IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim.App. Dkt. No. 2000800393
v.	)	
	)	USCA Dkt. No. 18-0234/MC
Lawrence G. HUTCHINS III, Sergeant (E-5) U.S. Marine Corps Appellant	)	

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

KIMBERLY RIOS
Lieutenant, U.S. Navy
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36996

KELLI A. O'NEIL
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7687
Bar no. 36883

MARK K. JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 31195

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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Issue Granted

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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's approved sentence included a bad-conduct discharge and more than one year of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

At Appellant's first court-martial in 2007, a panel of Members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of conspiracy, one specification of making a false official statement, unpremeditated murder, and larceny in violation of Articles 81, 107, 118, and 121, UCMJ, 10 U.S.C. §§ 881, 907, 918, 921 (2006). The Members acquitted Appellant of premeditated murder, one specification of making false official statement (false report), assault, housebreaking, kidnapping, and obstructing justice in violation of Articles 107, 118, 128, 130, and 134, UCMJ, 10 U.S.C. §§ 907, 918,

928, 930, 934 (2006).

The Members sentenced Appellant to fifteen years' confinement, reduction to pay grade E-1, a reprimand, and a dishonorable discharge. The Convening Authority approved a sentence of eleven years of confinement, reduction to pay grade E-1, and a dishonorable discharge and, except for the discharge, ordered it executed.

The Navy-Marine Corps Court of Criminal Appeals, after remanding for a *Dubay* hearing, set aside the Findings and Sentence. *United States v. Hutchins*, 68 M.J. 623, 631 (N-M. Ct. Crim. App. 2010).

The Judge Advocate General of the Navy certified the case, and this Court reversed and remanded. *United States v. Hutchins*, 69 M.J. 282, 293 (C.A.A.F. 2011) (reversing lower court's erroneous presumption of prejudice on counsel severance issue).

On remand, the Navy-Marine Corps Court of Criminal Appeals affirmed the Findings and Sentence. *United States v. Hutchins*, No. 200800393, 2012 CCA LEXIS 93 (N-M. Ct. Crim. App. Mar. 20, 2012).

Upon further review, this Court set aside Appellant's Findings and Sentence and authorized a rehearing. *United States v. Hutchins*, 72 M.J. 294, 296 (C.A.A.F. 2013) (reversing based on an *Edwards* violation).

The Convening Authority referred the same charges for which the previous Members had convicted Appellant to a general-court martial, adding no new charges. On rehearing in 2015, a panel of Members with enlisted representation convicted Appellant, contrary to his pleas, of conspiracy, unpremeditated murder, and larceny, in violation of Articles 81, 118, and 121, UCMJ, 10 U.S.C. §§ 881, 918, 921 (2006). The Members acquitted Appellant of making a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907 (2006).

The Members sentenced Appellant to 2,627 days of confinement and a bad-conduct discharge. The Convening Authority approved the adjudged sentence and, except for the punitive discharge, ordered it executed.

Statement of Facts

A. At Appellant's first court-martial in 2007, the United States charged Appellant with conspiracy, two false official statements, premeditated murder, larceny, assault, housebreaking, kidnapping, and obstructing justice. The Charge Sheet listed the Victim as "an unknown Iraqi man."

The United States charged Appellant with one specification of conspiring "to commit . . . larceny, housebreaking, kidnapping, false official statements, murder, and obstructing justice." (J.A. 219.) The conspiracy charge included, in part, the following overt acts: the co-conspirators walked "from Saleh Gowad's house to the dwelling house of unknown Iraqi man" and "enter[ed] the man's

house"; the co-conspirators "[took] an unknown Iraqi man from his house against his will"; the co-conspirators took the unknown Iraqi man to a specified hole; the co-conspirators forced the unknown Iraqi man to the ground and bound his hands and feet; Appellant and his co-conspirators fired their weapons towards the unknown Iraqi man who died as a result; and, that Appellant and his co-conspirators, made several false official statements about circumstances surrounding the man's death. (J.A. 219-21.)

The United States charged Appellant with two false official statement Specifications for writing a false combat report and lying to law enforcement about the facts surrounding the unknown Iraqi man's death. (J.A. 222.).

The United States also charged "premeditated murder of an unknown Iraqi man"; larceny for stealing a shovel and an AK-47 assault rifle from an unknown Iraqi citizen; assault for unlawfully forcing "an unknown Iraqi man to the ground and bind[ing] his hands and feet"; housebreaking for unlawfully entering the house of "an unknown Iraqi man, with the intent to commit . . . kidnapping"; and kidnapping the unknown Iraqi man. (J.A. 223-24.) Lastly, the United States charged two specifications of obstructing justice. (J.A. 224.)

B. The Members returned mixed Findings.

The Members convicted Appellant of conspiracy, but excepted the object offenses of housebreaking and kidnapping. (J.A. 582-84, 625.) The Members also excepted four overt acts : walking "from Saleh Gowad's house to the dwelling of an unknown Iraqi man . . . and enter[ing] the man's house"; "taking an unknown Iraqi man from his house against his will"; and making two false official statements about the man's death. (J.A. 582-84, 625.) In addition to the conspiracy charge as excepted, the Members convicted Appellant of the lesser-included-offense of unpremeditated murder, larceny, and making a false official written report on April 28, 2006 (that the man dug a hole and fired at the squad). (J.A. 583, 628-29.)

The Members acquitted Appellant of making a false official statement to law enforcement on May 8, 2006 (that the man had a shovel and an AK-47), assault consummated by a battery, housebreaking, kidnapping, and obstructing justice. (J.A. 584, 630.)

C. On appeal, this Court set aside the Findings and authorized a rehearing.

This Court set aside Appellant's Findings and Sentence due to an *Edwards* violation in the admission of Appellant's sworn statement to law enforcement and authorized a rehearing. *Hutchins*, 72 M.J. 294, 300 (C.A.A.F. 2013).

D. At Appellant's rehearing in 2015, the United States retried the guilty Findings from Appellant's 2007 court-martial.

The Convening Authority referred the same offenses for which Appellant had been previously convicted. No new charges were added. (J.A. 219-24, 583-84.)

E. The Military Judge denied Appellant's Motion to Suppress evidence related to charges of which the Members acquitted Appellant in 2007.

Before trial, Appellant moved to "exclude all evidence, allegations, and inferences of conduct subject to 'not guilty' findings" under the doctrine of issue "collateral estoppel," which is more appropriately defined as issue preclusion.[1] (J.A. 1134-41.)

The United States disputed application of issue preclusion analysis to evidence and provided notice that the evidence would be introduced under Mil. R.

[1] While "collateral estoppel component" and "issue preclusion" are used interchangeably, "issue preclusion" is the more descriptive term. *United States v. Bravo-Fernandez*, 137 S. Ct. 352, 356 n.1 (2016).

Evid. 404(b) "to demonstrate the accused's preparation, intent, lack of mistake or accident, and plan to execute the offense for which he is charged." (J.A. 1156-66.)

The Military Judge denied Appellant's Motion. (J.A. 711.) In his Ruling, he explained it was "folly" to speculate on the previous Members' rationale for their verdict and their decision to acquit Appellant of certain offenses. (J.A. 711.) He further found that "[t]he real risk of confusing [the Members] is if we try to parse the facts as proposed" by Appellant. (J.A. 711.) He also found that "[m]isconduct can violate more than one article of the UCMJ" and the uncharged conduct at issue was "not mutually exclusive to the charges of which the accused was acquitted." (J.A. 711.)

Prior to opening statements, Appellant again objected to the United States "going into anything related to uncharged or acquitted misconduct," but requested the Military Judge "to give an instruction on that immediately" if the United States introduced such evidence. (J.A. 713.) The Military Judge clarified Trial Counsel was not permitted to argue "charges that are not on the charge sheet," but that reference to the "underlying overt acts that apply to all members of the squad" as "part of all the acts that happened" was admissible. (J.A. 714-15.) The Military Judge explained, "just because acts were acquitted at a prior trial does not mean they can't be referenced in a subsequent rehearing." (J.A. 715.) The Military

Judge agreed to "give an instruction on what those overt acts that are uncharged can be used for. That's what the 404(b) instruction is for." (J.A. 715.)

During an Article 39(a) hearing, the Military Judge discussed providing the Members a Mil. R. Evid. 404(b) instruction prior to the United States reading-in the former testimony of the co-conspirators.[2] (J.A. 799-800.) Appellant renewed his objection to evidence relating to the acquitted conduct and claimed the United States did not give proper Mil. R. Evid. 404(b) notice. (J.A. 800-01.) The Military Judge found the evidence was admissible (J.A. 802) and that "under 404(b)(2)(A) and/or (B) that sufficient notice was given." (J.A. 808.) He reaffirmed the evidence was admissible "notwithstanding the acquittals on the other acts, because they are in furtherance of the conspiracy and are allowed in." (J.A. 808.)

[2] HM3 Bacos, LCpl Pennington, LCpl Shumate, and PFC Jodka recanted their prior sworn testimony and despite the Military Judge's order and a grant of testimonial immunity, refused to testify at the rehearing by invoking their Fifth Amendment right against self-incrimination. The Military Judge found these witnesses unavailable under Mil. R. Evid. 804 and their prior testimony admissible under Mil. R. Evid. 804(d)(1). (J.A. 744, 751, 844.)

F. At Appellant's rehearing, the United States introduced evidence from the previous court-martial supporting that Appellant (a) conspired to kill Saleh Gowad, a male relative, or any military-aged man, and (b) murdered an "unknown Iraqi man."

The United States read-in the prior testimony of Lance Corporal (LCpl) Pennington, Hospital Corpsman Third Class Petty Officer (HM3) Bacos, LCpl Shumate, and Private First Class (PFC) Jodka. (J.A. 745, 810, 841, 321.) LCpl Jackson testified in-person (J.A. 754-97.) Prior to the read-in testimony of each of the four witnesses, the Military Judge instructed that the Members could only:

> consider evidence that [Appellant] may have had [sic] 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 on or about 8 May to NCIS 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 charged offenses.

(J.A. 809.) In addition to testimony, the United States also introduced eighty-nine exhibits, including but not limited to, photographs of the unknown Iraqi man's dead body, the hole near the unknown Iraqi man's body, photos of the metal bullet fragments found inside various organs of the unknown Iraqi man, and the unknown Iraqi man's autopsy report. (J.A. 1041-60.)

1. LCpl Pennington testified they planned to kill Saleh Gowad, one of his brothers, or another military-aged male. They then murdered an "unknown Iraqi man."

Appellant was the squad leader of a seven-man squad operating near Hamdaniyah, Iraq. (J.A. 847.) Appellant's squad included Cpl Magincalda, Cpl Thomas, LCpl Pennington, LCpl Shumate, LCpl Jackson, HM3 Bacos, and PFC Jodka. (J.A. 847.)

During the evening hours leading to the murder, Appellant's command tasked him to establish a deliberate "12-hour ambush" and monitor a road intersection to prevent the placement of improvised explosive devices. (J.A. 847-49.) Appellant's squad arrived at the intersection and formed up in a palm grove next to the intersection. (J.A. 848-49.) Some members of the squad set up an outer perimeter while Appellant, Cpl Thomas, Cpl Magincalda, and LCpl Pennington talked outside the earshot of the others. (J.A. 849.) Appellant complained that Saleh Gowad, a suspected insurgent and high-value target in the area was causing trouble, but the rules of engagement prevented anyone from "tak[ing] care of him." (J.A. 850.)

Appellant suggested the squad could "take care of him" and Cpl Thomas, Cpl Magincalda, and LCpl Pennington agreed. (J.A. 375.) Appellant told a story about another squad who "got[] away with" detaining and killing a suspected

insurgent, then leaving his body in a hole. (J.A. 851.) The four discussed at length how they might kill Saleh Gowad. (J.A. 375-77.)

They planned to "bring[] him out to an IED hole, make it look like he was digging an IED, and kill[] him at the IED hole to make it look like it was just Marines shooting at a guy planting an IED." (J.A. 376.) They planned to bring zip ties so "[t]he guy would be zip tied at the hole to make sure he couldn't go anywhere . . . ." (J.A. 386.) Appellant pointed to houses nearby where the squad could steal a shovel and AK-47 in order to leave the items at the hole and make it appear the individual shot at the squad. (J.A. 377-78.)

Appellant then expanded the plan from killing Saleh Gowad to killing one of Gowad's brothers, since the Marines knew Saleh Gowad "was generally not at his home" and killing one of his brothers "could still damage [Saleh Gowad's] operation and send a message to him." (J.A. 386.)

If they could not get one of Gowad's brothers or if the operation was compromised, they made a backup plan: kill any military aged male from the village to damage Gowad's operations since he was "using the guys at that village." (J.A. 387.)

They agreed a "snatch team" would grab Gowad, and that the team would include Cpls Thomas and Magincalda, LCpl Pennington, and HM3 Bacos. (J.A.

384.) They agreed HM3 Bacos would fire the AK-47, and Cpl Magincalda would gather and place used shell casings around the body. (J.A. 383.)

After agreeing on the plan, Appellant, the fire team leaders, and LCpl Pennington called HM3 Bacos over and briefed him on the three-part the plan. (J.A. 385.) HM3 Bacos agreed to join. (J.A. 385.)

After planning for hours, the full squad gathered and Appellant briefed the junior Marines—LCpl Jackson, LCpl Shumate, and PFC Jodka—an overview of the plan:

> go pick up Saleh Gowad and bring him back to the hole, make it look like he was digging an IED, and that the squad would get on line and assault the guy and kill Saleh Gowad. They were also going to make it look like he was shooting an AK at us at the time.

(J.A. 389.) The junior Marines each agreed to join the plan. (J.A. 390.)

That night, the snatch team went to a local house. (J.A. 392-93.) A man opened the door, Cpl Thomas and LCpl Pennington entered pretending to execute a lawful search, and asked the man for his AK-47 rifle. (J.A. 393.) Cpl Magincalda and HM3 Bacos looked for a shovel outside the house. (J.A. 395.)

After getting the AK-47 and shovel, the snatch team hid the AK-47 and shovel behind a concrete building (the "market stall") before going to Saleh Gowad's house, as planned. (J.A. 396.)

The snatch team then walked to Saleh Gowad's house. (J.A. 396.) As the snatch team approached Gowad's house, a local woman saw them. (J.A. 398-99.) Believing their plan to grab and kill Saleh Gowad or one of his brothers was compromised, the snatch team walked to a nearby house to find another military aged male. (J.A. 398-99.)

The door to the second house was locked. (J.A. 399.) Cpl Thomas began "working with the door" and "eventually got the lock to open." (J.A. 399.) Cpl Thomas and Cpl Magincalda entered the house and found an unknown Iraqi man. (J.A. 399.) The unknown Iraqi man left his house, put on his sandals, and LCpl Pennington told him, "let's go." (J.A. 400.) The unknown Iraqi man and snatch team walked "one hundred to a hundred and fifty meters" until they reached the road. (J.A. 400.) Once there, the snatch team zip-tied the unknown Iraqi man's hands behind his back and walked to the concrete building to get the AK-47 and shovel. (J.A. 401.) After getting the AK-47 and shovel, the snatch team walked to a hole that had previously been dug for purposes of emplacing an improvised explosive device. (J.A. 401-06.)

Once the Marines and the unknown Iraqi man arrived, Cpl Magincalda jumped in the hole and "started digging around in the dirt." (J.A. 406.) LCpl Pennington held down the unknown Iraqi man while Cpl Thomas tried to bind his

feet. (J.A. 409-10.) The unknown Iraqi man struggled and tried to escape. (J.A. 409-10.)

One of the unknown Iraqi man's hands slipped free of the zip-ties, but LCpl Pennington wrestled him to the ground. (J.A. 410-11.) While struggling, the unknown Iraqi man defecated on himself. (J.A. 411.) The squad bound his legs, and LCpl Pennington placed the unknown Iraqi man in the three-to-four feet deep hole. (J.A. 411.)

The snatch team ran seventy-five to eighty meters to a tree where the squad waited. (J.A. 411.) Appellant used the radio to call "the patrol base to let them know that there was a guy out there at the IED hole digging with a shovel, and we were going to engage him." (J.A. 412-13.)

Without first receiving permission to engage, Appellant and his squad opened fire on the unknown Iraqi man as planned. (J.A. 413.) The unknown Iraqi man fell, wounded, "[a]bout 15 meters" north of the hole. (J.A. 414, 416.) Cpl Thomas found the unknown Iraqi man's body and shot "five, six, seven rounds into it" from ten meters away. (J.A. 416.) Appellant then fired "about three to five rounds in the guy's head" from three or four meters away, killing him. (J.A. 416.)

The Marines then manipulated the crime scene to match Appellant's call to the patrol base. (J.A. 417.) They removed the zip ties from the dead Iraqi man's

feet and placed spent AK-47 shell casings near the body. (J.A. 417.)

2. HM3 Bacos testified the plan was to detain and kill Saleh Gowad, and failing that, to detain and kill any military-aged male.

HM3 Bacos testified that the squad's primary plan was to detain and kill Saleh Gowad. (J.A. 446.) However, he also confirmed that if the snatch team "couldn't get Saleh Gowad . . . , we would try getting someone else, anyone, and then walk that military-aged male . . . down to the IED hole" and shoot him. (J.A. 446.)

Additionally, HM3 Bacos testified that after the snatch team was compromised at Saleh Gowad's house, they walked to a nearby house to get a random Iraqi man. (J.A. 453.) Cpl Thomas and Cpl Magincalda entered the unknown Iraqi man's house by simply opening the door. (J.A. 456.) HM3 Bacos further testified that the man walked only "15 to 20 feet" before the team zip tied his hands. (J.A. 457.)

HM3 Bacos testified that while they walked with the Iraqi man, he did not resist very much, until the snatch team retrieved the hidden AK-47 and began walking down the dirt road toward the hole. (J.A. 458, 460-61.) At that point, HM3 Bacos testified that the man began "struggling," "resisting," and "trying to turn around." (J.A. 461.) The Iraqi man tried to return home and begged the

Marines for his life, saying, "mister, mister, . . . mister, please." (J.A. 460.) But the Marines responded to his pleading by telling him to "shut the fuck up." (J.A. 460.)

At the hole, HM3 Bacos watched LCpl Pennington and Cpl Thomas struggle with the man as they tried to zip tie his feet. (J.A. 462.) After the struggle, "Corporal Thomas had the man's feet zip tied" and the Marines "started going to the tree," where LCpl Jackson, LCpl Shumate, and PFC Jodka were "getting on line." (J.A. 464-65.)

When Appellant called in over radio that they saw a man digging a hole, Appellant told the squad members to "[w]ait until I shoot first and then you guys can go ago [sic] ahead and shoot." (J.A. 466.) Once the Marines started firing, HM3 Bacos fired the AK-47 in the opposite direction and Cpl Magincalda captured the expended shell casings as planned. (J.A. 465-66.) After someone called a cease fire, the squad walked towards the wounded Iraqi man—who was on the ground struggling to breathe—and Appellant fired three rounds into the man's head. (J.A. 467-68.)

HM3 Bacos testified that after LCpl Pennington cut the zip ties off from the man's wrists and feet and Cpl Magincalda spread the expended shell casings next to the man's body, Appellant told his squad, "[c]ongratulations, gents, we just got

away with murder." (J.A. 468, 836-37.)

3. PFC Jodka testified that Appellant did not brief the full plan to the junior Marines, only that they were going to detain and kill Saleh Gowad.

PFC Jodka testified that Appellant briefed the squad about a plan to kidnap and kill Saleh Gowad and stage his death. (J.A. 321, 339.) However, PFC Jodka admitted that Appellant also told the junior Marines that they were not given a "full briefing" so that if questioned, they "could honestly say that we did not know the entire mission of the snatch team." (J.A. 323.)

4. LCpl Jackson testified in-person the squad planned to detain and kill either Saleh Gowad or any other male in his house.

LCpl Jackson testified that Appellant told him the plan was to "get a shovel and AK-47, detain and kill Saleh Gowad or any other male relative in the house, and then make it look like he was killed while "planting an IED." (J.A. 289-90.)

A few days after the squad carried out the plan, and while the shooting incident was under investigation, Appellant held a meeting with the squad to make sure everyone was "sticking to the story." (J.A. 298.)

5. LCpl Shumate testified the plan was to kill Saleh Gowad.

LCpl Shumate testified that Appellant told the squad the plan was to detain Saleh Gowad, take a shovel and an AK-47, and stage an attack. (J.A. 340.)

Appellant explained that once the snatch team detained Saleh Gowad, they would tie him up and place him in a hole and Appellant would report that the squad saw an insurgent on the road emplacing an improvised explosive device. (J.A. 340.) Appellant assigned LCpl Shumate to be the one to "originally spot the man," and HM3 Bacos and Cpl Magincalda would fire the AK-47 and catch the expended shell casings in a bag. (J.A. 340-41.)

G. Appellant did not offer prior cross-examination of the squad members.

The Defense did not offer the prior cross-examination testimony of HM3 Bacos, LCpl Pennington, LCpl Shumate, or PFC Jodka, but did offer the prior testimony of all four squad members invoking their Fifth Amendment privilege not to testify at Appellant's retrial. (J.A. 745, 839, 841-42, 889.)

H. As part of his instructions on Findings, the Military Judge reiterated to the Members that Appellant was previously acquitted of various charges and provided a Mil. R. Evid. 404(b) limiting instruction about the evidence related to the acquitted charges.

Prior to giving his Mil. R. Evid. 404(b) instruction, the Military Judge reminded the Members that Appellant had previously been acquitted of kidnapping, housebreaking, assault, obstruction of justice, premeditated murder, false official statement on May 8, 2006, and conspiracy to commit kidnapping and housebreaking. (J.A. 962.) Then, the Military Judge instructed:

> 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.

(J.A. 963.) The Military Judge emphasized the evidence could not be used for any other purpose, including character evidence or that Appellant "has general criminal tendencies." (J.A. 963.)

I. The Members convicted Appellant of conspiracy, unpremeditated murder, and larceny.

The Members found Appellant guilty of conspiracy with the exception of two overt acts: that Appellant and that PFC Jodka made a false official statement.. (J.A. 966.) In addition to convicting Appellant for conspiracy to commit murder and larceny, the Members found Appellant guilty of unpremeditated murder and larceny, but not guilty of making a false official statement. (J.A. 967.)

Argument

ISSUE PRECLUSION IS NOT IMPLICATED: APPELLANT RECEIVED IRRECONCILABLY INCONSISTENT VERDICTS AND THE ACQUITTAL EVIDENCE WAS ADMITTED UNDER A LOWER STANDARD OF PROOF. MOREOVER, ISSUE PRECLUSION SHOULD NEVER APPLY TO THE ADMISSION OF EVIDENCE AT REHEARINGS. APPELLANT HAS NOT APPEALED THE JUDGE'S PROPER ADMISSION OF MIL. R. EVID. 404(B) EVIDENCE. REGARDLESS, APPELLANT CANNOT SHOW HE WAS ACQUITTED OF AN ISSUE OF ULTIMATE FACT.

A. Standard of review.

A "de novo standard of review applies to the legal determination of whether a defendant may upset a guilty verdict because it is inconsistent with an acquittal." *United States v. Suarez*, 682 F.3d 1214 (9th Cir. 2012).

B. Consistent with *Bravo-Fernandez*, *Dowling*, and *Currier*, issue preclusion principles are never implicated at rehearings of prior convictions set aside for legal error unrelated to an inconsistent verdict where no new charges are referred.

1. The Double Jeopardy Clause and issue preclusion doctrine prohibit a second prosecution of acquitted offenses or offenses with the same issue of ultimate fact.

Article 44, UCMJ, which "mirror[s]" the Fifth Amendment safeguard against double jeopardy, provides that "no person . . . may be tried a second time for the same offense." Article 44(a), UCMJ; *see also United States v. Easton*, 71

M.J. 168, 175 (C.A.A.F. 2012); (U.S. CONST. amend. V).

Issue preclusion "means simply that when *an issue of ultimate fact* has once been determined by a valid and final judgment, that issue cannot again be litigated." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 443 (2016) (emphasis added); *see also Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). An issue of ultimate fact with preclusive effect is "an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018). "The absence of appellate review of acquittals . . . calls for guarded application of preclusion doctrine in criminal cases." *Bravo-Fernandez*, 137 S. Ct. at 358.

2. Under *Bravo-Fernandez*, Appellant's argument renders the 2007 Members' verdict irreconcilably inconsistent and the legal error causing reversal does not reconcile the verdict. Issue preclusion does not apply.

Where members convict on one charge and acquit on another, and both charges turn on the same issue of ultimate fact, the "established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *United States v. Powell*, 469 U.S. 57, 68 (1984). "[B]oth verdicts stand" and the "Government is barred by the Double Jeopardy Clause from challenging the

acquittal (citation omitted), but because the verdicts are *rationally irreconcilable*, the acquittal gains no preclusive effect." *Bravo-Fernandez*, 137 S. Ct. at 357 (citing *Green v. United States*, 355 U.S. 184, 188 (1957)) (emphasis added).

To bar subsequent prosecution on an issue of ultimate fact, "the burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided by a prior jury's verdict of acquittal." *Id*. at 359 (quotations omitted). A "defendant cannot meet that burden where the trial yielded incompatible jury verdicts on the issue the defendants seeks to insulate from relitigation." *Id*. at 365.

However, issue preclusion may prohibit a rehearing of a conviction vacated due to legal error if that conviction contradicts an acquittal and the legal error resolves the apparent inconsistent verdict. *Id*. at 364. "If for example, a jury receives an erroneous instruction on the count of conviction but the correct instruction on the charge on which it acquits, the instructional error may reconcile the verdicts." *Id*. (quotations omitted). But, in a case where an "unrelated legal error does not reconcile the jury's inconsistent returns . . . issue preclusion does not apply when verdict inconsistency renders unanswerable 'what the jury necessarily decided.'" *Id*. at 358 (citation omitted).

a. The appellant fails his burden to show the 2007 Members' verdicts are not irreconcilably inconsistent because they convicted Appellant of plotting to kill "an unknown Iraqi man."

At the previous court-martial, the 2007 Members excepted the object offenses of "kidnapping" and "housebreaking" from the conspiracy charge and excepted the following overt acts: that the snatch team walked "from Saleh Gowad's house to the dwelling of an unknown Iraqi man" and enter his house, and that they took "an unknown Iraqi man from his house against his will." (J.A. 582-84, 625.)

But, the 2007 Members convicted Appellant of unpremeditated murder of an "unknown Iraqi man" as well as conspiracy to commit unpremeditated murder with several acts in furtherance of the conspiracy involving an "unknown Iraqi man." (J.A. 571, 583.) The 2007 Members did *not* except the language of "unknown Iraqi man" in the murder charge or the multiple underlying overt acts related to the conspiracy to murder an "unknown Iraqi man" -- "that [the snatch team] did take an unknown Iraqi man to a hole," forced him to the "ground and bind his hands and feet,"; and, that Appellant and his squad fired their weapons toward the unknown Iraqi man who died as a result. (J.A. 221, 582-83.)

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." (Appellant Br. at 32; J.A. 23.) Appellant's argument fails to meet his burden that the prior Findings are not irreconcilably inconsistent with his argument. After all, the 2007 Members convicted Appellant of conspiracy to commit murder and murder of an "unknown Iraqi man." That verdict alone is inconsistent with his argument.

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. (J.A. 582-83.)

Appellant fails his burden to show that the issue whose relitigation he seeks to foreclose—planning to kill an unknown Iraqi man—was actually decided by the 2007 Members' verdict of acquittal as to parts of the conspiracy charge and the acquittal for kidnapping and housebreaking It is just as likely that the previous

Members returned mixed Findings based on "compromise, compassion, lenity, or misunderstanding of the governing law." *Bravo-Fernandez,* 137 S. Ct. at 358.

b. The legal error found by this Court in 2013 does not resolve the 2007 inconsistent verdicts.

In finding that Appellant's confession to law enforcement was erroneously admitted based on an *Edwards* violation, this Court set aside Appellant's Findings and Sentence and authorized a rehearing. *Hutchins*, 72 M.J. at 296 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). In concluding the erroneous admission of Appellant's statement was not harmless beyond a reasonable doubt, this Court found there was "a reasonable likelihood that the statement contributed to the verdict" since the United States used the statement throughout trial. *Id*. at 299. Thus, the legal error applied to all of the Members' Findings and does not reconcile them.

Because the legal error is unrelated to the inconsistent verdict, issue preclusion was not implicated at Appellant's rehearing where the United States referred no new charges and only retried the vacated convictions. (J.A. 219-224, 571, 582-83.)

3. Per *Dowling*, issue preclusion never applies to evidence because it is admitted by a lower standard of proof.

a. Evidence of uncharged conduct related to prior acquittals is admissible due to the lower evidentiary standard of proof.

In *United States v. Hicks*, 24 M.J. 3, 8 (C.A.A.F. 1987), this Court held that "collateral estoppel does not preclude use of otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted." Instead, the admissibility of such evidence is governed by the rules of evidence. *Id*.; *see also United States v. Miller*, 46 M.J. 63, 65-66 (C.A.A.F. 1997).

In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court declined to extend "the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." 493 U.S. at 348. Dowling was tried and convicted of robbing a bank while wearing a ski mask and carrying a small pistol. *Id.* at 344. At trial, the United States introduced evidence pursuant to Fed. R. Evid. 404(b) that Dowling committed another armed robbery of a woman's home while wearing a similar ski mask and carrying a pistol—an offense for which he was previously acquitted. *Id.* at 344-45. The

Dowling Court emphasized that the United States only had to prove Dowling robbed the woman by a "preponderance of the evidence" under Fed. R. Evid. 404(b). *Id.* Thus, "[b]ecause a jury might reasonably conclude that Dowling was the masked man who entered [the woman's] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crime at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite." *Id.* at 349.

The Supreme Court reaffirmed that the admission of evidence under a lower standard of proof was the basis for its decision in *Dowling*. *United States v. Felix*, 503 U.S. 378, 385-86 (1992). The Court explained,

> [t]he primary ruling of [*Dowling*] was [the] conclusion that the collateral-estoppel component of the Double Jeopardy Clause offered Dowling *no protection* despite his earlier acquittal, because the relevance of evidence offered [pursuant to] Rule 404(b) was governed by a lower standard of proof [i.e., preponderance of the evidence] than that required for a conviction [i.e., beyond a reasonable doubt].

Id. (emphasis added). It is a "basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Id.* at 387. Additionally, the Court noted it specifically declined to adopt a rule that "the admission of evidence concerning a crime under Rule 404(b) constitutes prosecution for that crime." *Id*. at 387 n.3.

b. Evidence related to the 2007 acquittals did not offend issue preclusion because it was admitted under a "preponderance of the evidence" standard of proof for Mil. R. Evid. 404(b) purposes.

Evidence of uncharged misconduct must be proven by a preponderance of the evidence for admissibility under Mil. R. Evid. 404(b). *United States v. Levitt*, 35 M.J. 108, 111 (C.A.A.F. 1992) (citing *Huddleston v. United States*, 485 U.S. 681, 108 (1988)). "For evidence of uncharged acts to be admissible . . . the military judge merely decides whether 'the evidence reasonably supports a finding by the court members that appellant committed' the misconduct." *United States v. Sweeny*, 48 M.J. 117, 120 (C.A.A.F. 1998) (quotations omitted).

Assuming, as Appellant contends, that the Members necessarily acquitted him of an issue of ultimate fact—plotting to kill an unknown Iraqi man—in their Findings, issue preclusion still does not apply because the evidence was introduced for Mil. R. Evid. 404(b) purposes and governed by a lower standard of proof. *Felix*, 503 U.S. at 385-86; (Appellant's Br. at 38.) As in *Dowling*, assuming the Members had a reasonable doubt Appellant committed the offenses of conspiracy to housebreak and kidnap, the excepted overt acts, premeditated murder, housebreaking, and kidnapping, 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. Thus, the complained of evidence in this case is not governed by the Double Jeopardy Clause, but rather by the Military Rules of Evidence.

4. Consistent with *Bravo-Fernandez* and *Dowling*, the Supreme Court's *Currier v. Virginia* plurality opinion supports that issue preclusion is inapplicable to charges and admission of evidence at a rehearing.

"Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States *in any other court-martial* of the same accused." R.C.M. 905(g) (emphasis added).

"[A] rehearing is a continuation of the former proceeding." *United States v. Beatty*, 25 M.J. 311, 314 (C.A.A.F. 1987) (quotations omitted). "When a conviction is overturned on appeal, the general rule is that the Double Jeopardy Clause does not bar reprosecution." *Bravo-Fernandez*, 137 S. Ct. at 363; *see also* Article 67(d), UCMJ. "This continuing jeopardy rule . . . reflects the reality that the criminal proceedings against an accused have not run their full course." *Bravo-Fernandez*, 137 S. Ct. at 363.

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). The *Currier* Court held issue preclusion does not apply to a second trial where the accused initially consented to sever the charges into two trials. *Id*. at 2150. In the opinion, a four–Justice plurality rejected petitioner's argument to extend issue preclusion principles "to prevent the parties from retrying any issue or *introducing any evidence* about a previously tried issue." *Id*. at 2152 (emphasis added). The plurality explained that while *Ashe* pressed the boundaries of double jeopardy jurisprudence, the focus of issue preclusion analysis "is the practical identity of offenses, and the only available remedy is the traditional double jeopardy bar against the retrial of the same offense—not a bar against relitigation of issues or evidence." *Id*. at 2153. The Court further noted that civil "claim preclusion" principles in a criminal context, which "purports to bar a second prosecution involving a different offense" is inconsistent with the text of the Double Jeopardy Clause which bars a prosecution for the "same offense." *Id*. at 2155.

Per *Currier*, and established issue preclusion principles in *Bravo-Fernandez* and *Dowling*, this Court should rule that issue preclusion is inapplicable to admission of evidence related to acquitted crimes at a prior trial where the United States does not add and amend the prior charges, and the legal error for setting

aside the findings on appeal is unrelated to the verdict inconsistency.

C. Evidence related to prior acquittals is admissible under the Military Rules of Evidence.

"[A] military judge's admission of evidence under Mil. R. Evid. 404(b) [is reviewed] for [an] abuse of discretion." *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000). "To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (internal citations and quotations omitted).

1. Appellant does not challenge the Military Judge's ruling or the lower court's analysis of Mil. R. Evid. 404(b) and *Reynolds* on appeal. He waived evidentiary analysis of this issue.

"A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citation omitted). "[A] valid waiver leaves no error for [this Court] to correct on appeal." *Id*.

The lower court found that application of the *Reynolds* factors favored admission of the evidence and concluded the Military Judge did not abuse his discretion. *Hutchins*, 2018 CAA LEXIS 31, at *42-43; *see United States v.*

Reynolds, 61 M.J. 445, 452 (C.A.A.F. 2005). The lower court also found no prejudice by the admission of the evidence after weighing the strength of the Government's case, the strength of the defense case, and the materiality and quality of the evidence in question. *Hutchins*, 2018 CCA LEXIS 31, at *43-44 (citing *United States v. Barnett*, 63 M.J. 388, 397 (C.A.A.F. 2006)).

Appellant does not challenge, and this Court need not review, the Military Judge and the lower court's Mil. R. Evid. 404(b) analysis and lack-of-prejudice findings. (J.A. 1134; Appellant Br. 43-49.) An argument for the application of collateral estoppel does not properly assert a Mil. R. Evid. 404(b) evidentiary issue before this Court. All that is before this Court is the lower court's "erroneous refusal to apply collateral estoppel." (Appellant Br. at 32.)

2. Absent waiver, this Court should review for plain error. There is no plain error.

Absent waiver, Appellant forfeited any Mil. R. Evid. 404(b) issue absent plain error by failing to object at trial and on appeal. R.C.M. 905(e); *see United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011). Under the plain error standard, Appellant must show that: (1) there was error; (2) the error was plain, or clear, or obvious; and (3) a material prejudice to his substantial rights. *Lewis*, 69 M.J. at 383.

Here, after Appellant moved to suppress the evidence on grounds of issue preclusion, the United States disputed an issue preclusion application to evidence and provided its Mil. R. Evid. 404(b) notice. (J.A. 1134-41, 1156-66.) Appellant's subsequent objections to the evidence renewed his grounds based on collateral estoppel—at no point did Appellant contest the evidence under Mil. R. Evid. 404(b) or *Reynolds*. Absent plain error, Appellant forfeited any issues of the admissibility of evidence under Mil. R. Evid. 404(b).

Appellant fails his burden to show admissibility of the evidence was plain or obvious error. The Supreme Court's precedent has declined to extend issue preclusion to exclude evidence "otherwise admissible under the Rules of Evidence simply because it related to alleged criminal conduct for which a defendant has been acquitted." *Dowling*, 493 U.S. at 348; *see also Felix*, 503 U.S. at 385-86. This Court has similarly declined to apply the issue preclusion doctrine to otherwise admissible evidence. *Hicks*, 24 M.J. at 8; *see also Miller*, 46 M.J. at 65-66. Thus, the Military Judge's Ruling admitting such evidence was not error, much less plain or obvious.

D. If this Court disregards prior precedent and applies issue preclusion, Appellant fails to demonstrate (a) the prior Findings necessarily determined he was acquitted of plotting to kill the unknown Iraqi man or (b) that any error was not harmless beyond a reasonable doubt.

1. This Court would disregard its own precedent and higher precedent should it analyze the admissibility of evidence under the issue preclusion doctrine.

Should this Court apply issue preclusion principles to the evidence in this case, it would run counter *Hicks* and *Miller* and Supreme Court jurisprudence. *See Hicks*, 24 M.J. at 8-9; *Miller*, 46 M.J. at 65-6; *Dowling*, 493 U.S. at 348-50; *Felix*, 503 U.S. at 386-87*).* Yet Appellant has not argued, and cannot demonstrate, that this Court should deviate from *stare decisis*. *See United States v. Quick*, 74 M.J. 332, 338 (C.A.A.F. 2015).

2. Appellant fails to demonstrate that issue preclusion applied to his rehearing.

"When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling," this Court has "pierced through the intermediate level and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Sheldon*, 64 M.J. 32, 37 (C.A.A.F. 2006).

Contrary to Appellant's assertion, if this Court reviews the Military Judge and the lower court's application of issue preclusion to evidence, it must review

whether Appellant met his burden to establish that the 2007 Members acquitted him of an issue of ultimate fact. *Bravo-Fernandez*, 137 S. Ct. at 359.

a. Appellant incorrectly argues, and fails his burden to show, that the Members acquitted him of an issue of ultimate fact—that he plotted to kill an unknown Iraqi man.

Because the Government is prohibited from appealing acquittals, application of issue preclusion in criminal cases "calls for guarded application." *Bravo-Fernandez*, 137 S. Ct. at 358. Particularly when a verdict "is the result of compromise, compassion, lenity, or misunderstanding of the governing law," the inability of the Government to appeal an acquittal "strongly militates" against the application of issue preclusion. *Id.* (quoting *Standefer v. United States*, 447 U.S. 10, 23 (1980)). The burden is on an appellant "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided by a prior jury's verdict of acquittal." *Id*. at 359 (citations and quotations omitted).

"A second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question." *Currier*, 138 S. Ct. at 2146. For issue preclusion to apply, "the Court must be able to say that it would have been irrational for the jury in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the

second." *Id*. To identify what a jury in a previous trial necessarily decided, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Bravo-Fernandez*, 137 S. Ct. at 359. "The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444.

Thus, Appellant must demonstrate that the previous Members based their Findings on a conclusion that there was no plot to kill a random Iraqi man and that they necessarily could not have rationally reached their Findings for any other reason. Appellant cannot meet this burden.

First, the Members could have found reasonable doubt as to the conspiracy to kidnap and housebreak because the details of the plan regarding the unknown Iraqi man were inconsistent.

LCpl Pennington testified that the plan was to "pick up Saleh Gowad if we could; if not him, one of his brothers; if not one of his brothers, we would pick up another military aged male, *bring him back to the hole*, *zip tie him,* put him in the hole." (J.A. 385, 863) (emphasis added). He added, "[t]he guy would be *zip tied at the hole* to make sure he couldn't go anywhere while he was at the hole." (J.A. 386, 862) (emphasis added). LCpl Pennington testified that when the unknown Iraqi man stepped outside of his home, he put on sandals, and the man walked 100

to 150 meters before the snatch team zip tied the Iraqi man's hands behind his back. (J.A. 875.)

However, HM3 Bacos testified the plan included "getting someone else, anyone, and then *walk* that military-aged male"' to the hole as opposed to zip tying the man at any point. (J.A. 446) (emphasis added). Contrary to LCpl Pennington's testimony, HM3 Bacos stated that the man was brought out of his home only "15 to 20 feet before he was zip tied." (J.A. 457.) HM3 Bacos testified that while they walked the zip-tied Iraqi man, he did not resist very much, until the snatch team retrieved the AK-47 and began walking down the dirt road toward the hole. (J.A. 458, 460-61.) At that point, HM3 Bacos testified that the man began "struggling," "resisting," and "trying to turn around." (J.A. 461.)

In regards to housebreaking, LCpl Pennington testified that the random Iraqi man's door was "locked" and that two members of the snatch team entered the random Iraqi man's house by "working the door" and getting the lock open. (J.A. 874.) In contrast, HM3 Bacos testified that two members of the snatch team entered the random Iraqi man's house by simply opening the door. (J.A. 456.)

Thus, the previous Members could have found that the contradicting testimony about the timing of the zip tying of the random Iraqi man and the entry of his home, and the man's initial lack of resistance, resulted in a reasonable doubt

as to the conspiracy to kidnap and housebreak, kidnapping, and housebreaking.

Second, the Members could have found—and did find—beyond a reasonable doubt that Appellant planned to kill the unknown Iraqi man, but that he did not plan the details of the snatch team entering a random man's home or how the snatch team would bring him to the hole. LCpl Jackson, HM3 Bacos, and LCpl Pennington provided varying details and significant gaps about the plan to find and seize a random Iraqi man.

LCpl Jackson testified that if the snatch team could not get Saleh Gowad, "they would get a relative of his or any other male in the house." (J.A. 289.) LCpl Pennington testified the plan was to "pick up [Saleh Gowad] if we could; if not him, one of his brothers; if not one of his brothers, we would pick up another military aged male, [and] bring him back to the hole." (J.A. 385, 863.) Contrary to LCpl Pennington, HM3 Bacos testified the plan was to simply "walk" this other man to the hole. (J.A. 446.)

Neither LCpl Jackson, LCpl Pennington, nor HM3 Bacos specified where they would find or pick up another man, whether they would enter into another man's house, how they would kidnap the other male, or how the snatch team would take him to the hole. In short, nothing in the Record supports Appellant's claims about the consistency of the previous testimony or the detail of the plan to

kill the unknown Iraqi man.

Third, the previous Members perhaps, "cut Appellant a break." In any case, the previous Members could have rationally "grounded [their] verdict upon an issue other than" a finding that there was no plot to kill a random Iraqi man. Appellant fails his burden, and the issue preclusion argument fails. *Schiro v. Farley*, 510 U.S. 222, 233 (1994).

b. Nothing in *Braverman* supports Appellant's argument that issue preclusion bars the admission of evidence. Contrary to Appellant's assertion, the conspiracy charge at the rehearing was a different agreement based on the 2007 Members' guilty Findings.

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

In *Braverman*, the Supreme Court answered "whether a single agreement to commit acts in violation of several penal statutes" constitutes "one or several conspiracies." 317 U.S. 49, 52 (1942). The Court explained, "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." *Id*. at 53. "Since the single continuing agreement . . . embraces its criminal object, it differs from successive

acts which violate a single penal statute and from a single act which violates two statutes." *Id*. at 54.

Braverman is inapplicable to this case for two reasons. First, nothing in *Braverman* supports Appellant's sole proposition before this court that issue preclusion prohibits the *admission of evidence* related to Appellant's prior acquittals. 317 U.S. at 52.

Second, the United States in *Braverman* conceded there was only one conspiracy agreement. 317 U.S. at 52. At the rehearing, the United States charged Appellant with a different agreement based on the 2007 Members' guilty Findings—to commit larceny, false official statements, murder, and obstructing justice. (J.A. 582-84, 625.) 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. *See Blockburger*, 284 U.S. at 304. Here, however, the agreement at the rehearing was a different agreement solely based on the Members' guilty Findings. (J.A. 219-24, 583-84.)

Accordingly, *Braverman* and double jeopardy were not implicated at Appellant's rehearing.

3. If this Court finds that the evidence should have been excluded under issue preclusion, the error was harmless beyond a reasonable doubt.

"Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In analyzing harmless beyond a reasonable doubt, this Court asks "whether there is a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). "The question is not whether the members were totally unaware of the error; rather, the essence of a harmless error is that it was unimportant in relation to everything else the jury considered on the issue in question." *Id*. (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quotations omitted).

Here, if this Court finds that the admission of the evidence was erroneous under the issue preclusion doctrine, such error was harmless beyond a reasonable doubt. First, affording the Members the presumption of following the Military Judge's Mil. R. Evid. 404(b) instruction, Members made limited use of that evidence during deliberations. (J.A. 809, 963); *see United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012). Second, even without evidence that Appellant conspired to kill the unknown Iraqi man, the Members at the second trial had

overwhelming evidence to convict Appellant of unpremeditated murder of "an unknown Iraqi man" beyond a reasonable doubt. The testimony introduced at trial unequivocally demonstrated Appellant plotted to kill Saleh Gowad (J.A. 757, 814, 851), that the snatch team returned with a man and placed him at the hole (765, 831, 883), and that Appellant nevertheless shot the man to his death. (J.A. 768, 834-35, 884, 886.)

Therefore, any error in the admissibility of such evidence was harmless beyond a reasonable doubt.

E. Appellant stands convicted for unpremeditated murder. Dismissal with prejudice is inappropriate even if this Court finds prejudice.

This Court has "long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). "When an error can be rendered harmless, dismissal is not an appropriate remedy." *Id*. "[D]ismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *Id*.

"[B]y permitting a new trial post vacatur, the continuing-jeopardy rule serves both society's and criminal defendants' interests in the fair administration of justice." *Bravo-Fernandez*, 137 S. Ct. at 363. "It would be a high price indeed for

society to pay . . . were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings." *Id*. (quotations omitted).

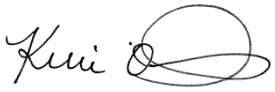
Setting aside Appellant's convictions and dismissing all charges with prejudice due to an error in the admissibility of evidence would allow Appellant to receive no convictions in a case where the evidence overwhelmingly demonstrated he plotted and engaged in murder. Appellant is not entitled to full immunity because of an erroneous admission of evidence—the traditional remedy for such an error is a retrial. *Bravo-Fernandez*, 137 S. Ct. at 363 (noting "general rule that, post vacatur of a conviction, a new trial is in order.").

Additionally, authorizing a rehearing with the exclusion of such evidence is an alternative remedy this Court should consider. This Court has consistently authorized a rehearing for unaffected charges where evidence admitted at trial was rendered inadmissible on appeal. *E.g. United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014); *United States v. Yammine*, 69 M.J. 70, 79 (C.A.A.F. 2010); *United States v. Rhodes*, 61 M.J. 445, 453 (C.A.A.F. 2005). Therefore, dismissal of the all the charges is not appropriate and this Court could authorize a rehearing on the unpremeditated murder and larceny charges.

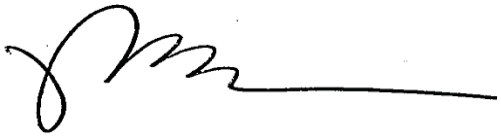
Conclusion

This Court should affirm the lower court's affirmation of the Findings and Sentence.

KIMBERLY RIOS
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
Bar no. 36996



KELLI A. ONEIL
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976, fax (202) 685-7687
Bar no. 36640



BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

MARK K. JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 31195

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KIMBERLY RIOS
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687