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	REPLY BRIEF Crim.App. No. 200800393 USCA Dkt. No. 18-0234/MC

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

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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

Statutes

Rules for Courts-Martial

Other Authorities

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. The identity of the intended victim was an issue of ultimate fact at the retrial. Accordingly, issue preclusion, not M.R.E. 404(b), is the proper analytical framework.

The *essential premise* of the lower court's decision to reject issue preclusion, and instead apply M.R.E. 404(b), was its erroneous determination that the identity of the conspiracy's intended victim was not an issue of "ultimate fact" at the retrial.[1] However, the Government Answer makes no effort to adopt or otherwise defend this essential premise, and the Government never challenges the defense argument that the identity of the victim was an ultimate fact at the retrial. Accordingly, this Court can presume that the Government has conceded to Appellant's argument that the lower court's analysis was incorrect, and, consistent with uncontroverted federal and military precedent, the Government concedes that the "agreement" and "meeting of the minds" underscoring a conspiracy are ultimate facts for a conspiracy charge.[2]

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[1] *Hutchins* V at *10-11.

[2] *See* Appellant's Brief at 33-37.

The Government instead skips ahead and tautologically declares that issue preclusion is inapplicable, because the evidence need only be proven by a preponderance of evidence under M.R.E. 404(b). In other words: because the acquitted acts evidence was offered under 404(b), then that proves that it was 404(b) evidence.[3] The Government's logical fallacy begs the question of whether the acquitted acts are ultimate facts, as if they are ultimate facts, then admission under 404(b) is an impermissible due process violation.

As this Court highlighted in *United States v. Hills*, ultimate facts essential to a criminal charge must be proven by the Government *beyond a reasonable doubt*.[4] And it is for that reason the 404(b) exceptions to issue preclusion identified in *Dowling* and *Hicks* are explicitly limited to acts which are *not* essential elements of charged offenses.[5] Otherwise, there is the *Hills* paradox which the Government

[3] *See* Answer at 28-29.

[4] *See United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F 2016).

[5] The Government Answer omits any reference to the limiting language from these opinions, although that language was explicitly cited in Appellant's brief. *See* Appellant's Brief at 29-31; *United States v. Dowling*, 493 U.S. 342, 348 (1990) ("[U]nlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case.") (quoting *Ashe v. Swenson* 397 U.S. 436 (1970)); *United States v. Hicks*, 24 M.J. 3, 8-9 (C.M.A. 1987) (In *Ashe v. Swenson* . . . [there] was an ultimate fact [which was] 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.)

now finds itself in: acts which must be proven beyond a reasonable doubt are instead allowed to be proven by only a preponderance.

But rather than attempt to distinguish the *Hills* problem, the Government instead embraces it wholeheartedly, arguing, "assuming the Members had a reasonable doubt Appellant committed the offenses of conspiracy to housebreak and kidnap . . . it does not matter because the United States only needed to establish the evidence related to those offenses by a preponderance of the evidence for Mil. R. Evid. 404(b) purposes."[6] But as noted in Appellant's initial brief, conspiracy agreements to commit multiple offenses are still singular agreements.[7] Thus, when the Government argues that it need only establish conspiracy to commit housebreaking and kidnapping by a preponderance, this necessarily and impermissibly reduces the burden of proof for the "agreement" element of the overall conspiracy charge. And as a practical matter, it was impossible for the members to bifurcate conspiracy to commit housebreaking and kidnapping from the remaining elements of the conspiracy charge, as they were all intertwined.

[6] Answer at 28-29.
[7] Appellant's Brief at 36-37.

B. Issue preclusion applies to a rehearing.

1. *Currier v. Virginia* did not overrule controlling precedent in *Ashe* and *Yeager*.

The Government claims, "The *Bravo-Fernandez* and *Dowling* rules that issue preclusion is not implicated at a rehearing like Appellant's is consistent with the Supreme Court's most recent analysis of issue preclusion in *Currier v. Virginia*, 138 S. Ct. 2144 (2018)."[8] Aside from the Government's gross misreading of the holdings of the referenced cases, it fails to address *Yeager*, which is controlling precedent from the Supreme Court and *directly contradicts* this position.[9]

Yeager specifically held that issue preclusion would apply to a rehearing where at the first trial a defendant was acquitted of some charges, and the jury hung on other charges. At the rehearing, the acquitted charges would be given issue preclusive effect against the remaining charges: "If [an acquitted act from the first trial] was a critical 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."[10]

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[8] Answer at 29-30.
[9] *See Yeager v. United States*, 557 U.S. 110 (2009).
[10] *Id.* at 111.

Further, as a mere plurality opinion, the decision in *Currier* had no legal effect on established issue preclusion precedent in *Ashe* and its progeny, including *Yeager*.[11] Although the Government may desire for the cases which established criminal issue preclusion to be overturned, it did not have the requisite five votes in *Currier*, nor does this Court have authority to overrule Supreme Court precedent. Further, even if the Government had found a fifth vote in *Currier*, the elimination of Constitutional issue preclusion would have no impact on R.C.M. 905(g), which firmly embeds issue preclusion in military justice as a procedural rule.[12]

Moreover, as issue preclusion remains established constitutional law, this Court should look to Justice Ginsburg's majority opinion in *Bravo-Fernandez* and dissenting opinion in *Currier* for expository guidance on its application: "In short, issue preclusion does not operate, as claim preclusion does, to bar a successive trial altogether. Issue preclusion bars only a subset of possible trials—those in which the prosecution rests its case on a theory of liability a jury earlier rejected."[13] Thus, under established (and controlling) issue preclusion jurisprudence, the prosecution in Sgt Hutchins' retrial was barred from presenting as a theory of liability that Sgt Hutchins had conspired to kill a random Iraqi man.

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[11] *See Ashe v. Swenson*, 397 U.S. 436 (1970).
[12] *See* R.C.M. 905(g).
[13] *Currier* at 2162 (Ginsburg, J. dissenting).

2. Claim preclusion also applies, as the conspiracy charged at the retrial was indistinguishable from the original charged conspiracy.

Aside from issue preclusion, claim preclusion is also applicable to the facts of this case. Here the Government concedes, "Had the United States charged Appellant at the rehearing with the same agreement it charged at the first trial—to commit larceny, housebreaking, kidnapping, false official statements, murder, and obstructing justice—then *Braverman* and Double Jeopardy would prohibit prosecution of the 'same offense' at the rehearing."[14] However, Sgt Hutchins did in fact face the "same offense" at the rehearing.

First, as the "agreement" element to the conspiracy charge was the same for both trials, the charge is the same, and claim preclusion applies. Second, even if the specific text of the conspiracy charge at the retrial was different from the text of the charge at the first trial, claim preclusion applies as the Government was prosecuting a greater offense after conviction of a lesser offense.

The Saleh Gowad theory of liability the members found at the first trial was a lesser included offense of the random Iraqi theory of liability presented by the prosecution. Where the prosecution alleged a plot to kill Saleh Gowad, a relative, or a random Iraqi, the members convicted for the lesser included offense of only plotting to kill Saleh Gowad. Accordingly, the Government's presentation at the

[14] Answer at 40.

retrial of the random Iraqi conspiracy agreement was a prosecution for the greater offense of which Sgt Hutchins had already been acquitted. And it is uncontroverted that where there is a conviction for a lesser included offense, it is a violation of Double Jeopardy to subsequently prosecute the greater offense.[15] Hence, Sgt Hutchins' rights against Double Jeopardy were violated both under issue preclusion and claim preclusion.

C. The Government waived any challenge to the lower court's assessment of the acquittals. But even if there was not waiver, the Government's argument is wholly unsupported by any credible review of the record.

1. The Government is estopped from disputing the findings of the lower court.

A party that does not appeal an adverse ruling waives the ability to challenge it, and the ruling becomes binding as the "law of the case."[16] Once a decision becomes the law of the case, "that decision should continue to govern the same issues in subsequent stages in the same case."[17] This court has refused to apply the "law of the case" doctrine only when the lower court's decision is "clearly erroneous and would work a manifest injustice."[18]

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[15] *See, e.g., Brown v. Ohio*, 432 U.S. 161, 168-69 (1977).
[16] *United States v. Morris*, 49 M.J. 227, 230 (C.A.A.F. 1998) (quoting *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A. 1994)).
[17] *United States v. Ruppel*, 49 M.J. 247, 253 (C.A.A.F. 1998) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).
[18] *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1998)).

The Government, without certifying a cross-appeal, is now requesting this Court rule the lower court erred when it found that Sgt Hutchins was acquitted of the plot to kill a random Iraqi.[19] The Government argues this Court should "'pierce through the intermediate level and examine the military judge's ruling.'"[20] To be sure, this Court does "pierce the veil" to review trial rulings, but the purpose is to evaluate the correctness of the intermediate appellate court's decision, not for an independent review of first impression. And there can be no such review unless an appeal is first submitted. Here, there is no cross-appeal from the Government, and therefore this Court has no basis to act on the Government's request to overrule the lower court.

Further, this Court specifically amended its Rules of Practice and Procedure in order to facilitate Government cross-appeals. In *United States v. Parker,* Judge Erdmann noted that, without the Government knowing if this Court would grant review of an Appellant's petition, it was impractical for the Government to certify appeals in every case as a contingency.[21] Judge Erdmann indicated that the Court's rules should be changed to provide the Government time to assess a cross-appeal after an Appellant's petition has been granted. Subsequently, this Court amended

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[19] Answer at 23-25; 34-39.
[20] Answer at 34 (quoting *United States v. Sheldon*, 64 M.J. 32, 37 (C.A.A.F. 2006)).
[21] *United States v. Parker,* 62 M.J. 459, 469 (C.A.A.F. 2006) (Erdmann, J. dissenting)

Rule 19 to provide the Government **30 days** from the date a petition is granted to evaluate whether it disagrees with any aspect of a lower court ruling and should certify a cross-appeal.[22] If the Government were correct that this Court is free to review any decision made by a lower court by simply "piercing the veil," there would have been no need to amend Rule 19. Hence, the law of the case doctrine applies, and the lower court's ruling that Sgt Hutchins was acquitted of conspiring to kill anyone other than Saleh Gowad is binding on the Government.

2. The Government's argument regarding inconsistency of the verdict and alternative bases for the members' findings is not credible.

As the trial judge did not make any findings of fact (or conclusions of law) when he denied the defense motion, the only findings of fact available to this Court are those made by the lower court. And putting aside the law of the case doctrine, under Article 66 the lower court was the appropriate forum to review the records of trial and factually assess the meaning of the members' acquittals. By contrast, Article 67 limits this Court to "take action only with respect to matters of law."[23] Therefore, to the extent this Court indulges the Government and reviews the lower court's determination regarding the acquittals, despite the law of the case doctrine, any such factual analysis must be under a "clearly erroneous" standard of review.[24]

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[22] *See* Rule 19(b)(3), RULES OF PRACTICE AND PROCEDURE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES.
[23] 10 USC § 867(c) (2012).
[24] *See United States v. Harrell*, 75 M.J. 359, 362 (C.A.A.F. 2016).

That said, the Government's argument regarding the acquittals would not be sustainable under *any* standard of review.

The Government disputes the lower court's determination that Sgt Hutchins was acquitted of plotting to kill a random Iraqi, but, remarkably, never cites to the lower court's opinion, and, more importantly, omits any discussion of which issues were actually in dispute at the first trial. Specifically, the Government omits that the defense team at the first trial *conceded* that the individual killed was not digging a hole when he was shot, but had instead been taken from his home, bound, brought to the IED hole by the snatch team, and the scene staged.[25] The only point of contention was whether the victim was intended to be (or was) Saleh Gowad.[26] The Government's failure to address these critical concessions is fatal to its remaining argument.

a. The verdicts from the first trial were consistent.

The Government argues that collateral estoppel does not apply to this case because the members' verdicts were inconsistent.[27] As an initial matter, when assessing verdicts for issue preclusion, Courts must use "realism and rationality . . . with an eye to all the circumstances and proceedings," to include an assessment of

[25] J.A. at 545-550.
[26] J.A. at 551.
[27] Answer at 23-24.

whether the examined verdicts are "*irreconcilably* inconsistent."[28] Accordingly, a common-sense mindset must be applied to the record to determine if any potential inconsistencies in verdicts can be reasonably reconciled.

Contrary to this guidance, the Government instead seeks to stretch and strain the record in order to manufacture inconsistency that simply does not exist:

> According to Appellant's argument, the 2007 members acquitted Appellant "of all crimes related to an alleged conspiracy agreement to kill *any random Iraqi male*," but they *simultaneously* believed—as demonstrated by their convictions—that Appellant conspired to commit murder; that Appellant's co-conspirators took *an unknown Iraqi man* to a hole, forced him to the ground, and bound his hands and feet and murdered the "unknown Iraqi man."
>
> Second, the 2007 Members apparently did not believe beyond a reasonable doubt that Appellant's co-conspirators forced the unknown Iraqi man to the ground and bound his hands and feet for purposes of the assault charge, but believed beyond a reasonable doubt that Appellant's co-conspirators did "force an unknown Iraqi man to the ground and bind his hands and feet" as an overt act in the conspiracy charge.[29]

There is no inconsistency. Sgt Hutchins and his squad had a reasonable belief they were authorized to seize and detain Saleh Gowad. Thus, while the members found as overt acts for the conspiracy charge that a victim was taken from his home, made to walk a distance, and was bound, they determined that these acts did not constitute the crimes of housebreaking, kidnapping and assault;

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[28] *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 359-60 (2016) (emphasis added).
[29] Answer at 23-24.

rather, these overt acts were all incident to a putative lawful seizure of Saleh Gowad.[30] As the lower court noted: "But for the squad's legal authority to arrest and detain high value targets such as S.G., the plan required housebreaking and kidnapping. The mistake of fact defense regarding the authority to detain applied only to S.G.; no one else was identified as a high value target."[31]

Ultimately, the question is not whether it is possible to conceptualize outlandish scenarios where verdicts can be inconsistent. The question, instead, is whether any "discrepancies" are reconcilable after a good faith and rational review of the record. Here, the members' detailed findings, in light of the evidence presented and the defense concessions, reveal that their determinations were consistent and, in fact, exceedingly rational.

b. The only issue rationally in dispute at the first trial was the identity of the intended victim.

The Government additionally challenges the lower court's determination that the only rational issue in dispute at the first trial was the identity of the intended victim of the conspiracy.[32] Under *Ashe*, any analysis of the members' findings must take into account "the pleadings, evidence, charge, and other

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[30] The members were instructed that for the crime of assault, the physical contact must be "without legal justification or excuse." (J.A. at 559). Hence, the Appellant's perceived authorization to seize Saleh Gowad as a HVI would legally justify forcing Gowad to the ground and binding his hands.
[31] *Hutchins* V at *16.
[32] Answer at 36-39.

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."[33] The standard is to determine what was "rationally" in dispute. As noted, this is not fanciful, or arbitrary, it is with common sense and realism.

The Government, however, bases its argument on immaterial differences in witness testimony on when the victim was zip tied, and on how far into the victim's house the snatch team entered, neither of which were raised by the counsel at trial.[34] As before, the Government strains to construct the record in such a way as to create indeterminacy. But the standard is not what can be created, the standard is what is rational in light of the entire record.

Sgt Hutchins' initial brief comprehensively addressed all of the evidence presented, and demonstrated that there was only one issue in dispute at trial: whether there was a Saleh Gowad plot or a random Iraqi plot.[35] That issue was resolved in his favor. The supposed discrepancies in the witness testimony identified by the Government were (1) not raised as issues of contention by either party at the court-martial, and (2) were of *no legal relevance* to the members' findings.

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[33] *Ashe*, 397 U.S. at 475-76 (citations omitted).
[34] Answer at 36-38.
[35] Appellant's Brief at 6-14.

Whether the victim was zip tied at his house, on the way to the hole, or at the hole, has no bearing on the fact that he was ultimately zip tied—a fact which no witness contradicted. Similarly, whether the door to the victim's home was locked or unlocked has no bearing on the fact that the snatch team went into the victim's home and brought him outside. The victim was then directed by the Marines to walk down the road. There is no dispute that he ultimately resisted, and his movement to the hole was not voluntary. Based on these facts, including the supposed discrepancies, the members would have still rationally found the existence of housebreaking, kidnapping, and assault, unless they determined that there was a lawful justification to seize the victim.

The Government's contention that the acquittals were solely based on a determination that the Appellant's plan did not discuss breaking into a home or when to zip tie the victim is wholly unsupported by the record. First, as previously noted, the members found as an overt act that the victim was forced to the ground and bound, which means they necessarily believed beyond a reasonable doubt that the victim was zip tied. Second, the members excepted the following overt act in its entirety:

> 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[36]

If the members' only doubt was on whether the plan included entry into a home, the members would not have excepted the entire overt act, and would have only excepted the language, "and Corporal Magincalda and Corporal Thomas did enter the man's house." Instead the members also excepted the language regarding the departure from Saleh Gowad's house to the random Iraqi's house.

The Government offers no alternative explanation for the exception of this language. The only rational explanation, and the only explanation which is consistent with the full complement of the members' findings and the evidence presented, is that they determined the plot did not include any plan to seize a random Iraqi, nor was a random Iraqi seized. As the lower court noted,

> "[t]he single rationally conceivable issue in dispute before the jury was whether" the appellant had conspired to enter the home of S.G. and seize him or to break into the home of someone else to kidnap someone other than S.G. "And the jury by its verdict found" that the appellant had not conspired to break into the home of anyone other than S.G. or kidnap anyone other than S.G.[37]

The Government's argument is without merit.

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[36] J.A. at 582-84 (members' findings).
[37] *Hutchins* V at *16 (quoting *Ashe v. Swenson*, 397 U.S. 436, 445 (1970)).

D. Prejudice and R.C.M. 905(g)

The Government's prejudice argument is non-responsive to Sgt Hutchins' brief, and should be disregarded.[38] Separately, even if Constitutional issue preclusion had been overturned by *Currier*, and rather than the harmless beyond a reasonable doubt standard, this Court instead applied a standard prejudice analysis for a R.C.M. 905(g) violation, the error would still be prejudicial.

The lower court's assessment of prejudice under M.R.E. 404(b) extolls the "calm, confident certainty" of the squad members' testimony, but omits the fact that all but one of the squad members refused to testify, and were not cross-examined.[39] Thus, any "calm, confident certainty" was not from the witnesses, but from the government counsel reading their testimony into the record. The lower court's prejudice analysis also fails to note that all of the squad members recanted their testimony (with the exception of Jackson), and fails to assess voluntary manslaughter.[40]

As noted in Sgt Hutchins' initial brief, the random Iraqi evidence was the heart of a Government case which was devoid of Iraqi witness testimony or conclusive forensic evidence, and was based on recanted testimony. The deletion of the random Iraqi evidence or an instruction for the members to disregard it

[38] Answer at 41-43.
[39] *Hutchins* V at *24.
[40] *Id.*

would have eviscerated the credibility of the overall prosecution, and, in accordance with the defense theory of the case, led to a full acquittal.

Further, an accused's state of mind is an essential element for distinguishing unlawful killing offenses, as the same exact physical sequence of events leading to a death can yield radically different criminal charges based on what was in the accused's mind: premediated murder, unpremeditated murder, voluntary manslaughter, involuntary manslaughter, negligent homicide or even acquittal for self-defense or insanity. The proper application of issue preclusion by the military judge at trial would have drastically limited the prosecution's evidence of Sgt Hutchins' intent, allowing the members to find voluntary manslaughter, or even to find no unlawful killing at all, as they did for Cpl Magincalda and Cpl Thomas.

Conclusion

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

Respectfully Submitted,

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Certificate of Filing and Service

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

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