davis*, law

enforcement likewise knew the appellant had recent disciplinary trouble, threatened violence, and knew details of the crime, and yet was not held to be a suspect when initially screened. *Id*. at 338–41.

Similarly in this case, Appellant was a known problem child who was currently subject to disciplinary actions, unrelated to the offense under investigation. And while Appellant had a "grudge against the maintenance shop and its personnel," unlike in *Davis*, Appellant had not made threatening statements and was not a mental health concern. (Appellant Br. at 26.) Considering these facts in light of *Davis*, the investigation had not yet sufficiently narrowed to make Appellant a suspect for purposes of Article 31.

Further, Appellant's reference to the Agents' statements during the subsequent interrogation as to why they went to Appellant's room is inapt. (Appellant Br. at 28.) When taken in context, the Agents' statements were part of a futility approach within an interrogation—that they had hard evidence to encourage cooperation—and is not dispositive as to their initial subjective belief when they approached Appellant's room. (Pros. Ex. 9 at 8:13:16.)

Appellant's citation to *United States v. Gilbreath*, No. 14-0322, 2014 CAAF LEXIS 1206 (C.A.A.F. 2014), is also inapt. In *Gilbreath*, a Marine followed up with a former armory custodian regarding a missing pistol, who provided an initial unbelievable explanation and who was then asked more pointed questions. *Id*. at

*6. Although *Gilbreath* focused on whether the questioner was acting in an official capacity, the inflection point that made the defendant a suspect in that case was his status as an armory custodian with an unbelievable story regarding a missing pistol, which should have at that point triggered Article 31(b) warnings before further questioning. *Id*. at *20. Whereas here, there was nothing that made Appellant—one of multiple key holders that habitually loaned keys to others as opposed to the tightly controlled armory custodians—a suspect until Agent Perry smelled the fuel-soaked shoes, at which point Agent Perry did not ask further questions. (J.A. 74, 86.)

Finally, as the lower court points out, "[t]here must be some space for law enforcement to gather information at the outset of an investigation without a requirement that agents give Article 31(b) warnings to every person who could have *possibly* committed the crime under investigation before interviewing them." (J.A. 15 (emphasis in original.)

As they testified, the Agents did not subjectively believe Appellant was a suspect until the fuel-soaked shoes made the Agents' "suspicion level . . . raise a little bit higher," (J.A. 86), and gave them a "hunch" Appellant was involved in the fire, (J.A. 74). Likewise, a reasonable person would not objectively have believed that Appellant committed the offenses given all the facts and circumstances.

b. Appellant's case is unlike *Muirhead*, which did not involve preliminary interviews and instead involved investigators focused on a single identified individual.

Appellant's comparison to *United States v. Muirhead*, 51 M.J. 94 (C.A.A.F. 1999), is inapposite. (Appellant Br. at 24, 26–28.) In that case, the appellant took his six-year-old daughter to the emergency room with vaginal bleeding, claiming she self-inflicted her injury using a "mop handle." *Muirhead*, 51 M.J. at 95. After an examination, the treating physician believed the injury was non-accidental and the result of sexual abuse, and he told the investigating agent that "his findings were tantamount to a finding of sexual abuse and suggested that appellant's house be searched." *Id.* at 95–96. During and after the search of Appellant's home, an investigator interviewed the appellant without providing Article 31(b) warnings. *Id*. at 96. The court held a "reasonable person would have concluded that appellant was a suspect in the abuse." *Id.* at 96–97 (citing *United States v. Meeks*, 41 M.J. 150, 161 (C.M.A. 1994)).

Unlike *Muirhead*, Appellant was not unquestionably implicated by objective facts before the Agents contacted him. Whereas the appellant in *Muirhead* was the custodian of a sexually abused six-year-old child, Appellant was one of many Marines who may have possessed keys and the Agents had no physical evidence tying Appellant to the suspected arson. (J.A. 90, 96–97, 134); *Muirhead*, 51 M.J. at 95. Additionally, unlike the targeted search of the appellant's home in

Muirhead, the Agents' purpose was to narrow their multiple leads when they arrived at a barracks to contact multiple possible key holders. *Compare Muirhead*, 51 M.J. at 97 *with* (J.A. 686) *and* (J.A. 71, 96, 138). Finally, the doctor's tantamount finding of child abuse would lead a reasonable person to conclude the father was a suspect unlike Appellant's supervisor's mere "hunch" that Appellant could have committed the arson. *Compare Muirhead*, 51 M.J. at 96–97 *with* (J.A. 691).

In short, contrary to Appellant's claim, *Muirhead* exemplifies the type of objective facts missing in Appellant's case that would confer "suspect" status. As the lower court held, the investigation had not yet reached the "inflection point" turning Appellant from a person of interest to a suspect, until after Agent Perry smelled the fuel on Appellant's shoes. (J.A. 14.) Because none of the objective circumstances before and during the Agents' contact with Appellant rendered Appellant a "suspect" for Article 31(b) purposes, the Military Judge did not abuse his discretion in concluding a rights advisement was unnecessary. (J.A. 691.)

2. Agent Perry's questions about Appellant's shoes were requests for consent to search and were therefore not interrogations.

A request for consent to search "does not infringe upon Article 31 or Fifth Amendment safeguards against self-incrimination because such requests are not interrogations and the consent given is ordinarily not a statement." *United States v. Frazier*, 34 M.J. 135, 137 (C.A.A.F. 1992) (citations omitted).

In *United States v. Robinson*, 77 M.J. 303, 306 (C.A.A.F. 2018), the court held that an investigator's request for the accused's consent to search his phone, even after he invoked his right to counsel, did not violate Article 31 or the Fifth Amendment.

Like the request in *Robinson*, Agent Perry's request to inspect Appellant's shoes "fit squarely within the consent to search exception" and was not a violation of Article 31. *Robinson*, 77 M.J. at 306; (J.A. 687).

C. Regardless, there was no prejudice.

Even assuming the Agents violated Article 31(b), Appellant suffered no prejudice from a statutory violation. *See United States v. Evans*, 75 M.J. 302 (C.A.A.F. 2016). Contrary to Appellant's argument, this is not a constitutional violation. *Compare* (Appellant Br. at 32), with *Evans*, 75 M.J. at 305.

In distinguishing between constitutional and non-constitutional violations of Article 31(b), this Court considers "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred; and the (3) the length of the questioning" in determining whether the defendant "reasonably believed that his freedom of action was curtailed to a degree associated with formal arrest." *Evans*, 75 M.J. at 305 (citations and quotations omitted).

Here, Appellant was not in custody when he initially spoke with the Agents: he invited them into his room and had a brief and cooperative conversation. (J.A. 71–72, 96.) As the lower court found, there were no indications Appellant's will was overborne or that he succumbed to the subtle pressures of military society. (J.A. 16.)

Prejudice of a non-constitutional violation is tested by weighing "(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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

First, the Government's case was strong. Contrary to Appellant's assertions, his initial statements were not "the linchpin of the Government's case." (Appellant Br. at 33). The evidence still showed: (1) the fire was started intentionally using ignitable fluids, (J.A. 171, 177, 341, 345–46, 352); (2) those same fluids were found on Appellant's shoes and gloves, (J.A. 356–59); (3) Appellant arrived at his barracks mere minutes after the fires began, (J.A. 156, 363, 437, 600, 605); (4) Appellant had a key hidden in his room, (J.A. 201–02, 372, 430); and (5) items belonging to Appellant's sergeant, with whom Appellant was upset, were placed on top of the fire, (J.A. 183, 418, 429–30, 440, 443, 476–77, 598).

Second, Appellant's case was weak. He attempted to shift blame to unknown persons through other fires around base; however, those with keys to the Facilities Building all had confirmed alibis. (J.A. 405–35, 438–99.)

Third, the materiality of any evidence from the initial encounter was mitigated by Appellant's subsequent voluntary statements to law enforcement. Even after he was informed of and waived his rights, Appellant made the same statements regarding the location of his key and his whereabouts on the evening of the fire. Before being confronted with any evidence from the search of his room, Appellant said that he spent the night of the fire with a friend, who dropped him off at the barracks at 0020, and Appellant fell asleep around 0100. (Pros. Ex. 9 at 7:19:15, 7:24:24, 7:27:05, 7:31:00.) Appellant denied entering the Facilities Building and claimed he previously reported his keys as lost. (Pros. Ex. 9 at 7:34:52, 7:55:45.) Appellant said his clothes smelled like gasoline because he recently worked on a fuel leak on his car. (Pros. Ex. 9 at 7:31:58, 7:32:25.)

Thus, Appellant's reference to *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991), is inapposite. In *Phillips*, the defendant's supervisors secured a confession after knowingly interrogating him without Article 31(b) warnings, which resulted in the defendant repeating his confession to law enforcement agents without a cleansing warning. *Id*. at 78–80. Whereas here, Appellant never confessed during the initial encounter or the subsequent interrogation. (Pros. Ex. 9.) Appellant read

the rights advisement, asked clarifying questions, and then signed his Article 31(b) waiver, negating any cause-effect relationship between the initial screening and the subsequent interrogation. (J.A. 101, 675; Pros. Ex. 9 at 7:14:38–7:18:55.) As the lower court found, there was no indication Appellant repeated his earlier statements because "the cat was out of the bag." (J.A. 18); *see United States v. Murphy*, 39 M.J. 486, 488 (C.A.A.F. 1994).

Finally, the quality of any evidence from the initial encounter was again mitigated by Appellant's subsequent voluntary statements to law enforcement. Even after he was informed of and waived his rights, Appellant consented to a search that disclosed his key was hidden in his room and the key card entry log for his room confirmed his movement on the evening of the fire, both independently connecting him to the fire.

Even assuming a violation of Article 31(b), Appellant suffered no prejudice. As the lower court opined: "While the evidence from the initial encounter was presented to the members, it was a single brick in a large wall. Even after removing that brick, the wall remains intact." (J.A. 18.)

II.

THE LOWER COURT DID NOT ERRONEOUSLY APPLY *BROWN V. ILLINOIS*, 422 U.S. 590 (1975). APPELLANT'S COUNSEL WAS NOT INEFFECTIVE BECAUSE (1) A MOTION TO SUPPRESS WOULD NOT HAVE BEEN MERITORIOUS; AND (2) APPELLANT SUFFERED NO PREJUDICE BECAUSE THE OTHER EVIDENCE OF HIS GUILT WAS OVERWHELMING.

A. Standard of review is de novo.

"[Q]uestions of deficient performance and prejudice [are reviewed] de novo." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

B. Appellants bear the burden of demonstrating that counsel were deficient and that the deficiency resulted in prejudice.

To establish ineffective assistance of counsel, an "appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To meet *Strickland*'s first prong, an appellant must show counsel's performance was deficient to the extent that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F. 2008). "Even under de novo review, the standard judging

counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Strickland's second prong requires an appellant to demonstrate "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Datavs*, 71 M.J. at 424 (citations omitted). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 64).

C. Civilian Defense Counsel was not deficient for failing to file a motion that would not have been meritorious: all three of Appellant's consents were sufficiently attenuated from the brief illegal apprehension, and regardless, discovery was inevitable.

1. This Court tests Appellant's claim by determining whether a motion to suppress would have been meritorious. Civilian Defense Counsel's strategic or tactical considerations are irrelevant.

"Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious . . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). The term "meritorious" is synonymous with "successful." *United States v. Jameson*, 65 M.J. 160, 164 (C.A.A.F. 2007). Thus, the "relevant question" under *Strickland* is whether "no competent attorney would think a motion to suppress would have failed." *Premo v. Moore*, 562 U.S. 115, 124 (2011).

In *Jameson*, the appellant alleged his trial defense counsel was deficient for failing to file a motion to suppress the results of his blood draw because his consent was involuntary. 65 M.J. at 163–64. The court determined the appellant's consent was voluntary, so the motion would not have been meritorious, and thus trial defense counsel was not deficient. *Id.* at 164. In reaching this conclusion, the court made no mention of trial defense counsel's tactical or strategic considerations in failing to file a motion. *Id.* at 164–65.

Here, as in *Jameson*, Appellant claims Civilian Defense Counsel was deficient for failing to file a motion to suppress the results of the search of his barracks room because his consent was involuntary. (Appellant Br. at 57–60.) But, as in *Jameson*, the dispositive question is whether such motion would be "meritorious"—irrespective of any lack of tactical or strategic considerations by Civilian Defense Counsel. *See* 65 M.J. at 164; (Appellant Br. at 58).

Consequently, this Court should disregard Civilian Defense Counsel's irrelevant Declaration and instead determine whether a motion to suppress would have been "meritorious."

2. Civilian Defense Counsel was not constitutionally deficient for failing to file a motion to suppress because such a motion would have failed: Appellant's three consents were sufficiently attenuated under *Brown*, and regardless, discovery was inevitable.

a. As the lower Court found, the initial handcuffing was lawful under *Terry*. The only illegality occurred when the handcuffing lasted "seconds, maybe a minute" longer than required.

An officer may search an individual's outer clothing when the individual's "unusual conduct" creates a reasonable belief that "the persons with whom he is dealing may be armed and presently dangerous." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The test is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id*. at 27. Moreover, the "use of handcuffs can be a reasonable precaution during a *Terry* stop to protect their safety and maintain the status quo." *United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006).

Courts have repeatedly found a reluctance to remove one's hands from one's pockets can justify a *Terry* stop. For instance, in *United States v. Williams*, 403 F.3d 1188 (10th Cir. 2005), police officers asked the appellant to keep his hands on the table, but he failed to comply and fidgeted in his seat. *Id.* at 1192. The appellant then stood up, put his hands in his pockets, and refused to take them out despite repeated requests. *Id.* The court found this conduct gave the officers "reasonable suspicion to believe he was possibly armed and dangerous." *Id.* at 1194.

Likewise, in *United States v. Cornelius*, 391 F.3d 965 (8th Cir. 2004), as two officers approached, the appellant changed directions and put his hand in his pocket. *Id.* at 966. An officer asked the appellant to remove his hand from his pocket, but he failed to comply. *Id.* The court found the officers were justified in conducting a *Terry* frisk based on these circumstances. *Id.* at 967–68.

Here, as in *Williams* and *Cornelius*, Agent Perry had a reasonable belief Appellant was "armed and presently dangerous" based on his "unusual conduct." *Terry*, 392 U.S. at 30. During their initial encounter, Appellant had to be asked multiple times to remove his hands from his pockets. (J.A. 100, 125); *see Williams*, 403 F.3d at 1192. When Agent Perry re-engaged Appellant, he was once again slow to remove his hands from his pockets, which made the Agent justifiably nervous. (J.A. 100); *see Cornelius*, 391 F.3d at 967–68. This "unusual conduct" gave Agent Perry reasonably belief Appellant may have been "armed and presently dangerous." *See Terry*, 392 U.S. at 30.

Nor are Appellant's challenges to Agent Perry's motivations availing. (Appellant Br. at 3, 11, 19, 39–43.) As the lower court found, the frisk "pertained to officer safety." (J.A. 22–24, 26.) This finding is correct because Agent Perry testified he became nervous for his safety when Appellant was slow to remove his hands from his pockets—especially in light of Appellant's reluctance to remove his hands earlier. (J.A. 100.) This fear was further justified by Agent Perry's

knowledge that Appellant had recently been confronted by law enforcement, which can trigger an unpredictable response. (J.A. 100 (noting "we may have spooked him a little bit, and we were concerned that potentially something bad was happening").)

Thus, in response to his "unusual conduct," *Terry*, 392 U.S. at 30, it was "lawful for [Agent Perry] to stop and frisk Appellant, and even to place handcuffs on him while doing so." (J.A. 22–23.) The only illegal apprehension was keeping Appellant handcuffed "extremely brief[ly]" as they walked up the stairs for "seconds, maybe a minute." (J.A. 24.)

b. When consent follows an illegal search or seizure, courts look to the three *Brown* factors—(1) temporal proximity, (2) intervening circumstances, and (3) the purpose and flagrancy of the violation—with the third factor being "particularly' important."

When a confession or a consent to search follows a Fourth Amendment violation, courts must determine whether the statement or consent "is the product of a free will." *Brown*, 422 U.S. at 602. The question "must be answered on the facts of each case. No single fact is dispositive." *Id.* at 603. The receipt of *Miranda* warnings remains an "important factor," but the Court identified three relevant factors (1) "[t]he temporal proximity of the arrest and the confession," (2) "the presence of intervening circumstances," and (3) "particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603–04 (citations omitted).

"[T]he Supreme Court has identified th[e] third factor as 'particularly' important, presumably because it comes closest to satisfying the deterrence rationale for applying the exclusionary rule." *United States v. Khamsouk*, 57 M.J. 282, 291 (C.A.A.F. 2002) (quoting *New York v. Harris*, 495 U.S. 14, 23 (1990)). "The third factor . . . reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016). "For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure," *id.* at 2064, but there need not be "malignant intent" or "outrageous" misconduct, *United States v. Darnall*, 76 M.J. 326, 331 (C.A.A.F. 2017).

Ultimately, the third factor turns on whether "unwise, avoidable, and unlawful" conduct, *United States v. Conklin*, 63 M.J. 333, 339 (C.A.A.F. 2006), "has been employed to exploit the illegality," *Khamsouk*, 57 M.J. at 291, in a way that is "purposeful or flagrant," *Strieff*, 136 S. Ct. at 2063.

c. Appellant's consent to the first search was sufficiently an act of free will because the brief apprehension was neither purposeful nor flagrant.

In *Brown*, the police misconduct was both purposeful and flagrant. Officers "broke into" and searched the defendant's apartment without probable cause. 422 U.S. at 592. When the defendant arrived, the police pointed a gun at the defendant

and arrested him without probable cause. *Id*. The police testified they did so "for the purpose of questioning [the defendant] as part of their investigation." *Id*. Finding the arrest "investigatory," "both in design and in execution," the Court noted the actions of police in arresting the defendant gave "the appearance of having been calculated to cause surprise, fright, and confusion." *Id*. at 605.

In *Khamsouk*, the police misconduct was accidental and minor. There, the agents possessed a deserter warrant, which did not permit them to enter the appellant's home. 57 M.J. at 284, 288–90. When the appellant came into view through an open door, an agent entered and apprehended the appellant. *Id.* at 284–85. The agent then read the appellant his Article 31, UCMJ, rights and questioned him. *Id.* at 285. The court found this conduct was neither purposeful nor flagrant for three reasons: (1) the agents sought written consent to search, which shows good faith; (2) one basis for the illegal apprehension was officer safety; and (3) the constitutional violation was unintentional and minor. *Id.* at 292–93.

Here, the first *Brown* factors favor Appellant, but the second and third factors, the third being "'particularly' important," favor the United States.

i. <u>There were intervening circumstances, including the execution of a written Consent Form, between the apprehension and search</u>.

Appellant's apprehension ended when Agent Perry was reunited with Agent Thompson. (J.A. 100.) The agents did not ask questions, but only asked Appellant

for consent to search his room. (J.A. 100–01.) Appellant executed a written Consent Form between the apprehension and search. (J.A. 101–02.) The Appellant had to read the form, initial eight separate times, and sign his name and annotate the date and time. (J.A. 102, 672.) Based on those facts, there were significant intervening circumstances and this factor weighs in favor of the United States.

ii. The purpose of the apprehension was officer safety.

As the lower court found, the purpose of the initial handcuffing was for officer safety, (J.A. 22–24, 26), much like the violation in *Khamsouk*, 57 M.J. at 292–93; *see also United States v. Whisenton*, 765 F.3d 938, 943 (8th Cir. 2014) (noting "the agents' safety concerns also motivated their decision to enter"). That the Agent failed to remove the handcuffs for, at most, a minute longer than was required does not establish his actions were "designed to achieve any investigatory advantage he would not have otherwise achieved" if he had simply walked with Appellant—uncuffed—back to his room. *Khamsouk*, 57 M.J. at 293.

Moreover, even if Agent Perry was entirely unjustified in handcuffing Appellant at any point during their encounter, his mistaken belief that he was justified did not transform his articulated reason for his actions—officer safety—into an exploitation of the unlawful arrest. In *Khamsouk*, the Court found important that the agent did not believe he was committing a constitutional

violation when he entered the residence to arrest the appellant: his actions did "not suggest flagrant or purposeful conduct of the sort the Court in *Brown* was attempting to address." 57 M.J. at 293.

Similarly here, even if Agent Perry was mistaken in his belief he possessed the authority to frisk and handcuff Appellant, his stated rationale demonstrates he was not engaged in "flagrant or purposeful conduct" that would constitute a violation of *Brown*. *See Strieff*, 136 S. Ct. at 2063 (finding mere negligence by officer insufficient to establish "purposeful or flagrant" conduct); *Khamsouk*, 57 M.J. at 293 (same).

Although the extended handcuffing was not justified, Agent Perry acted in good faith during these seconds or at most minutes when returning to his partner at Appellant's barracks room. (J.A. 106.) Just as he did not immediately ask questions after smelling the fuel-soaked shoes, he did not ask questions while Appellant was handcuffed. (J.A. 106–07.) He only asked further questions after warning Appellant of his Article 31(b) rights. (J.A. 107–08.) Just as he did not immediately search the room after smelling the fuel-soaked shoes, he did not search the room until Appellant had been released from the handcuffs and signed a consent form. (J.A. 106–07.

The Agent's actions were thus not the type of conduct "the policy underlying the exclusionary rule was intended to deter," *Khamsouk*, 57 M.J. at 293,

and are in stark contrast to the purposeful and deceptive practices in *Brown*, *see* 422 U.S. at 605.

iii. The apprehension was not flagrant.

The lower court noted the apprehension was "extremely brief and without incident," lasting for a period of "seconds, maybe a minute." (J.A. 24.) The Agents did not "use[] threatening or abusive tactics," and the illegality of the brief extension of the lawful frisk was "far from obvious." *United States v. Smith*, 919 F.3d 1, 12 (1st Cir. 2019). Nor was the momentary apprehension exploited by the Agents as an "expedition for evidence in the hope that something might turn up." *Brown*, 422 U.S. at 605. As in *Khamsouk* and unlike *Brown*, the brief apprehension was not flagrant because it did not include "more severe police misconduct . . . than the mere absence of proper cause for the seizure," *Strieff*, 136 S. Ct. at 2064; *see Brown*, 422 U.S. at 605; *Khamsouk*, 57 M.J. at 293.

Moreover, as in *Khamsouk*, the Agents provided Appellant with a Consent Form that he initialed, signed, and dated, *Metz I*, 2020 CCA LEXIS 334, at *39–40; (J.A. 672), which reflects the "absence of purposeful or flagrant conduct" by Agent Perry. *Khamsouk*, 57 M.J. at 292; *cf. also Brown*, 422 U.S. at 603 (noting *Miranda* warnings is an "important factor"); *United States v. Fox*, 600 F.3d 1253, 1261 (10th Cir. 2010) (providing consent form may help dissipate taint).

iv. Appellant's citation to *Palomino-Chavez* is inapt.

In *United States v. Palomino-Chavez*, 761 F. App'x 637 (7th Cir. 2019), an unpublished opinion from another jurisdiction, the appellant was lying in a hammock in his backyard when law enforcement approached and performed a *Terry* frisk. *Id.* at 640. Under these circumstances, the court found the *Terry* stop was unlawful because the officers did not have "the requisite individualized suspicion" of the appellant. *Id.* at 643.

By contrast here, the *Terry* stop of Appellant was legal, and the only illegality was the brief extension of the valid stop. *See supra* Section C.2.a; *Metz I*, 2020 CCA LEXIS 334, at *37. This difference in both purpose and flagrancy distinguishes this case from *Palomino-Chavez*. (Appellant Br. at 51–52.)

Simply put, the purpose and flagrancy of Agent Perry's misconduct—an "extremely brief" extension of a lawful frisk for officer safety—combined with the rights advisement, demonstrate he did not obtain the consent to search by "exploitation" of the unlawful apprehension. *Brown*, 422 U.S. at 599; *see also Khamsouk*, 57 M.J. at 291.

Thus, Appellant has failed to prove deficient performance because a motion to suppress would not have been meritorious. *See Kimmelman*, 477 U.S. at 375.

d. Even assuming Appellant's first consent was tainted, his statements during his interrogation were sufficiently an act of free will: all three *Brown* factors favor attenuation.

i. The interrogation was not temporally proximate to the apprehension.

"[T]here is no 'bright-line' test for temporal proximity," *United States v. Reed*, 349 F.3d 457, 463 (7th Cir. 2003), and the factor has been called "ambiguous," *Dunaway v. New York*, 442 U.S. 200, 220 (1979) (Stevens, J., concurring). Although "substantial time" is often required, *Strieff*, 136 S. Ct. at 2062, the Supreme Court has found as little as forty-five minutes favors attenuation under the right circumstances, *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980); *see also Whisenton*, 765 F.3d at 941–42 (finding fifteen minutes sufficient and citing other cases with smaller timeframes); *cf. Smith*, 919 F.3d at 11–13 (finding attenuation despite "at minimum, several minutes"); *United States v. Greer*, 607 F.3d 559, 562–64 (8th Cir. 2010) (finding attenuation despite "three or four minutes"). Thus, the nearly four hours between the apprehension and Appellant's interrogation must favor attenuation, at least marginally. (*See* J.A. 672, 675.)

ii. There were significant intervening circumstances.

The most notable intervening circumstance was Appellant's review of the Waiver of Rights Form, during which he confirmed he understood each line—including asking about his right to terminate the interview at any time, (Pros. Ex. 9 at 7:16:39); *cf. Whisenton*, 765 F.3d at 942 (appellant's "questioning of the agents

as to the manner of their search demonstrates his deliberate consideration of the situation"). Appellant initialed the Form twelve times, and signed it. (Pros. Ex. 9 at 7:14:38–7:18:55; *see also* J.A. 672.)

Although a rights advisement alone does not attenuate a violation, it remains an "important factor." *Brown*, 422 U.S. at 603; *see also Smith*, 919 F.3d at 11 (finding "recitation of the consent to search form" was "an important intervening circumstance"); *Whisenton*, 765 F.3d at 942 (discussing consent form as intervening circumstance); *Fox*, 600 F.3d at 1261 ("[I]ntervening circumstances include 'carefully explain[ing]' a consent form . . . ." (citation omitted)).

Other intervening circumstances included the two-hour search, during which Appellant was not restrained, (*see* R. 54; Decl. at 5); *cf. Fox*, 600 F.3d at 1261 (noting "release from custody" can be intervening circumstance (quoting *United States v. Washington*, 387 F.3d 1060, 1074 (9th Cir. 2004))), and the thirty-minute car ride away from the scene of the brief apprehension, (R. 56); *cf. Smith*, 919 F.3d at 11 (noting "an opportunity to pause and reflect, to decline consent, or to revoke consent help demonstrate that the illegality was attenuated" (citation omitted)). Taken together, these intervening circumstances indicate Appellant's interrogation was attenuated from his apprehension. *See Fox*, 600 F.3d at 1261.

iii. The purpose and flagrancy continue to weigh in the United States' favor.

The purpose and flagrancy of the misconduct remain unchanged. *See supra* Section C.2.c. Moreover, any concern that the Agents "exploit[ed]" the illegality is further diminished: the Agents did not pressure or threaten Appellant into waiving his rights; rather, the Agents were friendly and made small talk during the drive to law enforcement spaces, where they calmly and thoroughly advised Appellant of his rights after giving him food. *See* (Pros. Ex. 9 at 6:53:38, 7:14:38–7:18:55); *Smith*, 919 F.3d at 12 (officers were "professional and polite"); *Whisenton*, 765 F.3d at 943 ("interaction was cooperative and calm").

iv. Appellant's arguments are unavailing.

In *United States v. Ceballos*, 812 F.2d 42 (2d Cir. 1987), agents asked the appellant to come with them, but they did not allow him to take his own vehicle. *Id*. at 44–45. The agents then read him his rights, told him he was not under arrest, and questioned him. *Id*. The appellant consented to searches of his house and his brother's house and made incriminating statements. *Id.* at 45–46. The court concluded the agents had taken custody of the appellant without probable cause and "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." *Id*. at 50. As a result, the court suppressed the evidence.

Appellant's use of *Ceballos* is inapt because the case is factually distinguishable. (Appellant Br. at 53–55.) In *Ceballos*, the agents' misconduct was plainly investigatory and flagrant: they arrested the appellant without probable cause in order to interrogate him. *See id.* at 44–45, 50. By contrast here, Agent Perry possessed a non-investigatory purpose—officer safety—for the "extremely brief," non-flagrant, apprehension. *Metz I*, 2020 CCA LEXIS 334, at *40; *see also supra* Section C.2.c. Thus, *Ceballos* does not support Appellant's claim.

Likewise, Appellant's concerns about the Agents confronting him with evidence from the search are unsupported by the Record and distinguishable from precedent. (Appellant Br. at 55.) First, the incriminating portion of Appellant's interrogation—his false alibi story involving Corporal Taylor, (*see* J.A. 541–42)—occurred before Appellant was confronted with evidence from the first search, (*compare* Pros. Ex. 9 at 7:21:30 (telling false alibi), *with* Pros. Ex. 9 at 7:31:45 (asking about fuel-soaked clothes for first time)). References to small talk between the Agents and Appellant earlier that day were not products of the search.

Second, the case law and secondary sources Appellant cites are distinguishable. (Appellant Br. at 51–57.) Those sources are concerned with whether "the *Miranda* warning neutralizes the inducement to confess furnished by the confrontation of the defendant with the illegally obtained evidence." 6 Wayne R. LaFave, Search and Seizure 403 § 11.4(c) (5th ed. 2012) (citation omitted); *see*

also United States v. Shetler, 665 F.3d 1150, 1158–61 (9th Cir. 2011) (analyzing voluntariness of confession). Here, that question is moot because Appellant did not confess; rather, he denied his involvement in the fire at least a dozen times and told a false alibi. (*See* Pros. Ex. 9.)

Further, Appellant's reference to *Kaupp v. Texas*, 538 U.S. 626 (2003), is distinguishable based on its egregious facts. (Appellant Br. at 47.) In *Kaupp*, police officers woke a seventeen-year-old minor at three in the morning with a flashlight, handcuffed him, and "led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car." *Id*. at 628. They then drove the patrol car to the location where the victim's body had just been found, before taking the minor to the police station. *Id*. In *Kaupp*, the startled minor merely responded "Okay" when a group of police directed that "we need to go and talk" in the middle of the night, whereas here, Appellant consented to being transported to the Agents' offices in the middle of the day. He then read the rights advisement, asked clarifying questions, and signed the consent form, indicating he understood his right to stop questioning at any time. (J.A. 101, 675; Pros. Ex. 9 at 7:14:38–7:18:55.)

Because all three *Brown* factors favor attenuation, a motion to suppress Appellant's interrogation would have failed, *see* 422 U.S. at 603–04, so Civilian Defense Counsel was not deficient, *see Kimmelman*, 477 U.S. at 375.

e. Even assuming the evidence from the first day was tainted, Appellant's consent the next day was attenuated.

In *United States v. Cherry*, 794 F.2d 201 (5th Cir. 1986), the appellant's identification was found at a murder scene. *Id.* at 203. Agents found the appellant, illegally arrested him, and transported him to their headquarters. *Id.* The appellant denied his involvement and consented to a search of his barracks. *Id.* The search did not yield anything, but the victim's wallet was found nearby, and the agents learned the victim's final dispatch was to the appellant's barracks. *Id.* The appellant spent the night in a holding cell. *Id.* The next morning, when agents confronted the appellant with new evidence against him, he then confessed and gave a second consent to search his barracks. *Id.* at 203–04.

The court rejected the appellant's attempt to suppress the second consent because all three *Brown* factors favored attenuation: (1) the twenty-four hour gap was significant; (2) the acquisition of additional evidence was an intervening circumstance; and (3) the conduct was not flagrant. *Id.* at 206–07.

i. The second consent was not temporally proximate to the apprehension.

As in *Cherry*, a full day passed between the illegal apprehension and Appellant's second grant of consent, (*see* J.A. 672, 678, 688–89); *Cherry*, 794 F.2d at 206. In fact, Appellant had sufficient time to meet with Corporal Taylor to ask him to tell a fabricated story to law enforcement. (J.A. 508–10.)

Because "substantial time" passed between Appellant's brief apprehension and his second consent, the first factor favors attenuation. *Strieff*, 136 S. Ct. at 2062; *Cherry*, 794 F.2d at 206 (same); *see also Rawlings*, 448 U.S. at 107–09 (forty-five minutes); *Smith*, 919 F.3d at 11 (several minutes); *Whisenton*, 765 F.3d at 941–42 (fifteen minutes); *Greer*, 607 F.3d at 562 (three or four minutes).

ii. There were significant intervening circumstances.

Second, several intervening circumstances occurred between the illegal apprehension and the second grant of consent, including (1) two hours for the first search, (J.A. 672); (2) thirty minutes for the drive to law enforcement spaces, (J.A. 79, 688); (3) a detailed Article 31, UCMJ, rights advisement, (J.A. 675, 688; *see also* Pros. Ex. 9 at 7:14:38–7:18:55); *Smith*, 919 F.3d at 11; (4) a multi-hour interview, (Pros. Ex. 9, J.A. 710); (5) Appellant's return to his room for the night, (J.A. 710–11), *cf. Cherry*, 794 F.2d at 203 (appellant spent night in holding cell); (6) a several-hour wait the next morning, (J.A. 711); and (7) another rights advisement, (J.A. 676–682, 689).

Moreover, the Agents used the time between interviews to "finalize the scene processing" and "continue to gather more facts." (J.A. 103); *cf. Cherry*, 794 F.2d at 206 (discovery of new evidence was intervening circumstance).

Thus, the quantity and quality of the intervening circumstances support attenuation. *See Smith*, 919 F.3d at 11; *Cherry*, 794 F.2d at 206.

iii. The purpose and flagrancy continue to weigh in the United States' favor.

The purpose of Appellant's apprehension the day before was legitimate—officer safety—and the violation was not flagrant, lasting "seconds, maybe a minute." *See supra* Section C.2.c. In fact, Appellant returned to his barracks room for the night, (Decl. 3–4), whereas in *Cherry* the appellant was confined for twenty-four hours, *see* 794 F.2d at 206–07. Finally, Appellant exercised his right to silence and declined to consent to a search of his phone, which demonstrates his consent was not burdened by the prior violation. *See* (J.A. 676–82); *cf. Fox*, 600 F.3d at 1261 (knowledge of right to refuse supports attenuation).

iv. Appellant's citations to *Jones* and *Darnall* are inapposite.

In *United States v. Jones*, 286 F.3d 1146 (9th Cir. 2002), law enforcement illegally seized the appellant's office and secured it until the consent was given, which made the seizure "so connected to the subsequent consent so as to render the consent ineffective." *Id.* at 1153 (citation omitted). Here, unlike in *Jones*, any connection between the illegal apprehension and the second consent was broken: the first search of Appellant's room was over, the room was not secured, and Appellant returned to his room for the night—during which he was free to take stock of what evidence remained there. (J.A. 710–11.) Furthermore, Appellant

was not "induced or influenced" to grant a second consent: he refused a search of his cell phone and invoked his right to silence. (J.A. 689.)

Similarly, *Darnall* is distinguishable. (Appellant Br. at 49.) In *Darnall*, law enforcement handcuffed and transported the appellant to an interrogation room without probable cause, where he gave consent to search his room and car, but not his phone. 76 M.J. at 328, 330. Law enforcement nevertheless seized the phone, and using information provided during the appellant's interview, obtained a command authorization to search the phone. *Id.* at 328–29. An agent also directed the appellant to return the next day, at which time the agent leveraged information from the cell phone search to obtain a confession. *Id.* at 329.

Applying *Brown*, the Court found the "taint of the illegal apprehension" was not sufficiently attenuated from the "evidence derived from the phone or from the first or second interview" because (1) the interview "directly follow[ed] the arrest"; (2) the only intervening circumstances were the drive and a rights advisement; and (3) the agent's actions were "unwise, avoidable, and unlawful." *Id.* at 331 (citing *Conklin*, 63 M.J. at 339). Despite the appellant returning home overnight, the second interview was not attenuated because the agents leveraged their possession of the appellant's cell phone to compel his return. *Id.* The Court sought to deter the "somewhat sloppy and apathetic investigation." *Id.* at 332.

Darnall is distinguishable for two reasons. First, the connection between the first and second days in *Darnall* was much stronger: the same agent conducted both interviews, and the appellant's phone was seized overnight against his will. *See* 76 M.J. at 328–32. Here, two different agents interviewed Appellant the second day, and his phone was not held overnight. (J.A. 689.)

Second, in *Darnall*, the connection to the illegality was strong: "the interview took place directly following the arrest," and the first interview "provided the basis for the search of his phone" and "led directly to his return" the next day. 76 M.J. at 331. The agent "openly 'exploited the original illegality,' using information obtained from Appellant in his post-apprehension interview to obtain a warrant for his phone." *Id.* at 332. In contrast here, the momentary apprehension happened hours before Appellant's interview, and the interview did not "le[a]d directly to his return," as the Agents continued to seek evidence between the two interviews. (J.A. 103, 686–89.)

Finally, Appellant's claim that "Agent Perry viewed the second day as a continuation of the first" is neither supported by the Record nor dispositive. (Appellant Br. at 57.) First, Agent Perry's testimony is more fairly understood to mean he viewed the second day to be part of the same investigation—not a continuation of the same interrogation. (*See* J.A. 103.) This explains why the Agents sought a fresh consent from Appellant, rather than continuing their

questioning. (J.A. 676–82.) Second, even assuming Agent Perry viewed the second day as a continuation of the first, his opinion does little to prove a lack of attenuation: two different Agents interacted with Appellant on the second day, (J.A. 689), and the analysis of temporal proximity and intervening circumstances is objective, *cf. Darnall*, 76 M.J. at 331 (conducting objective analysis).

Thus Appellant's consent to a search his room the next day—after numerous intervening circumstances—was untainted by the momentary apprehension the day before. *See Brown*, 422 U.S. at 603–04. Civilian Defense Counsel was not deficient for failing to file a motion.

f. Regardless, a motion to suppress would not have been meritorious because discovery was inevitable.

"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." Mil. R. Evid. 311(c)(2). The United States must "demonstrate by a preponderance of the evidence that when the illegality occurred, [its] agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner." *United States v. Mitchell*, 76 M.J. 413, 420 (C.A.A.F. 2017) (citation omitted).

"'Active pursuit' does not require that police have already planned the particular search . . . . The government must instead establish that the police would have discovered the evidence 'by virtue of ordinary investigations of evidence or

leads already in their possession.'" *United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir. 2015) (citation omitted). "When the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation." *United States v. Owens*, 51 M.J. 204, 210–11 (C.A.A.F. 1999).

In *United States v. Watkins*, 981 F.3d 1224, 1236 (11th Cir. 2020), agents placed GPS trackers inside of packages containing cocaine and set up surveillance at the destination post office. *Id.* at 1227. When the trackers stopped working, the agents began to suspect a postal supervisor was involved. *Id.* at 1227–28. The agents became particularly suspicious of the appellant after she appeared "anxious, nervous, and scared" by their presence, so "their next step 'probably' would have been to conduct a knock and talk at [the appellant]'s house." *Id.* at 1228. One of the trackers then started to work, and it showed the package was at the appellant's house. *Id.* at 1229. When the agents knocked on her door, the appellant admitted to having the packages and made several incriminating statements. *Id.* at 1229–30.

Despite assuming a Fourth Amendment violation, the court found the discovery was inevitable. *Id.* at 1231–39. The agents were already suspicious of the appellant and had discussed visiting her house before the tracker started working, and there was no reason to believe the appellant would have reacted any differently when questioned. *Id.* at 1235–36. The evidence "would have been

discovered through ongoing investigation and the pursuit of leads that were already in the possession of the agents." *Id.* at 1238.

In *Darnall*, law enforcement intercepted a package, but the address on the package was vacant. 76 M.J. at 328. When the appellant picked up a fake package at his command, they arrested him. *Id.* The inevitable discovery exception did not apply because law enforcement were not "actively pursuing" other evidence, and if the appellant had not suggested he was the intended recipient, the "investigation probably would have sunk at that time and not been continued." *Id.* at 332–33.

i. The Agents would have inevitably searched Appellant's room.

Here, as in *Watkins* and unlike in *Darnall*, when the illegality occurred, the Agents possessed and were actively pursuing leads and evidence that would have inevitably led to the evidence. As in *Watkins*, Appellant eventually became the focus of the Agent's investigation: the Agents (1) knew there were no signs for forced entry at the Facilities Building, (J.A. 67–68); (2) were conducting screening interviews of a short list of key holders, (J.A. 70); (3) had been told Appellant was a "problem child," (J.A. 69); (4) had smelled Appellant's fuel-soaked shoes in his room, which made the Agents' "suspicion level . . . raise a little bit higher," and gave them "a hunch," (J.A. 74, 86); (5) "were following through with [their] investigative lead"—the fuel-soaked shoes—by surveilling Appellant, (J.A. 74, 86); and (6) had re-discovered Appellant's fuel-soaked shoes outside his room,

(J.A. 688). *See Watkins*, 981 F.3d at 1238; *see also United States v. Kozak*, 12 M.J. 389, 393 (C.M.A. 1982) (search inevitable as appellant focus of investigation).

Unlike in *Darnall*, where the "investigation probably would have . . . not been continued," 76 M.J. at 333, if Appellant had not consented, the investigation would not have stopped: the Agents testified they planned to conduct screening interviews with the other key holders, (J.A. 70, 90), all of whom had verifiable alibis, (*see* J.A. 405–35, 438–99). This would have led the Agents back to Appellant, and the key reader showing Appellant returned to his room shortly after the fire—disproving his alibi—would have justified a search. (*See* J.A. 86, 602–03.)

Thus, the "routine procedures" of the Agents—screening interviews and verifying alibis—would have inevitably led to a search of Appellant's room. *See Owens*, 51 M.J. at 210–11.

ii. Appellant would have inevitably given his false alibi.

In *United States v. Henderson*, 52 M.J. 14, 16 (C.A.A.F. 1999), the appellant was apprehended by German police after a lengthy foot chase following a violent altercation resulting in the victim's death. The appellant was taken to the German police station for questioning and advised of his rights under German law and Article 31, UCMJ. *Id*. The appellant adamantly denied any involvement in the incident until he asked to terminate the interview and continue the next morning.

Id. The German police agreed and ceased all questioning; however, a military special agent who was present as an observer then spoke to the appellant in private. *Id*. The special agent said he was a government representative but that if the appellant had nothing to hide, he should just tell the truth. *Id*.

The agent's supervisor entered the room to take the appellant's statement, but the appellant then stated that he wanted to first talk to a lawyer. *Id* at 16–17. The agents started to leave the room, indicating they could no longer speak to the appellant, but the appellant motioned them back and said he would make a statement if he could speak to a lawyer in the morning. *Id* at 17. The appellant gave a statement to both military and German law enforcement agents, admitting to stabbing the victim, but claiming it was in self-defense. The admission was the only direct evidence tying the appellant to the murder. *Id*.

The court found that the special agent encouraging the appellant to tell the truth, after questioning was terminated by German authorities, did not violate the *Edwards* rule. *Id*. (*see Edwards v. Arizona*, 451 U.S. 477 (1981)). The court further found that the appellant's later request for counsel was not unequivocal as he also asked to make a statement, and thus was insufficient to invoke the protections of *Miranda* and *Edwards*. *Id* at 18.

Finally, the court looked to the totality of the circumstances to determine if the "appellant's will was overborne and his inculpatory admissions were

involuntary." *Id*. The court found that the "appellant's incriminatory admissions were entirely voluntary. The record shows that he couched these admissions in his exculpatory story… in the hopes of avoiding his problems with the German Government." *Id*. (*See United States v. Washington*, 46 M.J. 477, 482 (1997) (confession voluntary where record shows appellant tried to talk himself out of trouble.)

So too here, Appellant's false statements were entirely voluntary and intended to keep himself out of trouble. Even assuming the Agents would not have inevitably searched Appellant's room, Appellant's false alibi statements were inevitable. Appellant had already expressed a willingness to talk to the Agents, and he was keen to distance himself from the fire. (*See* J.A. 71–72, 89, 96, 686–87.) Thus, there is no reason to believe Appellant would not have agreed to an interview and presented his false alibi. *See Watkins*, 981 F.3d at 1236 (noting "[t]here is no reason at all to believe" an individual's statements would be different if contacted "an hour or two later").

Unlike other cases where appellants were coerced into confessing using evidence from an illegal search, *see, e.g.*, *Shetler*, 665 F.3d at 1158–59, Appellant continued to deny his involvement, even after being confronted with the evidence against him, *see supra* Section C.2.d.iv. If Appellant was willing to maintain his innocence even after knowing the Agents had inculpatory evidence, a

preponderance of the evidence indicates Appellant would have inevitably denied his involvement and offered his false alibi.

Thus, the Agents had evidence and leads that would have inevitably led to the physical evidence, the interrogation, or both—so exclusion would not have been warranted, and Civilian Defense Counsel was not constitutionally deficient. *See Mitchell*, 76 M.J. at 420.

D. Even assuming deficient performance, Appellant fails to satisfy the second prong of *Strickland*: he cannot demonstrate a reasonable probability the result would have been different.

To prove prejudice from the failure to file a motion seeking suppression, an appellant must show that absent the evidence that would have been suppressed "there is a reasonable probability that the [fact finder] would have had a reasonable doubt as to his guilt." *Kimmelman*, 477 U.S. at 391. "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

1. Even without the items seized in the initial search, the United States' other evidence was overwhelming.

Nothing found during the first search was critical to dispelling any reasonable doubt about Appellant's guilt because even without the evidence from the first search, the United States would have presented the following: (1) the Facilities Building fire was "caused by deliberate action of a human being" using

"ignitable liquids," and all hypothetical accidental causes were eliminated (J. A. 171, 177, 341, 345–46, 352); (2) Agent Perry smelled fuel emitting from Appellant's shoes, (J.A. 74–75, 97–98, 356–59); (3) the fire began shortly before the alarm triggered at 0335, and Appellant re-entered his barracks room, 0.35 miles away, at 0336, (J.A. 156, 437, 605, 606); (4) Appellant was frustrated with his sergeant, whose belongings were found on the fire, (J.A. 183, 418, 428–30, 440, 443, 476–77, 598) ; (5) Appellant lied about his whereabouts, losing his key, and fixing his car, (J.A. 201–02, 250–52, 333, 430, 502–03, 597, 600); and (6) Appellant asked Corporal Taylor to lie for him, (J.A. 510–11).

Thus, suppression of the evidence from the first search would not have left the Members with reasonable doubt of Appellant's guilt. Appellant has failed to establish prejudice under *Strickland*.

2. Even if Appellant's interrogation were suppressed, the United States' case remained strong.

In *Schneble v. Florida*, the Supreme Court found that even if admission of a codefendant's statement about the petitioner was error, as it was in violation of the *Bruton* rule, it was harmless beyond a reasonable doubt where the evidence of the petitioner's guilt was overwhelming. 405 U.S. 427, 429–32 (1972); *see Bruton v. United States*, 391 U.S. 123 (1968) (admission of confession of codefendant who did not take the stand deprived defendant of rights under Sixth Amendment Confrontation Clause).

The Supreme Court held that the violation of the *Bruton* rule did not require automatic reversal as the properly admitted evidence of guilt was so overwhelming that the admission was insignificant by comparison. 405 U.S. at 430–31. The petitioner tried to blame his codefendant, but the objective evidence indicated otherwise. *Id*. The Court found that as the allegedly inadmissible statements of the codefendant at most corroborated the other evidence of petitioner's guilt, which was overwhelming, any error was at most harmless. *Id* at 431–32.

While the present case does not involve a codefendant's statement, but a search, the concept is the same. Here, nothing found during the first search was critical to dispelling any reasonable doubt about Appellant's guilt because even without the evidence from the first search, the United States would have presented the following: (1) the fire was started intentionally using ignitable fluids, (J.A. 171, 177, 341, 345–46, 352); (2) Agent Perry smelled fuel on Appellant's shoes, (J.A. 188–89, 198, 202–04); (3) Appellant arrived at his barracks mere minutes after the fires began, (J.A. 156, 363, 437, 600, 605); (4) Appellant lied about losing his key, (J.A. 201–02, 372, 430); and (5) items belonging to Appellant's sergeant, with whom Appellant was upset, were placed on top of the fire, (J.A. 183, 418, 429–30, 440, 443, 476–77, 598).

Thus, just as suppression of the codefendant's statement in *Schneble* would not have left the factfinder with reasonable doubt, due to the overwhelming

evidence from other sources, the suppression of the evidence from the first search would not have left the Members with reasonable doubt of Appellant's guilt. Appellant has failed to establish prejudice under *Strickland*.

The question under *Strickland* is not whether a piece of evidence was "damaging [in] nature." (Appellant Br. at 59.) Rather, the proper question is whether Appellant has proven that there is a reasonable probability the Members would have possessed reasonable doubt. *Kimmelman*, 477 U.S. at 391. Appellant has failed to do so because even without the evidence from the first search and the interrogation, the Members would not have possessed reasonable doubt as to his guilt. *See id.*

E. Additional factfinding was not necessary and the lower court conducted a proper analysis under *Brown*.

1. The lower court had sufficient evidence to conduct the *Brown* analysis because the Parties litigated a similar Motion and offered substantial evidence about Appellant's consent.

Because Appellant litigated a similar Motion at trial, the Record already contained evidence of the circumstances surrounding Appellant's consent to search his barrack's room. (*See supra* Section C; J.A 661–82; R. 66–140 (litigating Motion to Suppress).) Based on that evidence, the lower court found Appellant's consent to search was voluntary. *Metz I*, 2020 CCA LEXIS 334, at *35–40.

Just as the Record was sufficient for the lower court to determine Appellant's consent was voluntary, *see Metz I*, 2020 CCA LEXIS 334, at *35–40, the Record was sufficient to conduct a *Brown* analysis, *see supra* Section C.2.

2. This Court left the question of additional factfinding to the lower court.

When this Court believes additional factfinding is necessary, it can direct a lower court to "order a hearing or other proceeding." Art. 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (2016). For instance, in *United States v. Cabrera*, 80 M.J. 374 (C.A.A.F. 2020), the court granted review of three issues and remanded for "further appellate inquiry of the granted issues." *Id.* The court then ordered the lower court to obtain affidavits and authorized a *DuBay* hearing, if necessary. *Id.*

Here, unlike *Cabrera*, this Court did not order the lower court to conduct additional factfinding. Instead, it authorized the court to "order affidavits or a factfinding hearing, if necessary." *Metz*, 82 M.J. at 45. The lower court determined that additional factfinding was not necessary.

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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