IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Lawrence G. HUTCHINS III Sergeant (E-5) United States Marine Corps, Appellant	BRIEF AND ASSIGNMENT OF ERROR Crim.App. No. 200800393 USCA Dkt. No. 18-0234/MC

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

S. Babu Kaza
Lieutenant Colonel, USMCR
Appellate Defense Counsel
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
Ph: (571) 379-0992
Babu_Kaza@hotmail.com
CAAF Bar No. 33773

Christopher Oprison
DLA Piper
500 8th St, NW
Washington DC, 20004
Civilian Counsel for Appellant
Ph: (305) 423-8522
Fx: (305) 657-6366
Chris.Oprison@dlapiper.com
CAAF Bar No. 37031

Thomas R. Fricton
Captain, USMC
Appellate Defense Counsel
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Ph: (202) 685-7291
Fax (202) 685-7426
thomas.fricton@navy.mil
CAAF Bar No. 36933

Index of Brief

Table of Cases, Statutes, and Other Authorities

Supreme Court of the United States

Court of Appeals for the Armed Forces / Court of Military Appeals

Military Service Courts of Criminal Appeals

Federal Circuit Courts

Federal District Courts

Statutes

Rules for Courts-Martial

Other Authorities

Issues Presented

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE OF CONDUCT FOR WHICH APPELLANT HAD BEEN ACQUITTED AT HIS FIRST TRIAL.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge. Accordingly, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed the case under Article 66(b), Uniform Code of Military Justice ("UCMJ").[1] On January 29, 2018, the NMCCA affirmed the convictions, and on March 12, 2018, denied Appellant's motion for reconsideration. Appellant timely filed a Petition for a Grant of Review with this Court under Article 67(a)(3), UCMJ,[2] giving this Court jurisdiction.

Statement of the Case

Sergeant Hutchins was tried by a general court-martial, composed of members with enlisted representation, from July 23 to August 3, 2007. Contrary to his pleas, he was found guilty of violating Article 81, conspiracy;[3] Article 107,

[1] 10 U.S.C. § 866(b).
[2] 10 U.S.C. § 867(a)(3).
[3] Through exceptions and substitutions.

false statement; Article 118, unpremeditated murder; and Article 121, larceny.[4] In accordance with his pleas, he was found not guilty of premeditated murder, assault, housebreaking, kidnapping, obstruction of justice, and one specification of false official statement.[5] Sgt Hutchins was sentenced to be discharged from the U.S. Marine Corps with a dishonorable discharge, to be confined for fifteen years, to be reduced to the pay grade of E-1, and to receive a reprimand. On May 2, 2008, the convening authority approved the findings and sentence as adjudged, with the exception of the reprimand and all confinement in excess of eleven years.

On May 30, 2008, the record of trial was docketed at the Navy-Marine Corps Court of Criminal Appeals (NMCCA) for review pursuant to Article 66, UCMJ. After receiving the pleadings of the government and defense, NMCCA specified two additional issues for supplemental briefing. On May 20, 2009, upon NMCCA's consideration of the supplemental pleadings, it remanded the case for a *Dubay* hearing, which was conducted at Camp Pendleton on August 18, 19, and 28, 2009. The record was returned to NMCCA on November 2, 2009.

On March 15, 2010, NMCCA, sitting *en banc*, heard oral argument on the supplemental issue. NMCCA issued its opinion on April 22, 2010, setting aside

[4] *See* 10 U.S.C. § 881, 907, 918, and 921 (2000).
[5] *See* 10 U.S.C. § 907, 918, 928, 930, 934 (2000).

the findings and sentence.[6] On June 7, 2010, the Judge Advocate General of the Navy ("the JAG") certified the case to the Court of Appeals for the Armed Forces (CAAF), and oral argument was held on October 13, 2011. On January 11, 2011, CAAF issued its opinion, affirming in part and reversing in part, and remanding the case back to NMCCA for consideration of the remaining issues.[7]

The case was re-docketed at NMCCA on February 18, 2011. Sgt Hutchins thereafter filed supplemental briefs which raised four additional issues, to include unlawful command influence. In June 2011, NMCCA denied two motions to attach UCI-related documents to the record. On March 20, 2012, NMCCA issued an unpublished opinion, affirming the findings and sentence.[8] A petition for grant of review was filed with CAAF on March 26, and granted on July 2, 2012.

CAAF held oral argument on November 13, 2012, and on June 27, 2013, CAAF issued its opinion, setting aside the findings and sentence.[9] On July 8, 2013, the Government petitioned for reconsideration, which was denied by CAAF on July 17, 2013.

---

[6] *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010) ("*Hutchins I"*).
[7] *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011) ("*Hutchins II"*).
[8] *United States v. Hutchins*, No. 200800393, unpub. op (N-M. Ct. Crim. App. March 20, 2012) ("*Hutchins III*").
[9] *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013) ("*Hutchins IV*").

On October 13, 2013, the Solicitor General of the United States (SG) requested an extension of time in order to consider whether to file a petition for grant of certiori. On November 4, 2013, the SG requested a second extension of time, but withdrew that request on November 6, 2013.

On November 17, 2013, the case was remanded to the convening authority. On January 6, 2014, the convening authority referred charges to a new general court-martial.

Subsequently, in June 2015 an officer and enlisted members panel, sitting as a general court-martial, convicted Sgt Hutchins, contrary to his pleas, of one specification of conspiracy in violation of Article 81, UCMJ, one specification of murder in violation of Article 118, UCMJ, and one specification of larceny in violation of Article 121, UCMJ.[10] The members acquitted Sgt Hutchins of false official statement in violation of Article 107, UCMJ, and certain overt acts in the conspiracy charge.[11]

On January 29, 2018, NMCCA issued an unpublished opinion, affirming the findings and sentence.[12] Sgt Hutchins filed a motion for reconsideration on February 27, 2018, which was denied on March 12, 2018. Sgt Hutchins filed a

---

[10] 10 U.S.C. §§ 881, 918, 921 (2012); Joint Appendix (hereinafter JA) at 966-68; JA at 1216.
[11] 10 U.S.C. § 907 (2012); JA at 957; JA at 1216.
[12] *United States v. Hutchins*, No. 200800393, unpub. op (N-M. Ct. Crim. App. January 29, 2018) ("*Hutchins V*").

Petition for a Grant of Review and a Motion for Leave to File Separately with this Court on May 11, 2018, and filed a Supplement on June 29, 2018. This Court granted review on August 27, 2018.

Statement of Facts

In May 2006, allegations of war crimes in Iraq left the United States government reeling. Time magazine had published explosive allegations that Marines in Haditha killed innocent Iraqis, including children, and now there were reports that a squad of Marines had unlawfully killed an Iraqi in Hamdania on April 26, 2006. A public response was critical, and it was critical that the Hamdania incident not be seen as the direct result of problems within the chain of command, the war effort, or the pre-surge strategic decisions emanating from the Pentagon.

Rather, responsibility stopped at the squad leader, and the United States government had its narrative: on the night of April 25, 2006, Sergeant Larry Hutchins, a deranged squad leader motivated by bloodlust, led his squad to kidnap and kill an innocent Iraqi, just for the sake of killing. NCIS conducted an investigation which included solitary confinement of the squad members and coercive interrogations in support of the narrative. The Government thereafter built its overall prosecution of the Hamdania incident with Sgt Hutchins as the

pinnacle target, and in 2007 brought him to a general court-martial for murder and other crimes.

A. The Narrative (2007)

At Sgt Hutchins' first court-martial, the Government's theory of prosecution, as articulated in its opening statement and closing argument, was that on the night of April 25, 2006, Sgt Hutchins was assigned to conduct a counter-IED mission with his squad, but instead concocted a plan to murder an Iraqi. [13] According to the prosecution, Sgt Hutchins' plan required four squad members, Magincalda, Thomas, Bacos and Pennington (the "snatch team"), to leave the ambush position, steal an AK-47 and shovel, patrol to insurgent leader Saleh Gowad's house, and then unlawfully enter the house and kidnap a victim—either Saleh Gowad himself ("Plan A"), a relative of Gowad ("Plan B"), or any random Iraqi military aged male from any nearby house ("Plan C").[14] The snatch team would then bind the victim with zip ties, bring him to an IED hole by the ambush position, where Sgt Hutchins would then falsely report that the squad had identified a man digging by the road who had then engaged them with an AK-47.[15] The squad would then shoot the man, while two members of the squad would shoot the AK-47 in the air

[13] JA at 268-83; 531-45).
[14] *Id.*
[15] *Id.*

and save the shell casings, to later be scattered around his body.[16] The squad would maintain the false story in any after-action reports.[17] The defense challenged the sufficiency of the evidence and the theory of there being a plan other than grabbing Gowad.[18]

In support of this theory at the first trial, the prosecution introduced Sgt Hutchins' confession, and sworn testimony from squad members Jackson, Jodka, Shumate, Pennington, and Bacos. Sgt Hutchins' confession indicated that the plan that night was to seize Saleh Gowad from his house and then kill him, as he was an insurgent leader responsible for IEDs that had killed U.S. forces.[19] The squad's motive was frustration and terror experienced by Sgt Hutchins and his squad from the ineffectiveness of the rules of engagement, and the policy of "catch and release" of insurgents.[20]

1. Squad Testimony

The sworn testimony provided by Jackson, Jodka, Shumate, Pennington and Bacos was as follows:

---

[16] *Id.*
[17] *Id.*
[18] JA at 268-83.
[19] JA at 585.
[20] *Id.*

a. Jackson

Jackson testified that the plan was to kill Saleh Gowad or someone from Gowad's house.[21] He indicated that the snatch team left the ambush position, returned with a man, and the squad engaged the man as planned.[22] On cross-examination, the defense sought to establish the danger of the environment, and the frustration felt by the squad of the continual "catch and release" of insurgents.[23] The defense also focused its questions on the voluntariness of Jackson's participation in the plan, and that the plan was only to kill Saleh Gowad.[24]

b. Jodka

Jodka testified that the plan was only to kill Saleh Gowad.[25] He indicated that the snatch team left the ambush position, returned with a man, and the squad engaged the man as planned.[26] The defense cross-examination of Jodka was consistent with the cross-examination of Jackson, and also established that Jodka believed that it was in fact Gowad who was being shot and killed by the squad.[27]

c. Shumate

---

[21] JA at 289, 317.
[22] JA at 293-98.
[23] JA at 307-14.
[24] JA at 316-17.
[25] JA at 321-22.
[26] JA at 324-28.
[27] JA at 331-36, 339.

Shumate testified that the plan was only to kill Saleh Gowad, and indicated that the snatch team left the ambush position, returned with a man, and the squad engaged the man as planned.[28] The defense cross-examination was consistent with the cross-examinations of Jackson and Jodka, establishing that Shumate believed at the time that it was in fact Gowad who was being shot and killed by the squad. [29] Shumate also testified that, as Gowad was an identified "HVI" ("High Value Individual"), the squad was allowed to enter Gowad's house and detain him at any time, with no further authorization required from the chain of command.[30]

d. Pennington

Contrary to Jodka, Jackson and Shumate, Pennington testified in accordance with the full prosecution theory: the conspiracy agreement was to kill Saleh Gowad, a Gowad relative, or any random Iraqi male.[31] He indicated that he, along with the rest of the snatch team, left the ambush position, went to a dwelling where they procured an AK-47 and shovel, and then went to Saleh Gowad's house.[32] According to Pennington, at Gowad's house the snatch team was compromised by a female inhabitant, and they therefore went to another dwelling.[33]

---

[28] JA at 340-50.
[29] JA 355-56, 361-62, 372-74.
[30] JA at 363.
[31] JA at 385-87.
[32] JA at 403-07.
[33] JA at 408-10.

At this other dwelling they seized a man out of his bed and then forced him to walk with them after binding his hands with zip ties.[34] While walking the man to the IED hole, the snatch team paused while a helicopter flew overhead, and then continued on.[35] At the IED hole, Pennington indicated that he struggled with the man while they bound his feet and disturbed the dirt in the hole.[36] Pennington and the snatch team then returned to the ambush position, where they engaged the man in accordance with the plan, killing him.[37]

On cross-examination, the defense sought to establish the danger of the environment, the frustration felt by the squad of the continual "catch and release" of insurgents, and shared desire to kill Saleh Gowad.[38] The cross-examination challenged the plausibility of Pennington's testimony that the conspiracy included seizing any random Iraqi male, and Sgt Hutchins' knowledge that anyone other than Saleh Gowad had been seized and killed.[39] The defense also attacked Pennington's credibility, to establish that Pennington's testimony concerning the alternate plan to seize a random Iraqi was false and had been coerced during plea negotiations.[40]

---

[34] JA at 400-01.
[35] JA at 403.
[36] JA 406-07; 409-10.
[37] JA 411-16.
[38] JA 419-35.
[39] JA 438-40.
[40] JA at 443.

e. Bacos

Similar to Pennington, Bacos testified in accordance with the full prosecution theory: the plan was to kill Saleh Gowad, a Gowad relative, or any random Iraqi male.[41] His description of the actual events leading to the man's death was consistent with the account provided by Pennington.[42] On cross-examination, the defense sought to establish the danger of the environment, the frustration felt by the squad of the continual "catch and release" of insurgents, and Bacos' shared desire to kill Saleh Gowad and voluntary participation in the events.[43] The defense also established that Sgt Hutchins radioed the snatch team to have the man brought back to the ambush position to be identified, but the snatch team did not comply with this request.[44]

2. The Defense Case

The witnesses called by the defense at the first trial were to establish that Sgt Hutchins had good military character, and also that the command climate fostered by Sgt Hutchins' platoon and company leadership encouraged and contributed to the overall disregard of the rules of engagement.[45] The defense also sought to establish through the testimony of Lieutenant (Lt) Phan that, despite his denials, he

---

[41] JA at 446-48.
[42] JA at 450-70.
[43] JA at 471-72, 474, 478-81.
[44] JA at 488-89.
[45] JA at 490-99, 505-522, 523-530.

had in fact ordered Sgt Hutchins to kill Saleh Gowad.[46] Finally, the defense called Dr. David Bailey to testify about Sgt Hutchins' mental state during the time of the alleged acts. Dr. Bailey indicated that, due to the acute stress of the combat environment, lack of sleep, and continued post-traumatic stress from earlier combat, Sgt Hutchins was in a state of perpetual heat of passion.[47]

3. Closing Arguments

During closing argument, the Government simply reiterated its theory of prosecution.[48] The defense argument painted the picture of a dangerous operational environment, and the frustrations caused by an ineffectual Iraq War strategy, combined with the rogue standard set by the platoon and company chain of command. In particular, the defense argued that Lt Phan had ordered Sgt Hutchins to kill Saleh Gowad.[49] In effect, the defense closing argument conceded that the killing had happened, and that the individual killed was not digging a hole when he was shot, but had instead been brought to the IED hole by the snatch team, and the scene staged.

The main exception to this concession was to maintain that the plan was only to kill Saleh Gowad, not any random Iraqi, and that Sgt Hutchins never

[46] JA. at 500-02.
[47] JA at 503-04.
[48] JA at 531-44.
[49] JA at 545-47; 548-50.

intended or planned for any random Iraqi to be killed, nor would he have allowed any random Iraqi to be killed.[50] The defense argued that testimony from Bacos and Pennington to the contrary was false, and was coerced by the prosecution in the course of their plea negotiations.[51] Finally, the defense argued that Dr. Bailey's testimony concerning provocation negated premeditation for the premeditated murder charge.[52]

4. Kidnapping and Housebreaking Instructions

The members were instructed that housebreaking required proof beyond a reasonable doubt of an "unlawful entry" into a dwelling with the intent to commit the offense of "kidnapping" therein.[53] The members were also instructed that kidnapping required proof beyond a reasonable doubt that the accused "wrongfully" held another against that person's will, that is, "without justification or excuse."[54] The members were then instructed that if they found Sgt Hutchins had an honest and reasonable belief that the individual allegedly seized and killed by his squad was Saleh Gowad, and that he had authority to detain Saleh Gowad, they were required to find him "not guilty" of those charges.[55]

---

[50] JA at 551.
[51] JA at 545-58.
[52] JA at 557-58.
[53] JA at 550-81; JA 596-98.
[54] *Id.*
[55] *Id.*

5. Findings

The members determined that Sgt Hutchins only sought to kill Saleh Gowad, finding him "not guilty" of all the "Plan B" and "Plan C" allegations testified to by Pennington and Bacos. Specifically, the members acquitted Sgt Hutchins of kidnapping, assault, housebreaking, premeditated murder, conspiracy to commit housebreaking and kidnapping, and the following overt acts:

> The said Corporal Magincalda, Corporal Thomas, Lance Corporal Pennington, HM3 Bacos did, on or about 26 April 2006, walk from Saleh Gowad's house to the dwelling house of an unknown Iraqi Man, located at or near Hamdaniyah, Iraq, and Corporal Magincalda and Corporal Thomas did enter the man's house;
>
> The said Corporal Magincalda and Corporal Thomas did, on or about 26 April 2006, take an unknown Iraqi Man from his house against his will.[56]

The members determined that the conspiracy was only to kill Saleh Gowad, did not include any plans for alternate victims, and to the extent anyone else may have been seized, such actions were not the object of the conspiracy, were not in furtherance of the conspiracy, nor were they proven beyond a reasonable doubt.

B. Appellate Pleadings: The Government Persists (2009)

Notwithstanding the acquittals at trial, on appeal the Government persisted in its narrative, claiming in its initial Answer brief that Sgt Hutchins had planned to kill any random military-aged male.[57] Sgt Hutchins immediately highlighted this

[56] JA at 582-84 (members' findings).
[57] JA 1101-02.

error in his March 2009 reply brief, drawing the lower court's attention to the acquittals: "[T]he members . . . rejected the allegation that the Appellant had ordered the "snatch team" to seize any "military aged male…the facts cited by the Government must be wholly discounted by the Court."[58] Nevertheless, the Government repeated the same narrative in a supplemental pleading, and in response Sgt Hutchins again directed the lower court to the acquittals: "This Court and the Government are bound by the findings of the members, which were that . . . the Appellant only intended to kill Saleh Gowad, a known terrorist."[59]

C. SecNav Sells the Narrative (2009)

In November 2009, while Sgt Hutchins' case was in the midst of Article 66 appellate review and the annual Article 74 Naval Clemency and Parole Board process, Secretary of the Navy Ray Mabus issued a press release and affirmatively contacted several reporters, offering to provide telephonic interviews on the Hamdania case. This was part of a coordinated series of widely disseminated articles appearing, *inter alia*, in the Associated Press, The Marine Corps Times, and The North County Times.[60] The articles noted that Secretary Mabus had personally reviewed the transcripts and records in each case, and believed that all were guilty, and had received light sentences.

---

[58] *Id.*
[59] JA at 1103.
[60] JA at 1189-93.

Specifically regarding Sgt Hutchins, Secretary Mabus indicated that there would be no further clemency, and stated to *The Marine Corps Times* that the killing was "so completely premeditated . . . they picked somebody at random, just because he happened to be in a house that was convenient. . . It was completely planned and completely executed."[61]

D. *Hutchins* I: Narrative Accepted (2010)

In the lower court's decision in *Hutchins I*, the majority was not required to address the facts of the case, as its ruling was based on the improper severance from the case of the detailed defense counsel, which required automatic reversal. However, Judge Price, in a dissenting opinion, did address the facts of the case, and, did so in a manner consistent with the narrative.

Without any reference to the members' "not guilty" findings or to Sgt Hutchins' appellate briefs, Judge Price determined that Sgt Hutchins had targeted a man "with no suspected insurgent ties because he was a military-aged male who lived near a suspected insurgent, after their plan to kill a suspected insurgent was compromised."[62] Judge Price later reinforced that there was "contingency planning to abduct and kill any nearby military-aged male in the event their efforts to abduct suspected insurgent(s) was compromised."[63] The majority opinion did not note

[61] JA at 1190.
[62] *Hutchins*, 68 M.J. at 636-37.
[63] *Id*.

Judge Price's inconsistency with the members' findings, and responded to the dissent only by reiterating that the improper severance of counsel was not amenable to a speculative prejudice analysis.[64]

E. *Hutchins III*: Holding Firm (2012)

After this Court's remand in *Hutchins* II, Sgt Hutchins noted the contradiction between Judge Price's *Hutchins* I dissent and the members' findings in a supplemental brief to the lower court: "[T]his Court was informed on multiple occasions that the Government's assertion that Appellant had been convicted of planning to select a random victim was factually erroneous, and that the members had instead found Appellant "not guilty" of those allegations. Yet, Judge Price nonetheless made this exact error in his opinion."[65]

The lower court's resulting opinion in *Hutchins* III did not address Judge Price, and regarding the underlying facts of the case, *Hutchins* III indicated:

> The court-martial received testimony from several members of the squad that indicated the intended ambush mission morphed into a conspiracy to deliberately capture and kill a high value individual (HVI), believed to be a leader of the insurgency. *The witnesses gave varying testimony as to the depth of their understanding of alternative*

[64] *Hutchins* 68 M.J. at 631.
[65] JA at 1106 (Supp Reply Brief 1 Sep 2011).

> *targets, such as family members of the HVI or another random military-aged Iraqi male*.[66]

Although noting the "varying" testimony, *Hutchins* III did not recite the charges, specifications, or language on which the members had acquitted Sgt Hutchins.[67]

F. Retrial: Narrative Undaunted (2015)

1. Motion

At the retrial, the defense submitted a motion in limine, seeking to exclude evidence and testimony regarding conduct that was subject of the members' "not guilty" findings at the first trial, including the evidence of "housebreaking," "kidnapping," the alternate plan to seize a random Iraqi, and the alleged seizure of a random Iraqi by the snatch team.[68] The motion noted:

> [T]he government must be precluded from presenting any evidence as support for the remaining charged offenses that would be contradicted by the members "not guilty" findings . . . [or] it will be impossible to determine if any convictions in this retrial rest on conduct for which Sgt Hutchins was acquitted.[69]

Upon conclusion of oral argument, and without any review of the original record of trial, the military judge immediately ruled from the bench and denied the motion:

> The motion to suppress is denied. There is no requirement to speculate on the rationale on the last panel of members. In fact, it's folly to try to

---

[66] *Hutchins* III at *2 (emphasis added).
[67] *Id.* at *2-3.
[68] JA at 1134-55.
[69] JA at 1140-41.

> do that. The real risk of confusing them is if we try to parse the facts as proposed by the defense counsel. Misconduct can violate more than one article of the UCMJ and the conduct alleged in Paragraphs (a), (b), and (c) of the defense motion are not mutually exclusive to the charges of which the accused was acquitted.[70]

There were no additional findings of fact or conclusions of law.

2. Second Trial

a. Opening Statements

At the retrial, the Government, in its opening statement, identified the alleged plan to seize a random Iraqi as essential to its theory of prosecution:

> And that's where the accused brought his Marines in, and he briefed them on the plan: Plan A, get Gowad; Plan B, get Gowad's brothers; and Plan C. . . They went to this house to execute Plan C where they would get any Iraqi man. And that's the house they made entry into through that front door. Corporal Thomas jimmied the lock and they went in. And they found a man sleeping on the first floor of that house. They dragged that man out of the house, and they dragged him a thousand meters all the way back to the IED craters.[71]

The defense opening statement focused on the lack of credibility of the government's forensic evidence and witnesses, and political motivations driving the NCIS investigation in the wake of the Haditha killings:

> They're going to call a lot of witness. They're going to call the squad mates. They're going to call the NCIS agents to come in here and try to prove to you all those bad things that Major Newsome just told you about. They won't be able to do it. They don't have the facts to back it up. . . They're going to bring in the squad mates, who the prosecution said they don't want to be here. And we're going to show you why they

[70] JA at 711.
[71] JA at 722-23.

> don't want to be here. Because the first go around, every single one of them was brow beaten into giving a confession, a statement incriminating themselves and Sergeant Hutchins by overzealous agents who have no idea what the bounds of the Constitution are. They took a couple of weakened, scared, powerless, young Marines and forced them to confess to things that they never did.[72]

b. Merits Evidence

During the Government's case on the merits, Bacos, Pennington, Jackson, Jodka and Shumate were called to testify, however, with the exception of Jackson, they each asserted that they could not testify.[73] Despite having received grants of testimonial immunity for their acts in Iraq, they invoked their privilege against self-incrimination as their truthful testimony at the retrial would deviate from their prior testimony, thereby exposing them to charges of perjury, which was not protected by the immunity.[74] After a colloquy with each witness, the military judge nevertheless ordered them to testify, an order which they each refused in light of their privilege against self-incrimination.[75] Over defense objection, the military judge thereafter declared them unavailable, and ruled that their testimony from the first court-martial would be admissible.[76]

---

[72] JA at 730.
[73] JA at 736-37; 745-47; 841-44.
[74] *Id.*
[75] *Id.*
[76] JA 751-53; 806-08.

The prior testimony was read into the record, to include the prior testimony from Bacos and Pennington which detailed the allegations concerning the plan to seize any random Iraqi, and the actual seizure of a random Iraqi.[77] The defense consistently objected prior to and during the reading of the testimony, due to the inclusion of this evidence, but was overruled. The cross-examinations from the first trial were not introduced, pursuant to defense request.

During Jackson's live testimony, the defense cross-examination focused on NCIS coercion. Jackson acknowledged that the agents were aggressive, and, further, had presented him with Bacos' statement as a guide to follow for his own statement.[78] Jackson also agreed that he felt powerless during the NCIS interrogation, and that NCIS "broke" him.[79]

The defense case on the merits focused on using expert testimony to attack the NCIS investigation and forensic evidence. In addition, the defense called Dr. Thomas Streed to testify about false confessions and memory confabulation.[80] Dr. Streed indicated that false confessions could be induced by a number of factors, including "stress, benefit, or harm."[81]

---

[77] JA at 810-39; 846-88.
[78] JA at 777-79.
[79] JA at 782.
[80] JA at 891.
[81] JA at 904.

c. 404(b) instruction

The military judge provided a M.R.E. 404(b) instruction for the use of acquitted acts evidence, denying a defense request for a more expansive limiting instruction.[82] The instruction was as follows:

> [T]he accused was acquitted at a prior proceeding of the offenses of kidnapping, housebreaking, assault, obstruction of justice, premeditated murder, and false official statement on or about 8 May, as well as conspiracy to commit kidnapping and housebreaking. You may therefore consider evidence that the accused may have been involved in plans or acts involving entering the alleged victim's home, moving him to another location, involvement in a shooting, and providing a statement to NCIS on or about 8 May for the limited purpose of its tendency, if any, to prove a plan or design of the accused to commit the charged acts. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies, and that he therefore committed the offenses charged.[83]

d. Closing Arguments

During closing argument, the government maintained its focus that the conspiracy was to seize any random Iraqi:

> Again, when they all entered into that agreement, when he got every single one of their buy-in, they're all now co-conspirators. They're all criminally liable. . . As we know from the testimony we heard, they executed that plan. They executed that plan to a "T." Members, this is a textbook case of conspiracy and murder executed to a "T."
>
> . . . .
>
> They feel the plan is compromised. They're scared away. And so, they just move right along the next house in accordance with the plan. The house of any random Iraqi male. They go to the next closest house,

[82] JA at 811-817; 1194-96 (App. Ex. CLIV).
[83] JA at 809, 913-14.

> Magincalda and Thomas come out with an unknown Iraqi man. He's flex-cuffed, zip tied . . . .
>
> And if it wasn't going to be Saleh Gowad, well, then it was going to be somebody else and it didn't matter who. They were going to take matters into their own hands, and they were going to send a message.[84]

During the defense argument, the defense asked the members to disregard this evidence, due to the prior acquittals:

> The rulings in the acquittals in that prior case are binding. The judge instructed you that you can consider the underlying acts, whether or not that was part of the conspiracy or plan or something along those lines. Gentlemen, I would ask you to disregard, not the judge's instruction, but to disregard the evidence. Give it no weight. Give it no credibility. The government has done everything they can to bring in everything they've got to try to convict Sergeant Hutchins of something. He has been acquitted of these offenses.[85]

In rebuttal, the Government contrarily exhorted the members that they must consider this evidence in their findings: "And I was stunned when the defense told you to disregard the evidence because that is one thing you should not do."[86]

After deliberations, the members convicted Sgt Hutchins of conspiracy, murder and larceny.

F. *Hutchins* V: A Partial Dose of Reality (2018)

Pursuant to Article 66 UCMJ, NMCCA reviewed Sgt Hutchins' retrial, to include the military judge's decision to admit the acquitted acts evidence.

---

[84] JA at 916-17; 920.
[85] JA at 942.
[86] JA at 945.

NMCCA's resulting opinion ("*Hutchins* V") determined, as a factual matter, that Sgt Hutchins was in fact acquitted at his first trial of conspiring and committing crimes under alleged plans "B" and "C":

> In light of these instructions, the evidence, and counsel's arguments, the findings of not guilty of housebreaking, kidnapping and conspiracy to commit them along with the exception of the overt acts of walking to an unknown Iraqi man's house, entering the house, and taking the man from his home against his will, support the appellant's proffered acquittal.[87]

Nevertheless, *Hutchins* V held that there was no error in convicting Sgt Hutchins under the same conspiracy charge and co-conspirator liability charges for which he had already been acquitted. Under the heading, "Not an issue of ultimate fact in the case before us," the court stated:

> Whom the appellant conspired to kill was central to the government's theme and theory at both trials but was not an issue of ultimate fact at his second court-martial. The conspiracy specification did not name the victim the appellant and his co-conspirators agreed to murder. Whether the man shot by the IED crater was the same man the appellant intended to kill was not critical to a finding of guilty for murder…And for the same reasons, the identity of the appellant's intended victim was not essential to the other charges referred to his second court-martial. *With no pending charges dependent upon whom the appellant agreed to kidnap and kill, there is no issue of ultimate fact*.[88]

[87] *Hutchins V* at *12, *16.
[88] *Hutchins V* at 11 (emphasis added).

For the lower court, the terms and scope of the conspiracy agreement were not essential facts to the conspiracy charge, or to the co-conspirator liability inherent to the murder and larceny charges.

This appeal follows.

Summary of Argument

Double jeopardy and the doctrine of collateral estoppel prevents the government from attempting to prove essential facts in a court martial by relying on offense of which the accused had been acquitted. The Government's narrative, and the cornerstone of its prosecutions at both trials, was that Sgt Hutchins conspired to kill a random Iraqi. However, Sgt Hutchins was acquitted of this narrative at his first trial, and instead convicted of conspiring to kill insurgent leader Saleh Gowad. Accordingly, at the retrial the government was collaterally estopped from presenting the random Iraqi conspiracy to the members as an ultimate fact or essential element of any charge. The Government nevertheless did so, and the impermissible random Iraqi conspiracy was the essential element of Sgt Hutchins' conspiracy conviction, and the co-conspirator liability underlying his murder and larceny convictions. This violation of collateral estoppel was not harmless beyond a reasonable doubt. If the precluded evidence had been suppressed, or the members instructed to disregard it, there would have been a perfect dovetail with the trial defense team's evidence and theory of defense, and

the members would have acquitted Sgt Hutchins of all charges and specifications. The appropriate remedy is dismissal with prejudice, as this double jeopardy violation cannot now be rendered harmless, and no useful purpose would be served by continuing the proceedings.

Argument

THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE OF CONDUCT FOR WHICH APPELLANT HAD BEEN ACQUITTED AT HIS FIRST TRIAL.

A. Standard of Review

The Court reviews a military judge's admission of evidence under an abuse of discretion standard, where the facts are reviewed for clear error, and the law reviewed *de novo*.[89] However, the Court will show less deference where the military judge fails to make findings of fact and conclusions of law on the record.[90]

B. Legal Background

1. Supreme Court

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[91] This bedrock constitutional principle has been reiterated and upheld since the inception of the American judicial system: "If there

[89] *United States v. Harrell*, 75 M.J. 359, 362 (C.A.A.F. 2016)
[90] *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).
[91] U.S. CONST. amend. V.

is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."[92] UCMJ Article 44(a) applies the protections of the Fifth Amendment of the United States Constitution to members of the military.[93]

In *Ashe v. Swenson*, the Supreme Court held that once an issue of ultimate fact has been determined by a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense.[94] In *Ashe*, six poker players were robbed by a group of masked men. Ashe was charged with robbing one of the men and eventually acquitted by a jury.[95] The State subsequently attempted to retry Ashe for the robbery of another poker player. Ashe was convicted at his second trial.[96]

The Supreme Court, however, reversed the conviction, holding that collateral estoppel was "embodied in the Fifth Amendment guarantee against

---

[92] *Ex parte Lange*, 85 U.S. 163, 168, 21 L. Ed. 872 (1873).
[93] The Fifth Amendment of the Federal Constitution protects an accused from further prosecution for the same offense. *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990). Service members are protected with respect to each of the three components of the constitutional prohibition against double jeopardy: (1) trial for the same offense after acquittal; (2) trial for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Josey*, 58 M.J. 105, 106 (C.A.A.F. 2003).
[94] 397 U.S. 436, 443 (1970).
[95] *Id.* at 438.
[96] *Id.* at 440.

Double Jeopardy."[97] The Court ruled that during the first trial no rational jury would have found that the robbery did not take place or that the alleged victim had not been robbed, and that therefore, the only disputed fact was the identity of the robber.[98] Stated in another fashion, the Supreme Court determined that the second trial was prohibited because the only contested issue at the first trial was whether Ashe was one of the robbers.[99] As such, the jury's verdict of acquittal collaterally estopped the State from trying him for robbing a different player during the same criminal episode.[100] The Supreme Court noted:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to *"examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."* Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal. . . . *"If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering*. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is

[97] *Id.* at 445.
[98] *Id*.
[99] *Id.* at 446.
[100] *Id.* at 446.

> impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction."[101]

There are two notable limitations to the use of collateral estoppel in criminal cases. The first is where there are logically inconsistent findings from the jury due to guilty verdicts on some counts and acquittals on other counts. The second limitation is where evidence from a prior charge, which has been subject to an acquittal, is used in a separate proceeding with a different standard of proof. In *Dowling v. United States*, the Supreme Court held that evidence from an acquitted charge could be admissible at a later proceeding under Rule 404(b), *provided the acquittal did not determine an ultimate fact in the later proceeding*.[102] "[U]nlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case."[103]

More recently, the Supreme Court reaffirmed the principle of criminal collateral estoppel in *Yeager v. United States*.[104] The underlying crime in *Yeager* was insider trading connected to the Enron corporate meltdown. The defendant was acquitted of fraud and conspiracy, but the jury deadlocked on charges of insider trading. In applying collateral estoppel to a new trial on the deadlocked charges, the Court noted, "[i]f the possession of insider information was a critical

---

[101] *Id.* at 475-76 (citations omitted) (emphasis added).
[102] 493 U.S. 342. 348 (1990).
[103] *Id*.
[104] 557 U.S. 110 (2009).

issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element."[105]

2. Application in Military Courts

Rule for Court-martial ("R.C.M.") 905(g) enshrines the doctrine of collateral estoppel in the military justice system: "Any matter put in issue and finally determined by a court-martial . . . may not be disputed by the United States in any other court-martial of the same accused . . ."[106] Further, *Ashe* was applied in military courts as early as 1972, in *United States v. Marks*.[107] In *Marks* the Court collaterally estopped the government from prosecuting the accused, after the Court examined the record of a prior federal prosecution that resulted in an acquittal of the accused, and determined that the jury in the federal case had decided essential facts against the government.

In *United States v. Hicks*, the Court of Military Appeals reached the same conclusion that would be reached by the Supreme Court three years later in *Dowling*, holding:

> [C]ollateral estoppel does not preclude use of otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted. The questions to be decided are whether the evidence is relevant (Mil.R.Evid. 401) and whether the probative

[105] *Id.* at 111.
[106] R.C.M. 905(g).
[107] *United States v. Marks*, 45 C.M.R. 55 (C.M.A. 1972).

> value of the proffered evidence is outweighed by its prejudicial effect (Mil.R.Evid. 403). The relevance of evidence of prior misconduct is governed by Mil.R.Evid. 404(b).[108]

As in *Dowling*, *Hicks* clarified that evidence could only be admissible under M.R.E. 404(b) if it was *not* evidence which was an ultimate fact and essential to a conviction in both cases:

> In *Ashe v. Swenson* . . . the fact underlying the issue of identity -- that is, whether the accused was present at the robbery -- was an ultimate fact and essential for conviction in both proceedings. *On the other hand, the other-acts evidence here was totally separate from the instant offenses in time and place; was used for a limited evidentiary point; did not require proof beyond a reasonable doubt; and, although probative, was unnecessary to support a conviction of the instant charges.*[109]

C. Discussion

The military judge's denial of the defense motion to suppress the presentation of plans "B" and "C" as part of the conspiracy agreement was error. His determination, "there is no requirement to speculate on the rationale on the last panel of members. . . In fact, it's folly to try to do that," is *directly* contradicted by *Ashe* and its progeny.[110] Similarly, the military judge, without any citation to authority, determined that any object offenses and "overt acts" which were potentially in furtherance of a conspiracy were admissible—to include the object

---

[108] 24 M.J. 3, 9 (C.M.A. 1987).
[109] *Id.* at 8-9 (emphasis added); *see also United States v. Griggs*, 51 M.J. 418, 419-20 (C.A.A.F 1999) (applying *Dowling*).
[110] *Compare* JA at 711 (military judge's ruling) *with Yeager*, 557 U.S. at 119-20 (quoting *Ashe*).

offenses and overt acts that had been specifically excepted out of the conspiracy charge by the members at the first trial.[111]

Hutchins V correctly determined that, contrary to the Government's narrative, Sgt Hutchins was in fact acquitted of all crimes related to an alleged conspiracy agreement to kill any random Iraqi male. The Government has not certified a cross-appeal to this Court challenging that factual determination. Accordingly, the Government has waived any continued opposition to *Hutchins V's* rejection of its narrative, and that issue is not now before this Court for review.[112] Rather, the issue before this Court is *Hutchins V's* erroneous refusal to apply collateral estoppel, through its determination that the object of the conspiracy "was not an issue of ultimate fact at [Sgt Hutchins'] second court-martial," and its concurrent misapplication of M.R.E. 404(b).[113]

---

[111] R. at 1250-51.

[112] *See United States v. Savala,* 70 M.J. 70, 76-77 (C.A.A.F. 2011) (holding that where the Government does not certify an appeal it may not challenge a lower court's findings, unless those findings are clearly erroneous or a manifest injustice would occur.); *see also United States v. Wilder,* 75 M.J. 135, 137 (C.A.A.F. 2016)("Appellant has not challenged this holding on appeal, so it is the law of the case and not before us.").

[113] *Hutchins* V at 11.

1. UCMJ Conspiracy

The text of Article 81, UCMJ, states: "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."[114] The Manual for Courts-Martial identifies the elements of Article 81 as:

> (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
>
> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.[115]

In the case at bar, the trial judge provided the members with the following instruction on conspiracy agreement:

> The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. *It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties*.[116]

2. The conspiracy agreement is the essential fact of a conspiracy charge.

Uncontroverted federal and military precedent establishes the "meeting of minds" and "agreement" between co-conspirators as the *quintessential* fact of a

---

[114] Art. 81, UCMJ.
[115] Manual for Courts-Martial (2005 ed.), Art. 81
[116] JA at 951. (emphasis added)

conspiracy charge. "[T]he essence of conspiracy is an agreement, an agreement to commit some act condemned by law either as a separate federal offense or for purposes of the conspiracy statute."[117] "Unlawful agreement" is "[t]he fundamental element of a conspiracy."[118] It "determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy."[119] To meet the "unlawful agreement" element, "the evidence must show that 'two or more persons agreed to participate in a joint venture intended to commit an unlawful act.'"[120]

To meet its burden "the government must establish a unity of purpose, an intent to achieve a common goal, and an agreement to work together [to achieve that common goal]."[121] It makes no difference if two people may operate toward

---

[117] *United States v. Jimenez Recio*, 537 U.S.270, 274 (2003), citing *Iannelli v. United States*, 420 U.S. 770, 777 (1975).
[118] *United States v. Rubin*, 844 F.2d 979, 983 (2d Cir. 1988).
[119] *United States v. Grimm*, 738 F.3d 498, 502 (2d Cir. 2013) (quoting *United States v. Salmonese*, 352 F.3d 608, 614 (2d Cir. 2003) (internal quotation marks omitted)).
[120] *United States v. Banki*, 685 F.3d 99, 117 (2d. Cir. 2011) (quoting *United States v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009)); *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) ("The essence of any conspiracy is, of course, agreement.").
[121] *United States v. Hitt*, 107 F. Supp. 2d 29, 33 (D.D.C. 2000), *aff'd*, 249 F.3d 1010, 1023 (D.C. Cir. 2001) (quoting *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1994) (alteration in original)).

the same purpose unless they have *agreed* to act toward that purpose together.[122] Put simply, conspiracy requires a "meeting of minds."[123]

In order to prove an agreement to break the law, the government may not rely upon evidence of "a vague agreement to do something wrong.'"[124] The law, instead, requires not just "a general agreement to engage in unspecified criminal conduct," but an agreement "as to the 'object' of the conspiracy."[125] "That is, the defendant has to know what the 'object' of the conspiracy he joined was."[126]

---

[122] *See United States v. Geibel*, 369 F.3d 682, 690 (2d Cir. 2004) ("[C]onspiracy is not defined by its purpose but rather by the agreement of its members to that purpose.") (quoting *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (internal quotation marks omitted)).

[123] *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring); *see also United States v. Winans*, 612 F. Supp. 827, 838 (S.D.N.Y. 1985) ("[T]he crime of conspiracy is an illegal agreement among conspirators for which a 'meeting of the minds' is required.").

[124] *United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998) (quoting *United States v. Provenzano*, 615 F.2d 37, 44 (2d Cir. 1980)); *see also United States v. Al Kassar*, 660 F.3d 108, 126 (2d Cir. 2011) ("[I]t is not enough that the defendant participated unwittingly or joined under the mistaken impression that the conspiracy involved some other, legal activity . . . ."); *United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004) ("Proof that the defendant knew that *some* crime would be committed is not enough.") (quoting *United States v. Friedman*, 300 F.3d 111, 124 (2d Cir. 2002)).

[125] *United States v. Rosenblatt*, 554 F.2d 36, 38-39 (2d Cir. 1977).

[126] *United States v. Ulbricht*, 31 F. Supp. 3d 540, 551 (S.D.N.Y. 2014); *see also Rosenblatt*, 554 F.2d at 38 ("[T]he 'essential nature of the plan' must be shown.") (quoting *Blumenthal v. United States*, 332 U.S. 539, 557 (1947)); *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) ("'[G]overnment must prove that the defendant agree[d] on the essential nature of the plan,' and that there was a 'conspiracy to commit a particular offense and not merely a vague agreement to do something wrong.'") (citations omitted); *Ungar v. Islamic Republic of Iran*, 211 F.

Similarly, this Court has noted that conspiracy requires "a mutual understanding among the parties."[127] And further: "'Agreement is the essential evil at which the crime of conspiracy is directed' and it '*remains the essential element of the crime*.' If there is no actual agreement or 'meeting of the minds' there is no conspiracy."[128]

3. A single conspiracy agreement may encompass multiple offenses.

In *Braverman v. United States*, the Supreme Court held that a conspiracy to commit multiple offenses remains a single agreement, and a single conspiracy:

> For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.[129]

Supp. 2d 91, 100 (D.D.C. 2002) ("[C]onspiracy . . . require[s] proof of a 'common and unlawful plan whose goals are known to all members.'") (citation omitted).

[127] *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003) (citing *United States v. Cobb*, 45 M.J. 82, 85 (C.A.A.F. 1996)).

[128] *United States v. Valigura*, 54 MJ 187, 188 (CAAF 2000) (citing *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975); W. LaFave & A. Scott, SUBSTANTIVE CRIMINAL LAW § 6.4(d) at 70-71 (1986)) (emphasis added).

[129] *Braverman v. United States*, 317 U.S. 49, 53 (1942); *see also United States v. Mack*, 58 M.J. 413, 418 (C.A.A.F 2003) (citing *Braverman*).

Thus, if there is a hypothetical conspiracy "X," with the object of committing criminal offenses "A," "B," "C," "D," and "E," the conspiracy does not consist of a separate agreement for each offense, rather it is one agreement:

Incorrect

Conspiracy X

Agreement—A
Agreement—B
Agreement—C
Agreement—D
Agreement—E

Overt Acts

Correct

Conspiracy X

Agreement—ABCDE

Overt Acts

The unitary agreement and "object" of the conspiracy is the *in toto* commission of crimes A, B, C, D and E.

4. Double jeopardy was violated where Sgt Hutchins was convicted of charges based on the same conspiracy agreement for which he had already been acquitted.

As the Supreme Court noted in *Yeager*, double jeopardy bars prosecution of any charges containing "essential elements" previously decided in the accused's favor.[130] The conspiracy agreement charged at Sgt Hutchins' first trial was an agreement to commit larceny ("L"), housebreaking ("H"), kidnapping ("K"), false official statements ("F"), murder ("M"), and obstruction of justice ("O"):

[130] *Yeager*, 557 U.S. at 111.

Charged Conspiracy

Agreement—LHKFMO

Overt Acts

As discussed, Sgt Hutchins was acquitted of all crimes/language related to an alleged plot to kill a random Iraqi, to include conspiring to commit housebreaking and kidnapping. Hence, Sgt Hutchins was acquitted of agreement "LHKFMO," and the members' instead convicted for conspiracy agreement "LFMO":

Convicted Conspiracy

Agreement—LFMO

Overt Acts (minus H and K acts)

As noted above by federal and military precedent, the criminal "meeting of the minds" and "agreement" is the essential element of a conspiracy charge. Thus, per *Yeager*, the conspiracy charge at Sgt Hutchins' retrial would be an impermissible violation of double jeopardy if the alleged underlying "agreement" was an agreement for which Sgt Hutchins had already been acquitted, i.e. agreement LHKFMO.

The only permissible agreement which could be presented to the members at the retrial was agreement LFMO. Yet, conspiracy agreement LHKFMO, and the

housebreaking and kidnapping overt acts in furtherance thereof, were the *linchpin* of the Government's case, and the essential element of the conspiracy conviction and co-conspirator liability underlying the murder and larceny convictions:[131]

Retrial Convicted Conspiracy
Agreement—LHKFMO
Overt Acts (including H and K acts)

Accordingly, Sgt Hutchins' rights against double jeopardy were violated.

5. The lower court's faulty analysis disregards the housebreaking and kidnapping acquittals.

The lower court found that double jeopardy was not violated, as "Whom the appellant conspired to kill was . . . not an issue of ultimate fact at his second court-martial."[132] The lower court further noted that the conspiracy specification did not identify a specific victim, and only identified "an unknown Iraqi male."[133] However, contrary to the lower court, a conspiracy agreement *is* an ultimate fact of a conspiracy charge (as noted above), and the identity of the victim was an essential element of the conspiracy charge at the second trial through the

[131] Even under the Government's evidence, Sgt Hutchins was not present when the larceny of the rifle occurred, and was behind the firing line and manning the radio when his squad allegedly fired on the victim. Sgt Hutchins' convictions for those charges were therefore necessarily through co-conspirator liability.
[132] *Hutchins V* at 11.
[133] *Id*.

government's wrongful use of housebreaking and kidnapping as object offenses of the conspiracy.

To be clear, regardless of the specific language in the conspiracy specification on victim identity, it was wholly impermissible to convict Sgt Hutchins of conspiring under conspiracy agreement LHKFMO. The government was only permitted to present conspiracy agreement LFMO. Thus, the issue is not whether the victim was named in the specification, but whether the conspiracy agreement Sgt Hutchins was accused of at the retrial included the same agreement for kidnapping and housebreaking for which he had been acquitted.

As discussed above, Saleh Gowad was an authorized target for seizure, and therefore kidnapping and housebreaking could only exist if he was not the intended victim of the conspiracy. Accordingly, the government's presentation of evidence/argument at the retrial that the intended victim of the charged conspiracy agreement included someone other than Saleh Gowad was in "direct contradiction" to the acquittals from the first trial, and a violation of double jeopardy.[134] The lower court's analysis simply disregards that the acquittals for the housebreaking and kidnapping crimes/conspiracy were based on the identity of the intended victim, and disregards that at the second trial the identity of the intended victim

[134] *United States v. Rosario*, 76 M.J. 114, 118 (C.A.A.F 2017).

was an essential element and ultimate fact of the conspiracy *agreement*. Accordingly, the lower court erred.

6. The military judge's 404(b) instruction did not mitigate the Double Jeopardy error, and instead created additional due process violations.

Admission of prior acquitted acts as M.R.E. 404(b) evidence at a subsequent proceeding is only permissible where the prior acts were from *a separate transaction* as the charged offense, and "did not determine an ultimate issue in the present case."[135] The military judge even acknowledged this dissonance, noting that the 404(b) case law was for "separate and completely unrelated offenses that the government sought to bring in evidence of post-acquittal, as opposed to this one where all the facts are together and they're contemporaneous."[136]

The military judge nevertheless continued to analyze the issue under the M.R.E. 404(b) rubric, and the disconnect is apparent in his instruction. Simply instructing the members that Sgt Hutchins was "acquitted" of certain offenses (while still failing to reference the excepted overt acts), but then indicating that they could use the evidence to "prove a plan or design of the accused to commit the charged acts" establishes a distinction without a difference: the members were

---

[135] *Dowling*, 493 U.S. at 348; *Hicks*, 24 M.J. at 9; *United States v. Harris*, 67 M.J. 611 (A.F. Ct. Crim. App. 2009) (Evidence from acquittal is admissible when it is from a different transaction as the charged offenses.); s*ee also* R.C.M. 905(g).
[136] JA at 735.

free to rely on the evidence underlying the acquitted offenses to establish essential facts for the pending charges. More directly, there is no appreciable distinction between relying on evidence to determine "plan or design" and relying on evidence to determine the terms of a conspiracy "agreement." Therefore, the members were fully authorized by the 404(b) instruction to use the acquitted acts to determine an essential fact: the conspiracy agreement. The instruction was ineffectual.

And further, the military judge's instruction provided no guidance on whether the acquitted acts evidence was still subject to the "beyond a reasonable doubt" standard.[137] For example, the members could believe that the acquitted acts evidence need not be found beyond a reasonable doubt, as there is a separate lower standard where they need only "consider . . . for the limited purpose" its tendency to prove the plan of the accused. But the "plan" of the accused was the conspiracy charge, and the co-conspirator liability which formed the basis of his convictions. Given that the acquitted act evidence was indistinguishable from the charged offenses, Appellant's due process right to be presumed innocent until proven guilty beyond a reasonable doubt was fatally compromised.

In *United States v. Hills*, this Court addressed a similar issue, where the use of M.R.E. 413 allowed the members to bootstrap evidence to support a conviction

[137] *Cf.* JA at 1194 (defense proposed 404(b) instruction).

without applying the reasonable doubt standard.[138] "[H]ere, the error involved using charged misconduct as M.R.E. 413 evidence, which permeated the military judge's instructions to the members and violated Appellant's presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in constitutional error."[139] As in *Hills*, the judge's instruction in the instant case confused the burden of proof, and violated due process.

7. The violation of the prohibition against double jeopardy was not harmless beyond a reasonable doubt.

The lower court held that the nature of the conspiracy was not an essential fact to the case, as there were "no pending charges *dependent* upon whom the appellant agreed to kidnap and kill."[140] In essence, that Sgt Hutchins may have been found guilty based on acquitted acts, but that error was harmless because his convictions were not "dependent" on those acquitted acts, as he could have been convicted under alternate theories of liability. In the context of a M.R.E. 404(b) prejudice analysis the lower court assessed that "evidence of Plan A was sufficient to assuage any concerns that members needed to fall back on evidence of Plans B and C."[141] As will be discussed below, the lower court misapprehends the proper prejudice standard.

---

[138] *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).
[139] *Hills*, 75 M.J. at 356.
[140] *Hutchins V* at 11 (emphasis added).
[141] *Hutchins V* at *24.

a. Constitutional Standard

In *Price v. Georgia*, the Supreme Court considered prejudice from a Double Jeopardy violation even where the defendant was acquitted of the jeopardy-barred charge:

> One further consideration remains. Because the petitioner was convicted of the same crime at both the first and second trials, and because he suffered no greater punishment on the subsequent conviction, Georgia submits that the second jeopardy was harmless error when judged by the criteria of *Chapman* v. *California*, 386 U.S. 18 (1967), and *Harrington* v. *California*, 395 U.S. 250 (1969). We must reject this contention. The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. *Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence*.[142]

The principles from *Price v. Georgia* were later refined by the Supreme Court in *Morris v. Matthews*:

> Accordingly, we hold that, when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense. In this situation, we believe that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.[143]

---

[142] *Price v. Georgia*, 398 U.S. 323, 331 (1970) (emphasis added).
[143] *Morris v. Matthews*, 475 U.S. 237, 246-47 (1986).

In *United States v. Coleman*, the Sixth Circuit applied the *Morris v. Matthews* "reasonable probability" test where the defendant faced a charge of conspiracy in conjunction with a jeopardy-barred charge of attempted arson.[144] *Coleman* found that the defendant did not meet his burden, where, (1) the jury was instructed to consider the two charges separately, and its verdict on one was not to affect its decision on the other, and (2) during deliberations the jury sent a note to the judge noting that it was deadlocked on the conspiracy charge, and had not yet reached discussion on the attempted arson charge.[145] Under those circumstances, the defense could not show a reasonable probability of a different result if the jeopardy barred charge had not been presented.

b. Analysis

Applying *Morris v. Matthews* to Sgt Hutchins' case, there is a reasonable probability that but for the presentation of the random Iraqi evidence, Sgt Hutchins would not have been convicted of the charges. Specifically, in contrast to *Coleman*, the members were permitted to consider the "random Iraqi" conspiracy as the crux of the prosecution, and there is no indication that they first considered a Saleh Gowad-only conspiracy.[146]

---

[144] *United States v. Coleman*, 887 F.2d 266 (6th Cir. 1989) (unpublished).
[145] *Id.* at *12-*13.
[146] Further, neither the government nor the defense argued for the members to convict under a Gowad-only conspiracy.

Further, the entire defense case was built on raising reasonable doubt as to the credibility of the witness testimony, to include ulterior motives from the Iraqis who reported the incident, political bias from NCIS, and the inadequacy of the forensic evidence (to include the autopsy of an unidentified body and a lack of ballistics evidence).[147] In support of the defense theory, the members were faced with statements from multiple essential government witnesses which disavowed their own prior testimony, evidence of NCIS' coercive interrogation tactics, a lack of testimony from any Iraqi witnesses, and a lack of any conclusive forensic evidence.[148]

Thus, had the members been instructed that they must further disregard and find reasonable doubt in any testimony related to a supposed plot to kill a random Iraqi, and the purported acts in furtherance of that plot, they would have been required to find reasonable doubt in essential testimony of the key prosecution witnesses, which would have been fatal to the government's case. Bacos and Pennington were the only witnesses to testify as to what the snatch team allegedly did when it left the ambush position.

The defense could have effectively argued to the members that if they were already required to disregard Bacos and Pennington's testimony on the scope of

[147] JA at 921-44 (defense closing).
[148] *Id.*

the conspiracy and actions in furtherance of it, they must necessarily find reasonable doubt in Bacos and Pennington's entire testimony. This would have further buttressed the defense argument for the members to put weight in the recantations of testimony from Bacos, Pennington, Jodka, and Shumate, and find reasonable doubt in the government's case. And for Jackson, he testified that his initial statement to NCIS was made with Bacos' statement to guide him. Thus, if the members disregarded Bacos' testimony, there would have necessarily been reasonable doubt to Jackson's testimony, particularly in light of his acknowledgment of NCIS coercion and in light of Dr. Streed's false confession and confabulation testimony.

Similarly, if this testimony had simply been stricken, the members would have been faced with gaps in testimony concerning the seizure and identity of the alleged victim, which were essential pieces of the prosecution's case. This would have again dovetailed with the theory of defense that the members could not trust the testimony of the squad members, creating reasonable doubt. Hence, there is more than a "reasonable probability" that exclusion of the jeopardy-barred evidence would have impacted the ultimate findings.

In addition, without the presentation of the jeopardy-barred "random Iraqi" evidence, the case against Sgt Hutchins would have been limited to an alleged plan to kill an insurgent leader as a consequence of an ineffectual "catch and release"

policy. The members would have considered whether the actions of a Marine in a combat environment to eliminate an insurgent should in fact be considered under the crime of "murder," with the same murder conviction one would receive, for example, for a gang-related drive-by shooting in the United States.

The members could have considered whether, in light of the surrounding circumstances, the particular facts of this killing included the necessary *mens rea* to support a criminal charge. This is not merely an academic consideration, as in the cases of Cpl Thomas and Cpl Magincalda, the only companion cases to be fully contested, neither was found guilty of murder or any lesser included offense thereof.[149] Alternatively, consideration of a Saleh Gowad-only plot rather than a random Iraqi plot raises an absolute probability that if the members did convict, it may have been for voluntary manslaughter rather than conspiracy-fueled murder (and co-conspirator liability larceny), given the heat of passion of the combat environment, combined with the intent to eliminate a dangerous insurgent.

The lower court also failed to consider the impact of the random Iraqi evidence on sentencing, despite its acknowledgment that this evidence demonstrated a particular "murderous callousness."[150] Sgt Hutchins was entitled to

---

[149] Magincalda was convicted of conspiracy, wrongful appropriation and housebreaking; Thomas was convicted of conspiracy and kidnapping. *See* JA at 631-701 (Staff Judge Advocate Recommendation, dated September 18, 2015 (includes Convening Authority Actions in companion cases)).
[150] *Hutchins V* at *24.

not be sentenced for the same acts for which he had been acquitted. Cpl Thomas and Cpl Magincalda's cases are once again instructive in demonstrating that Sgt Hutchins' sentence was not a foregone conclusion. Cpl Thomas did not receive any confinement, and Cpl Magincalda did not receive a punitive discharge.[151] Had the members only sentenced Sgt Hutchins for the Saleh Gowad conspiracy, rather than the random Iraq conspiracy, Sgt Hutchins stood an excellent chance of receiving the "no punishment" sentence advocated for by his defense counsel, particularly in light of the mitigation presented during the defense sentencing case.

8. Dismissal with Prejudice is the appropriate remedy, where the Government has already accomplished its objective of establishing its false narrative, and, further, where Sgt Hutchins has already served his full sentence, and no purpose would be served by continued proceedings.

Dismissal with prejudice is warranted "where the error cannot be rendered harmless," as the Government has already accomplished its objective, and "no useful purpose would be served by continuing the proceedings."[152] Here, the Government's objective has been the public advancement of its narrative that Sgt Hutchins planned to kill a random Iraqi, and the disregard of the acquittals. That

[151] *See* JA at 631-701 (Staff Judge Advocate Recommendation, dated September 18, 2015 (includes Convening Authority Actions in companion cases)).
[152] *United States v. Barry*, No. 17-0162, 2018 CAAF LEXIS 583, at *20-21 (C.A.A.F. Sep. 5, 2018) (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

objective was accomplished throughout the retrial, and as a result Sgt Hutchins will forever have his name associated with guilt for crimes of which he was acquitted.

Further, there is no purpose to be served by continued proceedings. Sgt Hutchins has already served his full sentence of confinement—which was over 4 times confinement than that of any other squad member. There is no further punishment to be gained, and to the extent public opprobrium is required through a technical conviction, the Government and Secretary Mabus have already achieved that through their improper public narrative.

Moreover, there is the irony of attempting to cure a double jeopardy violation by putting the accused through yet another trial. As noted by *Price v. Georgia*, "To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly."[153] Thus, a third trial would only exacerbate the prejudice. The Government's inability to comply with the Constitution at two separate trials should not be rewarded by an endless supply of mulligans. Justice demands this case be finished.

The ordeal Sgt Hutchins and his family have endured over 12 years greatly exceeds any punishment the Government could ever have lawfully achieved. And, further, the Sgt Hutchins of 2006 no longer exists. As he noted in his unsworn statement at the retrial:

---

[153] *Price v. Georgia*, 398 U.S. at 331.

> That's not who I am. I read that after action report that I wrote [in 2006]. I read it, you know, two days ago to trial, three days ago, and I hadn't seen it in years. I didn't have it in prison with me. And when I read that, my God, it's not me. It's who I had to be in a situation that I was in, but it's not me. It's not who I've become, who I – it's just not me.[154]

And as eloquently argued by defense counsel during sentencing:

> The prosecution wants you to punish this Marine for killing this unknown Iraqi man ten years ago. . . The problem is, gentlemen, he's not here anymore. That 22-year-old hard-charging Sergeant doing the best he could to save his Marines, he's gone. He's not coming back. He died in the dark dank cell of Leavenworth eight years ago. What you have in front of you is a grown man, who's come to terms with his demons, has felt remorse for what he's done, has become a family man, a beloved member of his unit, and there's no need for any additional punishment.[155]

The strain of the ongoing proceedings on Sgt Hutchins' family was also articulated at the retrial by his wife Reyna, and his ten-year old daughter Kylie. Reyna noted, "I mean, this is the way my child has spent the last nine years of her life is like this. This whole thing, sitting in this courtroom over and over and over again. No child deserves to live like this . . . ."[156] She also testified that she could not truly be happy when Sgt Hutchins was released from the brig in 2013, as she knew that the Government would continue the back and forth pull of legal proceedings.[157]

---

[154] JA at 992.
[155] JA at 1036.
[156] JA at 1012.
[157] JA at 1017.

Kylie, who was eighteen-months old when her father was first put in the brig, and ten at the time of the retrial, testified how her father would get the shakes in his hands when he was first released from the brig in 2010, and she would comfort him:

> Q. A story about you helping your daddy get to sleep.
>
> A. Yeah.
>
> Q. He gets the shakes a little bit; right?
>
> A. Yeah. I remember that, and I would, and it would just mean the world to me, even when he was shaking. I would tell him it was okay and that things were going to get better, but in all reality, they didn't.[158]

[158] R. at 1028.

The below depicts Sgt Hutchins and his daughter Kylie, during this time frame in June 2010, after his initial release from the brig (he was returned to confinement eight months later):[159]

Kylie also testified about watching her siblings with her father:

> Q. You've gotten a chance to see your dad do some things with your brother and little sister that he didn't get to do with you?

[159] JA at 223 (Appellant's September 2011 Supplemental Reply Brief at 17); *see also* Mark Walker, "Father's Day special for Hamdania Marine" THE NORTH COUNTY TIMES, June 20, 2010, available at http://www.sandiegouniontribune.com/sdut-military-fathers-day-special-for-hamdania-marine-2010jun20-story.html.

A. Yes, and it means the world to me to see him love the baby and watching him and watch her grow up, and him and Aidan playing swords together and them saying "I love you" to each other. It's just an amazing thing that I'm happy to see that they have, and *I'd rather them have it than me because they don't deserve what I had. They deserve better, and they always will*.[160]

Conclusion

WHEREFORE, Appellant requests this Court dismiss the findings and sentence with prejudice.

Respectfully Submitted,

//s//
S. BABU KAZA
Lieutenant Colonel, USMCR
Appellate Defense Counsel
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
Ph: (571) 379-0992
Babu_Kaza@hotmail.com
CAAF Bar No. 33773

//s//
CHRISTOPHER OPRISON
DLA Piper
500 8th St, NW
Washington DC, 20004
Civilian Counsel for Appellant
Ph: (305) 423-8522
Fx: (305) 657-6366
Chris.Oprison@dlapiper.com
CAAF Bar No. 37031

THOMAS R. FRICTON
Captain, USMC
Appellate Defense Counsel
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Ph: (202) 685-7291
Fax: (202) 685-7426
thomas.fricton@navy.mil
CAAF Bar No. 36933

[160] R. at 1028 (emphasis added).

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 12,190 words.

2. This brief complies with the type style requirements of Rule 37 because it was prepared with a monospaced typeface using Microsoft Word 2010 with 14 point, Times New Roman font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on October 10, 2018.

THOMAS R. FRICTON
Captain, USMC
Appellate Defense Counsel
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Ph: (202) 685-7291
Fax: (202) 685-7426
thomas.fricton@navy.mil
CAAF Bar No. 36933