IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Bradley M. METZ** Corporal (E-4) U.S. Marine Corps Appellant	**BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 21-0059/MC Crim.App. Dkt. No. 201900089

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

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Issue presented

THE ADMISSIBILITY OF EVIDENCE SEIZED AFTER AN ILLEGAL APPREHENSION IS GOVERNED BY *BROWN v. ILLINOIS*, 422 U.S. 590 (1975). DID THE LOWER COURT ERR BY FAILING TO APPLY *BROWN* DESPITE FINDING APPELLANT WAS ILLEGALLY APPREHENDED?

Statement of Statutory Jurisdiction

Appellant's approved general court-martial sentence includes a bad-conduct discharge and one year of confinement.[1] The Court of Criminal Appeals (CCA) exercised jurisdiction under Article 66(b), UCMJ, and this Court has jurisdiction under Article 67(a)(3), Uniform Code of Military Justice (UCMJ).[2]

Statement of the Case

Contrary to Appellant's pleas, a general court-martial panel of members found him guilty of one specifications of arson, housebreaking, and unlawful entry in violation of Articles 126, 130, and 134, UCMJ, respectively.[3] They sentenced him to one year of confinement, total forfeitures, reduction to E-1, and bad-conduct discharge.[4] The Convening Authority approved the sentence as adjudged.[5] The CCA affirmed the findings and sentence as correct in law and fact on

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[1] Joint Appendix (J.A.) 50.
[2] J.A. 24, 26.
[3] J.A. 655; 10 U.S.C. §§ 926, 930, 934 (2012).
[4] J.A. 656.
[5] J.A. 50.

September 23, 2020.[6] Appellant petitioned this Court on November 20, 2020, and this Court granted review on February 22, 2021.

Statement of Facts

A. Fires broke out in a facilities maintenance shop at Camp Pendleton where Appellant and seven or eight other Marines had lawn maintenance duty.

Appellant was one of seven or eight members of the "grounds maintenance section" at Camp Pendleton.[7] Marines assigned to the section had to do "basic landscaping, the weed eating, mowing, cleaning up the area."[8] Appellant and other Marines worked out of a facilities maintenance shop on the base where they regularly used fuel,[9] including "two-stroke and gasoline" to power "weed-eaters and our leaf-blowers[.]"[10] In their spare time, some Marines, including Appellant, would work on their cars in the shop.[11]

Before dawn one morning at Camp Pendleton, base firefighters came to put out fires in the shop.[12] After controlling the fires, the firefighters noticed they appeared to have been set with fuel.[13]

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[6] J.A. 20.
[7] J.A. 512-13.
[8] J.A. 512-13.
[9] J.A. 505.
[10] J.A. 515.
[11] J.A. 511, 537.
[12] J.A. 164.
[13] J.A. 191.

The firefighters then notified the Naval Criminal Investigative Service (NCIS) of a suspected arson.[14]

B. Agent Craig Perry—an experienced arson investigator—and Agent Katelyn Thompson decided to interview Marines with regular access to the shop, including Appellant.

Agent Craig Perry was assigned as the lead investigator of the case.[15] In his career, he had investigated "at least 100" arsons, including twenty structure fire arsons.[16] He had received training and education in the field of arson, including with the Bureau of Alcohol Tobacco and Firearms.[17]

Agent Katelyn Thompson assisted Agent Perry.[18] At the scene, she interviewed Staff Sergeant Jerome Stewart and First Lieutenant Zachary Krebs, the non-commissioned and commissioned officers of the shop.[19]

The agents asked the two Marines for a list of people with access to the building.[20] Agent Perry later explained that he did this because he suspected the arsonist was a person with access to the building since there was no immediate

[14] J.A. 188.
[15] J.A. 187.
[16] J.A. 187.
[17] J.A. 187.
[18] J.A. 212.
[19] J.A. 59-60, 87, 202.
[20] J.A. 202.

sign of forced entry.[21] The Marines provided NCIS with a list of ten names.[22] But the list also stated: "Sometimes the keys get passed to others."[23]

As was also noted on the key list, Agent Thompson later stated that Staff Sergeant Stewart told her "there was a grudge against the shop with Corporal Metz" and that if anyone started the fires, it was Appellant.[24] But at trial, Staff Sergeant Stewart claimed he actually told Agent Thompson that "most of our Marines are always disgruntled" and that he "could easily see Coles, Narrow, Green, or Metz doing it" and that he threw "Fernandez's name out there just for shits and giggles[.]"[25] He said that when the agents told him a "hardhat" and "green logbook" appeared to have been "deliberately moved and out of place," it could easily be Metz or [another Marine named] Coles."[26] At trial, the Government argued that Staff Sergeant's words here were merely a "hunch from some staff sergeant about Corporal Metz."[27]

Regardless, Agent Thompson testified that Staff Sergeant Stewart's words had no effect on her. As she put it, "[o]ther people don't run our investigations, and

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[21] J.A. 202.
[22] J.A. 711-12.
[23] J.A. 711.
[24] J.A. 62, 77.
[25] J.A. 571.
[26] J.A. 570-71.
[27] J.A. 133.

just because someone may have a problem with Corporal Metz does not mean that we do. We were investigating key holders at that point."[28]

C. The agents headed to the barracks where Marines in the shop lived.

Staff Sergeant Stewart told the agents that keyholders lived on the second floor of a nearby barracks.[29] Agent Perry and Agent Thompson headed there shortly after.[30] They explained they wanted to conduct "screening interviews."[31]

When the agents arrived at the barracks, they "didn't suspect anyone" because they "were just following investigative leads[.]"[32] As Agent Perry explained, "there was no reason to suspect anybody at that point."[33]

D. Appellant allowed the agents into his room and told them he was unaware of the arson and did not have keys to the shop.

The first room the agents approached belonged to Appellant.[34] Agent Perry and Agent Thompson both identified themselves and explained that they were "conducting an investigation into something that happened" at the shop.[35] They asked Appellant if they could come into his room to speak with him, and Appellant

[28] J.A. 77.
[29] J.A. 62, 86.
[30] J.A. 62.
[31] J.A. 82, 126.
[32] J.A. 62.
[33] J.A. 89.
[34] J.A. 88.
[35] J.A. 89.

gave them permission to do so.[36]

Upon entering the room, Agent Perry asked Appellant whether he was aware of anything that happened at the maintenance shop.[37] Appellant replied that he was not.[38] Agent Perry explained there had been "an incident" there, and asked Appellant whether he had keys to the shop.[39] Appellant said he had keys but had loaned them to a friend who had misplaced them.[40]

Agent Thompson stated she did not regard Appellant as a suspect at this point in the investigation.[41]

E. When Agent Perry entered Appellant's bathroom, he detected a strong odor of fuel on shoes and grew suspicious.

Agent Perry then asked Appellant if he could look around the room.[42] Appellant allowed him to do so.[43] Agent Perry noticed a pair of shoes hanging in Appellant's bathroom whose insoles had been removed as if to allow the shoes to dry off.[44] Appellant gave Agent Perry permission to go into the bathroom.[45] Upon

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[36] J.A. 63.
[37] J.A. 64.
[38] J.A. 64.
[39] J.A. 64.
[40] J.A. 64.
[41] J.A. 62.
[42] J.A. 65.
[43] J.A. 65.
[44] J.A. 89-90.
[45] J.A. 90.

coming within several inches of the shoes, Agent Perry detected an "overwhelming odor" of "jet fuel or diesel" that he could not smell outside the bathroom.[46]

At this point, Agent Perry made a "slashing diagonal motion" across his neck to signal to Agent Thompson that it was time for the agents to exit the room.[47] Agent Perry later explained: "When I smelled that odor, at that point, obviously, I was a little bit more concerned that we were zeroing in, potentially, on some information pertinent to our investigation."[48] Before leaving Appellant's room, Agent Perry provided him with their contact information.[49]

F. Despite the odor on the shoes, Agent Perry later clarified that he did not believe he had probable cause to apprehend Appellant.

Despite the odor, both agents explained they did not have probable cause to apprehend Appellant or to get a search authorization.[50] Agent Perry later stated:

> It definitely – it's not something that I thought a person was easily going to just explain away, but it doesn't reach that level of probable cause to the point where I was going to walk out of that bathroom and, you know, suspect him and slap the cuffs on him and send him to NCIS for interrogation.[51]

Similarly, at the same hearing, Agent Thompson stated that she did not

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[46] J.A. 90.
[47] J.A. 65.
[48] J.A. 90.
[49] J.A. 90-91.
[50] J.A. 90.
[51] J.A. 126.

believe the agents had probable cause.[52] She stated: "We didn't know why there was gasoline on his shoes, but we had a hunch it may have to do with the fire."[53]

G. After leaving Appellant's room, the agents monitored the area to see if he would try to throw away the shoes. But he actually put them out in the open.

The agents then left Appellant's barracks and went back to their car to monitor Appellant from a distance.[54] Agent Thompson stated that she "thought that [Appellant] may ditch his shoes and that he may try to throw them into the dumpster, so we were just trying to surveil him to see if he would do that."[55] She explained the agents' thought process as follows:

> If he threw his shoes into the garbage, that would give us more of a reasoning to know. There were many reasons why there could've been gasoline found on his shoes, so that's what we were trying to attempt to figure out.[56]

But Appellant did not try to throw out the shoes. In fact, he put them out in the open.[57] When the agents reapproached Appellant's room, the shoes had now been placed on a catwalk near Appellant's door.[58]

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[52] J.A. 69.
[53] J.A. 66.
[54] J.A. 91.
[55] J.A. 66.
[56] J.A. 76.
[57] J.A. 66, 91.
[58] J.A. 66, 91.

H. Agent Perry claimed he went to contact the duty officer to ensure Appellant's safety after Appellant did not answer his door on a reapproach.

After about thirty minutes, the agents returned to Appellant's room.[59] But he was no longer there.[60] Agent Thompson explained that the agents thought there might be a "safety" issue.[61] But she admitted she had no indication of a safety concern other than the fact that the agents "had just gone to talk to [Appellant] about a possible serious offense" but now he was not "answering his door" and the agents had not seen him exit his room.[62] Likewise, Agent Perry also admitted "[w]e weren't quite at exigent circumstances[.]"[63]

Agent Thompson explained that she stayed at Appellant's barracks room door and "kept knocking" at his door, while Agent Perry "went down to the duty [officer] to figure out if he had seen Metz."[64]

I. Rather than contacting the duty officer, Agent Perry approached Appellant and asked him to remove his hands from his pockets.

Agent Perry quickly spotted Appellant "coming out of a breezeway area towards the smoke pit, center courtyard of the same building, on the ground

[59] J.A. 66.
[60] J.A. 66.
[61] J.A. 67.
[62] J.A. 67.
[63] J.A. 67.
[64] J.A. 67.

level."[65] He explained that Appellant "briefly made eye contact with [him]" and that he "called out to [Appellant]."[66]

He stated that Appellant "didn't seem to respond like I would figure someone appropriately would."[67] But he did not point to any signs of threatening behavior by Appellant.

He then stated Appellant's hands "were back down in the pockets."[68] He claimed that when the agents were first in his room, Agent Thompson "had to tell [Appellant] a couple times . . . to take his hands out of his pockets."[69] He later modified this by saying she asked him "at least one time" to do this.[70]

But on cross-examination during a suppression hearing, civilian defense counsel asked Agent Perry: "So during the first contact, there was something about his hands in his pockets.[71] You didn't cuff him at that time?" In response, Agent Perry stated, "No."[72]

During her testimony on the events, Agent Thompson made no mention of

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[65] J.A. 92.
[66] J.A. 92.
[67] J.A. 219.
[68] J.A. 92.
[69] J.A. 92.
[70] J.A. 117.
[71] J.A. 117.
[72] J.A. 117.

any such request to tell Appellant to remove his hands from his pockets.[73]

J. Although Appellant removed his hands from his pockets as requested, Agent Perry still handcuffed him because he "didn't like his behavior."

Appellant then removed his hands from his pockets.[74] Despite this, Agent Perry handcuffed him.[75] He claimed that while Appellant removed his hands from his pockets, he "was very slow to do so."[76] He explained further:

> I was a little bit, based off of what I had gathered from the shoes, under the impression that maybe he was trying to get rid of something else, but more importantly, I just didn't like his behavior at that point, so I did approach and tell him, 'Hey, you're making me real nervous right now, and we want to talk to you some more,' but I did control him briefly.[77]

Later, Agent Perry stated that "he didn't feel comfortable with the way [Appellant] was acting at a most basic safety level" and explained that Appellant "didn't appear to be in that common area for a specific purpose."[78]

Agent Perry claimed that he applied the handcuffs "to control [Appellant], pat him down for weapons, and then he was released."[79] He explained that his pat down revealed that Appellant was not carrying weapons.[80]

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[73] *See generally* J.A. 58-85.
[74] J.A. 219.
[75] J.A. 92.
[76] J.A. 92.
[77] J.A. 92.
[78] J.A. 127.
[79] J.A. 117.
[80] J.A. 127.

K. Despite learning Appellant was not a threat, Agent Perry kept Appellant handcuffed and brought him back to his room to "discuss things."

But Agent Perry did not release Appellant from handcuffs right away as his initial testimony implied. On both direct examination and cross-examination, he acknowledged that he kept Appellant in handcuffs as he walked him back to his barracks.[81] He also stated that as Appellant was in handcuffs, he asked Appellant "if he would be able [and] willing to go up and discuss things with us at his room, to which he said yes."[82] He told Appellant: "Just until I get some stuff figured out, this is what I'm going to do."[83]

He later stated that as Appellant was handcuffed, he told Appellant "that he was not under arrest, he was being detained."[84] He told Appellant "we would like to talk to [you] some more, and he agreed to go with us back toward his room."[85]

L. Agent Perry later admitted he did not have probable cause to apprehend Appellant at this point.

Agent Perry admitted that as he escorted Appellant in handcuffs back to Appellant's room, he did not have probable cause to apprehend him.[86] He explained his level of suspicion toward Appellant as follows:

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[81] J.A. 92, 118.
[82] J.A. 118.
[83] J.A. 127.
[84] J.A. 219.
[85] J.A. 219.
[86] J.A. 119.

> I definitely had some indicators that I was moving down the right direction, but as far as having enough to justify probable cause that Corporal Metz was indeed my arsonist in this case, no, I wasn't there yet.[87]

Agent Thompson also agreed there was not probable cause.[88]

Agent Perry stated that it took "[s]econds, maybe a minute" to bring Appellant back up the stairs to his barracks.[89] He explained that he took a "direct" path to the room because he wanted "to keep [Appellant] out of line of sight of anybody else that was outside."[90]

But he later acknowledged another Marine observed what was happening.[91]

M. Either as Appellant was still handcuffed or immediately after, the agents asked him if he would be willing to consent to a search of his room before handing him a form, which he signed.

Agent Perry stated that he removed Appellant's handcuffs when they returned to Appellant's room since he "no longer felt that there was a threat."[92] While both agents were standing with Appellant in front of his room, Agent

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[87] J.A. 119.
[88] J.A. 69 ("I don't believe we had probable cause at that point.").
[89] J.A. 127.
[90] J.A. 127.
[91] J.A. 288 ("I recall someone sticking their head out of the room after we had made contact with Corporal Metz.").
[92] J.A. 127.

Thompson told Appellant: "We would like to search your room. Do you have anything against that?"[93]

As the lower court acknowledged, it is "not perfectly clear from the record if Appellant was asked this while still in handcuffs."[94] Agent Perry stated that he "believe[d]" Appellant was no longer handcuffed by this point.[95]

Regardless, Agent Perry agreed that very little time transpired between when Appellant came back in handcuffs and the search.[96] As he put it: "We advised him of our desire to search and the execution of that written search, which is *a very short time* after coming back up to the room on the second contact."[97]

N. <u>After searching Appellant's room, Agent Perry seized various clothing items from Appellant's barracks room wall locker</u>.

The search lasted roughly two hours.[98] The agents had Appellant wait outside the room with one agent as the other searched inside the room.[99]

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[93] J.A. 67, 69.
[94] J.A. 18.
[95] J.A. 92.
[96] J.A. 223.
[97] J.A. 223 (emphasis added).
[98] J.A. 700.
[99] J.A. 70.

Agent Perry testified that when he searched Appellant's room, he noticed "a hanging laundry bag that had some damp clothing in it" within a wall locker.[100] Some of the clothing items had "a gasoline smell to them."[101]

Similarly, Agent Thompson noted that she "found a pair of black pants that produced a strong odor similar to gasoline."[102] She stated "a pair of blue, green, and white checkered boxers, a charcoal grey shirt, a white t-shirt, and a pair of black sweat pants" also produced the smell.[103]

The agents also seized a lighter from Appellant's dresser and a "crushed red cell phone" found in a trashcan.[104]

O. At the conclusion of the search, Agent Perry again handcuffed Appellant, and the agents drove him to the station for an interrogation.

After the agents were done searching Appellant's room, Agent Thompson told him the agents "had suspicion within the clothing that [they] had found, that [Appellant] may have more to do with the investigation."[105] She explained to him that that the agents would "like to talk to him, and in order to do so, we had to take him down to our office."[106] Agent Perry again put Appellant in handcuffs and

[100] J.A. 93.
[101] J.A. 93.
[102] J.A. 698.
[103] J.A. 698.
[104] J.A. 698.
[105] J.A. 71.
[106] J.A. 71.

escorted him to the NCIS vehicle.[107] The drive took thirty minutes.[108] They did not stop for food; an later agent threw a McDonald's cheeseburger toward Appellant at the beginning of his interrogation.[109] The interrogation immediately followed.[110]

P. Agent Thompson was Appellant's primary interrogator, and she frequently referenced their prior interactions from earlier that day.

Special Agent Thompson was the agent who collected Appellant's personal information at the beginning of the interrogation and read him his rights, which Appellant ultimately waived.[111]

Throughout the interrogation, she referred to their interactions from earlier that day. For example, before reading him his rights, she referred to a prior conversation she had with him that day in which he told her he had held other jobs before joining the Marine Corps.[112]

Throughout the interrogation, she referred to other conversations they had from earlier that day. For example, she talked about the fact that Appellant had

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[107] J.A. 71.
[108] J.A. 71.
[109] J.A. 674 at 6:53:37.
[110] J.A. 228 ("By the time we reached seizing the clothes, he was transported there shortly after. So a matter of within an hour.").
[111] *See generally* J.A. 674, 703.
[112] J.A. 674 at 7:13:00 ("What did you do prior to the Marine Corps? *I know you said you had a bunch of jobs*.") (emphasis added).

earlier told her he was with a friend the prior evening; his feelings toward the Marine Corps; and information about his family from back home in Wisconsin.[113]

Q. In his interrogation, Appellant told the agents he was out with Corporal Taylor the night of the fires; Agent Thompson said she would contact Corporal Taylor after the interrogation.

Appellant claimed he had an alibi. He told Agent Thompson he was with a friend, Corporal Caleb Taylor, in the hours before the fire started.[114] Agent Thompson asked Appellant for Corporal Taylor's phone number, but Appellant claimed Corporal Taylor had just gotten a new phone.[115] When Agent Thompson asked where Corporal Taylor was stationed, Appellant provided her with his command at Camp Pendleton.[116] Agent Thompson stated she would contact Corporal Taylor after the interrogation.[117]

Appellant explained that he and Corporal Taylor went to a buffet to eat dinner before going back to Corporal Taylor's hotel to drink beers.[118] He claimed Corporal Taylor dropped him off at his barracks at around 1220, roughly three hours before the fires broke out.[119] He explained that he did laundry, brushed his

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[113] J.A. 674 at 7:13:00, 7:19:47, 7:31:35; 7:42:00, 7:52:56.
[114] J.A. 674 at 7:19:50.
[115] J.A. 674 at 7:20:10.
[116] J.A. 674 at 7:21:00.
[117] J.A. 674 at 7:33:52 ("Yeah maybe you did get back to base around that time, *and we will check with your buddy*.") (emphasis added).
[118] J.A. 674 at 7:21:20.
[119] J.A. 674 at 7:21:20-7:24:00.

teeth, and checked Facebook before going to bed at around 0100.[120] He claimed he woke up around 0900 or 1000.[121] When Agent Thompson asked him about his lost keys, he explained that he had told his command about the lost keys.[122]

R. Appellant made numerous incriminating statements after Agent Thompson confronted him with evidence the agents seized in his room, including: "If I were you, I'd peg me for it too."

Agent Thompson did not accept Appellant's claims. She told him the clothes the agents seized from his room smelled like gas.[123] In response, Appellant told her he was working on his car within the last few days and that his car "drips."[124]

Agent Thompson did not accept this explanation. Later, she said: "So if you were sitting in my seat, what would you think? You'd be pointing at you, right?"[125] Appellant replied: "Yeah."[126]

She continually pressed him on why his clothes smelled like gasoline. She said: "I understand you were working on your car, but when I smelled your pants, they smelled pretty bad, dude. Like, even in the underwear you were wearing . . . smelled pretty bad."[127]

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[120] J.A. 674 at 7:22:50-7:23:02.
[121] J.A. 674 at 7:31:22.
[122] J.A. 674 at 7:55:45.
[123] J.A. 674 at 7:31:50.
[124] J.A. 674 at 7:32:00.
[125] J.A. 674 at 7:39:55.
[126] J.A. 674 at 7:40:00.
[127] J.A. 674 at 7:40:08.

At another point, she asked: "Why do your clothes smell like gasoline?"[128] Appellant again said his "car leaked something from the back" and that he had checked it "three or four days ago."[129]

Seconds later, Appellant admitted his story sounded "shitty" that he was "disgruntled" and then said: "Like, if I were you, I'd peg me for it too."[130]

At another point, he told Agent Thompson "I understand" when she told him his story was "weak as crap."[131] Shortly after this, she asked him: "What gets you here?"[132] Appellant responded, "Being disgruntled."[133] When she told him, "So, when I call your dad and I have to tell him that you're under our custody for starting a fire . . . When I tell him all the evidence we have, you think your mom's going to be upset?" Appellant replied, "Yes."[134]

Later, he nodded when another agent told him: "When we have to present all this shit, you know it's not going to look good."[135] The agent also asked: "Do you

[128] J.A. 674 at 7:57:00.
[129] J.A. 674 at 7:57:30.
[130] J.A. 674 at 7:58:22-7:58:55.
[131] J.A. 674 at 8:01:30.
[132] J.A. 674 at 8:16:20.
[133] J.A. 674 at 8:16:23.
[134] J.A. 674 at 8:24:00.
[135] J.A. 674 at 8:38:15.

think you're the only fucking Marine who's gotten drunk and done something stupid?"[136] Appellant stated: "No."[137]

Later, the agent told Appellant he was going to examine the data from the keycard reader at Appellant's barracks.[138] Responding to Appellant's alibi that he came home shortly after midnight, the agent stated: "Probably the last [entry] is not going to be at [0025] when you come back with your laundry, right?"[139] In response, Appellant nodded.[140]

At another point, the agent stated:

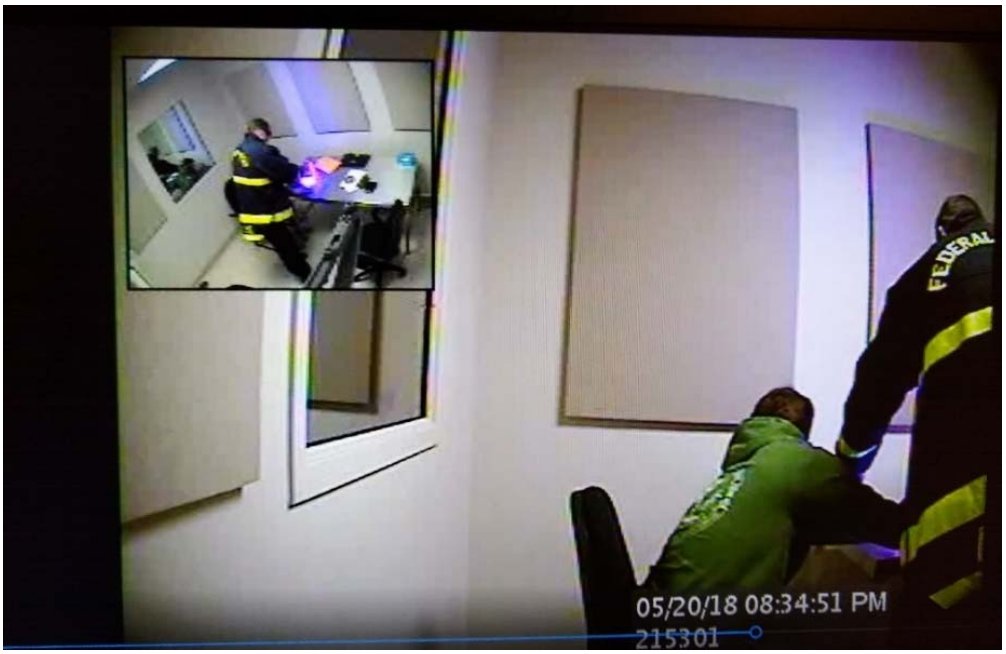
> What I think happened is, you're drunk, you go in there, you're fucking around, maybe it was some of your buddies, I don't know, and then a small thing turns into a big thing. Does that sound reasonable?[141]

In response, Appellant stated: "I could see that happening."[142]

[136] J.A. 674 at 8:38:30.
[137] J.A. 674 at 8:38:35.
[138] J.A. 674 at 8:38:35.
[139] J.A. 674 at 8:40:00.
[140] J.A. 674 at 8:40:13.
[141] J.A. 674 at 8:40:37-8:40:50.
[142] J.A. 674 at 8:40:53.

S. Appellant made more incriminating statements after Agent Perry entered the room and shined a light on Appellant's hands before another agent falsely said the light showed Appellant's hands tested positive for "accelerant."

At one point in the interrogation, Agent Perry entered the room and had Appellant put his hands out while Agent Perry shined an ultraviolet light on Appellant's hands as shown in the following image:[143]



At trial, Agent Perry admitted this was a ploy to trick Appellant into thinking the light detected gas on Appellant's hands.[144] During the interrogation, when another agent asked Appellant if he was aware Agent Perry's test revealed

[143] J.A. 674 at 8:34:51.
[144] J.A. 299.

the presence of "accelerant" on his hands.[145] Appellant nodded his head and said "All right."[146]

When the agent asked Appellant what his command was going to think, Appellant responded: "Yeah, it looks horrible."[147]

T. Agent Perry told Appellant "I'm gonna overwhelm you," and Appellant appeared to agree that he had enough evidence to convict Appellant.

Near the end of the interview, Agent Perry re-entered the room. He said: "I have enough to probably convict you right now."[148] Appellant nodded.[149] But later, when Appellant continued to deny culpability, Agent Perry said:

> You can tell me you didn't do it. I've been doing this a long time. Everyone says, 'I didn't do it.' But eventually, they think about it, and they say, 'Hey, I don't wanna go down for that. I fucked up.' . . . I think that's what they're hoping you'll do. In a way, I'm hoping you'll do that because I'm gonna overwhelm you. That's what I've gone to school for. That's what I've gone to extra schools for. That's what I do here.[150]

U. Agent Perry ordered Appellant back to the station the next morning.

After Appellant had been in the interrogation room for four hours, Agent Thompson entered the room and told him "You're command's here."[151] Her report

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[145] J.A. 674 at 8:43:33.
[146] J.A. 674 at 8:43:33.
[147] J.A. 674 at 8:44:25.
[148] J.A. 674 at 8:50:27.
[149] J.A. 674 at 8:50:27.
[150] J.A. 674 at 8:50:27.
[151] J.A. 674 at 10:42:50.

stated: "S/METZ was released to Gunnery Sergeant Ryan HAND, USMC, 5th Marine Regiment, 1st MARDIV, CPC."[152]

The following morning, Agent Perry had Appellant brought back to the station.[153] Agent Perry explained his thought process for doing so as follows:

> One, for a break from where we left things; a chance for us to, kind of, regroup as far as the investigation went; to finalize the scene processing, and by 'finalize,' I meant to gather what initial information we needed out of that scene at that time to a point where it could be secured until we, kind of, had a game plan further in that investigation; and, frankly, to continue to gather more facts in our investigation.[154]

Appellant was escorted back by more senior members of his command.[155]

V. After being brought back, Appellant agreed to a second search of his room.

When Appellant arrived back at the NCIS station, agents patted him down for weapons before having him place his cell phone and smart watch into a storage locker within NCIS.[156] The agents then took Appellant to an interview room.[157] Appellant declined a second interrogation but provided consent to a second consent of search of his room.[158] The form did not contain a cleansing warning or otherwise inform him of a defect in the search from the prior day.

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[152] J.A. 702.
[153] J.A. 95.
[154] J.A. 95.
[155] J.A. 704.
[156] J.A. 688.
[157] J.A. 704.
[158] J.A. 704.

W. During the second search, agents found keys to the maintenance shop as well as black gloves that smelled like fuel.

During the second search, agents found a pair of black gloves that emitted an odor of gas.[159] They also found a key to the maintenance shop within a Kleenex box.[160] When the agents were finished conducting the search, they released the room to Appellant's command.[161] Shortly after the search was completed, Appellant's commanding officer ordered him into pretrial confinement.[162]

X.. At a suppression hearing concerning an alleged Article 31(b) violation, Agent Thompson admitted she did not have enough evidence to get a search authorization and Agent Perry said he lacked probable cause to apprehend.

Before trial, defense counsel challenged the admissibility of all derivative evidence following the agents' initial entrance into Appellant's barracks on the basis that the agents failed to advise Appellant of his Article 31(b) warnings.[163]

Both agents testified on the motion. Regarding Appellant's first consent search, trial counsel asked Agent Thompson whether she "even had probable cause at that point for a command authorized search and seizure?" In response, Agent Thompson stated "No, I do not."[164] Likewise, Agent Perry explained that he did

[159] J.A. 458-59.
[160] J.A. 460.
[161] J.A. 681.
[162] J.A. 47, 682.
[163] J.A. 683.
[164] J.A. 69.

not have probable cause to apprehend Appellant at this time.[165]

Y. Civilian defense counsel did not raise a Fourth Amendment challenge but appeared to believe Agent Perry's handcuffing was problematic.

During the suppression hearing, civilian defense counsel objected when trial counsel asked Agent Thompson whether Appellant appeared to be "under any sort of duress" when he signed the consent form.[166]

The military judge sustained the objection but then interrupted the testimony by asking civilian defense counsel if he was "contesting this issue."[167] The military judge explained that he "didn't take that away from [defense counsel's] brief."[168]

In response, civilian defense counsel did not directly answer the question but rather gave an ambiguous answer about inevitable discovery.[169] At no point did he claim that he was challenging the evidence based on an illegal apprehension.[170]

On cross-examination, civilian defense counsel suggested Agent Thompson was hiding the fact that Agent Perry escorted Appellant to his room in handcuffs by asking her: "That wasn't just in your direct testimony. You didn't include that, that he was handcuffed at that time, did you?"[171]

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[165] J.A. 126.
[166] J.A. 69.
[167] J.A. 70.
[168] J.A. 70.
[169] J.A. 70.
[170] J.A. 70.
[171] J.A. 80.

At another point, civilian defense counsel asked Agent Thompson whether she threatened Appellant with a search authorization if he did not consent to the search.[172] Agent Thompson denied doing so.[173]

Later, when Agent Perry explained that he asked Appellant "if he would be able willing [sic] to go up and discuss things with us in his room," civilian defense counsel asked: "You asked that to a man who was in cuffs?"[174]

Still, the defense did not raise a separate Fourth Amendment motion.

Z. During argument on the Article 31(b) motion, trial counsel informed the court he identified "several different, sort of, Fourth Amendment issues" and asked if the court wanted him to brief them. The military judge said "No."

During argument on the Article 31(b) suppression motion, trial counsel concluded his argument before stating:

> That's all I have, sir. There's several different, sort of, Fourth Amendment issues regarding the fact pattern here, if there's something specific that you'd like the government to brief on about meeting its burden or the initial statements or what was seized from the room, sir.[175]

In response, the military judge stated: "No. I think you've sufficiently and thoroughly responded to the issues at bar, as I understand it, but you'll have an opportunity . . . to respond to the defense argument."[176]

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[172] J.A. 83.
[173] J.A. 83-84.
[174] J.A. 118.
[175] J.A. 136.
[176] J.A. 136.

AA. Though civilian defense counsel argued the doctrine of "fruit of the poisonous tree" applied, he argued this in relation to an Article 31(b) issue but not to any Fourth Amendment violation.

In arguing on the motion, civilian defense counsel told the military judge that his "opinion as to the credibility of these agents is low."[177] He was responding to the agents' testimony that they did not view Appellant as a suspect when they first approached his room.[178] He argued that after their failure to advise Appellant of his Article 31(b) rights when they entered the room, "anything that happened after that is wrapped up in the fruit of the poisonous tree."[179]

BB. The court asked counsel what his "theory" was regarding fruit of the poisonous tree. Again, counsel did not raise a Fourth Amendment motion.

The military judge interrupted civilian defense counsel by stating: "So I do have a question."[180] He asked counsel how the "clothing and things like that" were "derivative evidence from the [unwarned] statements . . . that were made during the first interaction?"[181]

In response, counsel explained that the agents only discovered the clothing after speaking with Appellant without warning him when they first entered his

[177] J.A. 139.
[178] J.A. 139-40.
[179] J.A. 139-40.
[180] J.A. 142.
[181] J.A. 142.

room.[182] Again, counsel did not raise a Fourth Amendment challenge.

CC. At trial, the Government heavily referred to the interrogation.

During opening statement at trial, trial counsel referred to Appellant's interrogation.[183] Trial counsel referred to Appellant's factual claims during his interrogation, including: (1) that he did not start the fires; (2) that he did not wake up until around 0900 or 1000 the morning of the fire; (3) that he did not have keys to the shop; (4) that his car had a leak; and (5) that he was with Corporal Taylor the evening before the fire.[184]

DD. The Government called Agent Perry and Agent James Marczika to rebut Appellant's statements during his interrogation.

The Government had Agent Perry take the witness stand as the interrogation played in open court.[185] At various points, the Government paused the interrogation to have Agent Perry refute Appellant's statements with his investigative findings. For example, regarding Appellant's claim during the interrogation that he drove by the arson scene on his way to the gym, Agent Perry explained that there was no gym in that direction.[186] Additionally, when Appellant

[182] J.A. 143 ("So when – so the [first consent search] comes about, essentially, connected to the agent smelling the shoes, and the smelling of the shoes occurs only as a result of the accused's willingness to speak.").
[183] *See generally* J.A. 149-153.
[184] J.A. 151.
[185] J.A. 261.
[186] J.A. 261-62.

claimed in the video that his clothes smelled like gas due to a leak in his car, Agent Perry testified that he searched under Appellant's car and saw no leak.[187]

The Government's next witness was Agent James Marczika.[188] Contrary to Appellant's claim in the video that he had reported his lost keys to the shop to his command, Agent Marczika testified that he found the keys—and black gloves that smelled like fuel—when he searched Appellant's room the second day.[189]

EE. The Government admitted keycard data from Appellant's room contradicting his claim Corporal Taylor dropped him off around midnight.

The Government also called the manager of Appellant's barracks at the time of the arson.[190] He explained that Marines would use key cards to enter their barracks room.[191] He stated that an NCIS agent approached him and asked him to provide him with data about the swipes into Appellant's room.[192] He explained that he showed the agent data that generated on a device.[193] The agent then took photos of the data listed on the device using his phone.[194] The Government admitted these photos.[195] He explained that one of the photos showed that on the evening of the

[187] J.A. 264.
[188] J.A. 452.
[189] J.A. 458-60.
[190] J.A. 430.
[191] J.A. 431.
[192] J.A. 434.
[193] J.A. 434.
[194] J.A. 434.
[195] J.A. 436, 675-79.

fires, someone accessed Appellant's barracks door just after 2000 hours.[196] The next entry to the room did not occur until 0336 hours the morning of the fires.[197]

FF. The Government also called Corporal Taylor, who testified (1) Appellant approached him after his interrogation and told him to lie to NCIS; (2) he saw Appellant under command escort the next morning; and (3) NCIS came to speak to him within a day or so.

The Government also called Corporal Taylor, whom the Convening Authority ordered to testify under a grant of immunity.[198]

Corporal Taylor testified that shortly after Appellant's interrogation, Appellant called him telling him he wanted to meet up somewhere.[199] He testified that they eventually met up that evening in the barracks room of a mutual friend, with whom Corporal Taylor had been staying.[200] There, Corporal Taylor testified that Appellant told him he had been speaking with NCIS all day and that "if anybody talks to me about [the investigation], to tell them a specific story."[201] Corporal Taylor explained that Appellant told him to tell anyone who asked that Corporal Taylor dropped Appellant off at his barracks the evening of the fire around 0100 or 0130, and that the two had been drinking specific beers.[202]

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[196] J.A. 438.
[197] J.A. 438.
[198] J.A. 578, 739.
[199] J.A. 585.
[200] J.A. 587.
[201] J.A. 588.
[202] J.A. 588.

Corporal Taylor testified that this information was not true.[203]

Corporal Taylor testified that he saw Appellant the next day "outside the PX" when he "went in for morning coffee."[204] He explained that "somebody was with him and Corporal Metz said it was his escort."[205]

He stated that NCIS came to speak with him either later that day or the next.[206] He testified that he initially told the agents the false story Appellant told him to share.[207] He said that he repeated the false story when agents again approached him the next month.[208] He claimed that he later initiated a third conversation with NCIS in which he told agents the true story.[209]

GG. The military judge issued a false exculpatory statements instruction.

The military judge also issued a false exculpatory statements instruction.[210] The instruction told the members: "There has been evidence that after the offenses were allegedly committed, the accused may have made a false statement, or given a false explanation about the alleged offenses."[211] The instruction told the members

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[203] J.A. 589.
[204] J.A. 591.
[205] J.A. 591.
[206] J.A. 591.
[207] J.A. 591.
[208] J.A. 594.
[209] J.A. 594-95.
[210] J.A. 613-14.
[211] J.A. 613.

they could consider statements made that were "later shown to be false" as "consciousness of guilt."[212] The instruction also stated that "an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence."[213]

HH. In closing argument, trial counsel claimed Appellant lied numerous times during his interrogation.

The Government's closing argument predominantly focused on refuting Appellant's claims throughout his interrogation by pointing to the investigative findings.[214] Trial counsel made repeated references to the interrogation, including to a specific timestamp of the interrogation in which Appellant claimed he was with Corporal Taylor the night of the fires.[215] Trial counsel also referenced the portion of the interrogation in which Appellant claimed his car leaked fuel, which he claimed was contradicted by Agent Perry's testimony.[216] Trial counsel later told the members Appellant contradicted himself in the interrogation by first claiming he did not know about the fires but later claiming he had driven by the scene.[217]

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[212] J.A. 614.
[213] J.A. 614.
[214] *See generally* J.A. 615-27, 648-54.
[215] J.A. 618.
[216] J.A. 626-27.
[217] J.A. 649.

II. In a post-trial declaration, Appellant explained (1) Agent Perry handcuffed him after patting him down; (2) he was still handcuffed when Agent Thompson verbally sought consent to search his room; (3) his command told him he was not allowed to go back to his room before they took him to NCIS on the second day; and (4) his civilian defense counsel did not ask him to describe the sequence of events following Agent Perry's handcuffing.

During his appeal before the lower court, Appellant provided a sworn declaration describing the key events in this case.[218]

In describing the handcuffing, Appellant clarified that Agent Perry applied the handcuffs after he had already patted Appellant down.[219] Appellant swore that he was still handcuffed when Agent Thompson asked him if he had "anything against" letting the agents search his room.[220]

Regarding the following morning, Appellant stated he was taken to his command after being awakened at 0700 by the duty officer.[221] He stated that when they arrived at his command, the duty officer told him: "You can't go back to your room, and you will need an escort if you want to leave here."[222]

Regarding his counsels' performance, Appellant stated that his attorneys visited him "on a few occasions" as he was in pretrial confinement.[223] But he stated

[218] J.A. 726.
[219] J.A. 727.
[220] J.A. 727.
[221] J.A. 729.
[222] J.A. 729.
[223] J.A. 730.

that his attorneys did not ask him "to recount the details of [his] arrest by Special Agent Perry and the follow-on events in court[.]"[224]

JJ. In a post-trial declaration, the lower court granted Appellant's motion to attach Corporal Taylor's immunity agreement as well as Corporal Taylor's declaration explaining that he testified because he was ordered to do so.

Following trial, Corporal Taylor (now Mr. Caleb Shiher), provided a sworn declaration explaining that he only testified because he was ordered by the Convening Authority to do so.[225] He explained that the Convening Authority threatened him with criminal prosecution if he failed to do so.[226]

The lower court also attached his immunity agreement.[227] Consistent with the declaration, the agreement—signed by the Convening Authority—explained that the agreement was issued because Corporal Taylor "will likely refuse to testify on the basis of [his] privilege against self-incrimination if ordered to appear as a witness."[228] The agreement also permitted the Government to prosecute Corporal Taylor for "wrongful failure to testify."[229]

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[224] J.A. 730.
[225] J.A. 737-38.
[226] J.A. 738.
[227] J.A. 738.
[228] J.A. 739.
[229] J.A. 739.

KK. On review, the NMCCA concluded Agent Perry unlawfully apprehended Appellant but found no prejudicial error.

On appeal, the NMCCA found that Agent Perry "had no reason after he stopped and frisked Appellant to apprehend him."[230] The court noted that Agent Perry "had determined there was no threat."[231] As the court explained, both Agent Perry and Agent Thompson both stated that they did not believe they had probable cause at this time.[232]

But the court claimed counsel were not ineffective for failing to move to suppress the evidence based on an illegal apprehension.[233] The court reasoned that Appellant signed a permissive authorization for search and seizure when Agent Perry brought him back to his room, and Appellant's "consent was voluntary."[234]

[230] J.A. 18.
[231] J.A. 18.
[232] J.A. 18.
[233] J.A. 18.
[234] J.A. 18-19.

Summary of Argument

Agent Perry unlawfully apprehended Appellant when he handcuffed him and escorted him to his room, and Appellant received ineffective assistance of counsel when his counsel failed move to suppress the evidence on this basis.

The lower court erred by finding Appellant's consent to the first search dispositive. As the Supreme Court explained in *Brown v. Illinois*, voluntary conduct after an unlawful seizure addresses the Fifth Amendment but not the Fourth Amendment concern of deterring unlawful conduct.

The exclusionary rule should have applied to the evidence from both searches as well as Appellant's interrogation, especially given the purposeful and investigatory nature of Agent Perry's unlawful handcuffing.

There was no reasonable tactical decision not to move to suppress the evidence based on the handcuffing. The agents both testified they had no probable cause to arrest Appellant. Trial counsel even alerted the parties to "Fourth Amendment issues." The court gave counsel a chance to clarify his position on the issue. Still, civilian defense counsel did not raise a Fourth Amendment challenge.

Had counsel raised a motion, there is a reasonable probability the motion would have been meritorious, and that the outcome would have been different since the investigation and all derivative evidence stemmed from the first search of Appellant's room.

Argument

THE EVIDENCE SEIZED FROM APPELLANT'S ROOM AND HIS INTERROGATION WERE THE FRUIT OF AN ILLEGAL APPREHENSION. HAD COUNSEL FILED A MOTION TO SUPPRESS, THERE IS A REASONABLE PROBABILITY THE MOTION WOULD HAVE BEEN MERITORIOUS AND THE TRIAL OUTCOME WOULD HAVE BEEN DIFFERENT.

A. The standard of review is *de novo*.

Issues of ineffective assistance of counsel are reviewed *de novo*.[235]

B. The Government may not apprehend without probable cause.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[236]

An apprehension is the military equivalent to an arrest.[237] A person subject to the UCMJ may only be apprehended for an offense triable under the UCMJ where probable cause supports the decision to do so.[238] And probable cause exists where "there are reasonable grounds to believe that an offense has been or is being

[235] *United States v. Grigoruk*, 56 M.J. 304, 306 (C.A.A.F. 2002) (citation omitted).
[236] J.A. 21.d
[237] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [HEREINAFTER MCM], Rule for Courts-Martial (R.C.M.) R.C.M. 302(a)(1) Discussion.
[238] MCM, R.C.M. 302(c).

committed and the person to be apprehended committed or is committing it."[239]

C. A *Terry* frisk requires a reasonable belief the person is armed and dangerous and when extended beyond its purpose can become an unlawful arrest.

As the Supreme Court explained in *Terry v. Ohio*, to briefly stop someone, an officer need not have probable cause but "must be able to point to *specific and articulable* facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[240]

A frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse resentment, and it is not to be undertaken lightly."[241] Thus, a frisk requires the officer to have "reason to believe that he is dealing with an armed and dangerous individual[.]"[242] An "inchoate and unparticularized suspicion or 'hunch," is not sufficient.[243]

Even where a *Terry* stop is lawful, it may become an unlawful seizure if it becomes "more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases.[244] For example, in *Rodriguez v. United States*, the police pulled appellant's car over, issued him a warning, but

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[239] *Id*.
[240] 392 U.S. 1, 21 (1968) (emphasis added).
[241] *Id*. at 17.
[242] *Id*. at 27.
[243] *Id*.
[244] *Florida v. Royer*, 460 U.S. 491, 504 (1983) (plurality opinion with Justice Brennan concurrence).

then ordered him out of the vehicle for a dog sniff when he refused their request to let him do this.[245] The Court held that because "addressing the infraction [was] the purpose of the stop, it "'last no longer than is necessary to effectuate th[at] purpose."[246]

Similarly, in *United States v. Soza*, the Tenth Circuit found that what began as a lawful *Terry* stop became transformed into an unlawful arrest when officers applied handcuffs even after appellant willingly obeyed their order to put his hands on his head.[247] The Court explained it was sensitive to the officers' safety, but found deference to the officers' decision was not warranted since "[d]efendant had obeyed their directions on at least two separate occasions by that point and had made no threatening gestures or suspicious movements[.]"[248]

1. <u>As the lower court agreed, Agent Perry unlawfully apprehended Appellant when he escorted him to his room in handcuffs after determining Appellant was not dangerous and while admitting there was no probable cause</u>.

Agent Perry—an experienced arson investigator—agreed there was no probable cause when he approached Appellant near the smoke pit. He explained that while he had suspicion toward Appellant, the odor on the shoes "doesn't reach that level of probable cause to the point where I was going to . . . slap the cuffs on

[245] 135 S. Ct. 1609, 1613 (2015).
[246] *Id*. at 1614 (citations omitted).
[247] 686 F. App'x 564, 569 (10th Cir. 2017).
[248] *Id*. at 569-70.

him and send him to NCIS for interrogation."[249] Yet that is essentially what he did.

Simply put, there was no need to handcuff Appellant. Agent Perry had just spoken with Appellant in his room, where he was cooperative.[250] Neither agent testified that Appellant gave them any reason to feel threatened. Even when Appellant failed to answer his door on the reapproach, Agent Perry admitted: "We weren't quite at exigent circumstances[.]"[251]

Agent Perry claimed he was concerned that "maybe [Appellant] was trying to get rid of something *else*[.]"[252] But he knew Appellant had not gotten rid of anything: in fact, Appellant had placed the shoes in the hallway near his door.[253] Agent Perry also stated he was concerned because Appellant "didn't appear to be in that common area for a specific purpose."[254] But Appellant was in the common area where he lived.

Regardless, his observations of Appellant did not give reasonable grounds to believe Appellant was "armed and dangerous."[255] He spotted Appellant near the smoke pit and "called out" to him.[256] He claimed Appellant was "very slow" to

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[249] J.A. 126.
[250] J.A. 63-65.
[251] J.A. 67.
[252] J.A. 92 (emphasis added).
[253] J.A. 659.
[254] J.A. 127.
[255] *Terry*, 392 U.S. at 27.
[256] J.A. 92.

remove his hands from his pocket.[257] He gave no reason to explain why this created a reasonable perception Appellant was armed and dangerous. In fact, the Seventh Circuit has explained that removing one's hands is "*compliant* behavior" and "not the making of reasonable suspicion that a person is armed and dangerous."[258]

Agent Perry's final justification was also the most revealing. He admitted the "more important[]" reason he handcuffed Appellant was that he "just didn't like this behavior at that point[.][259] But as the Supreme Court explained in *Terry*, an officer may not base his decision to frisk off an "inchoate and unparticularized suspicion or 'hunch,' but to the *specific and reasonable* inferences[.]"[260]

In light of Agent Perry's explanation here, this Court should follow the Tenth Circuit's rationale in *Soza*. While the police often get deference for "rapid choices" they make, here, this deference is not warranted: Agent Perry's rationale shows handcuffing "was not reasonably necessary to protect" his safety.[261]

Even assuming *arguendo* temporarily handcuffing Appellant was appropriate, as the lower court noted, any lawful basis had ended after Agent Perry determined Appellant was no longer a threat.[262]

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[257] J.A. 92.
[258] *United States v. Williams*, 731 F.3d 678, 690 (7th Cir. 2013) (emphasis added).
[259] J.A. 95.
[260] *Terry*, 392 U.S. at 27 (emphasis added).
[261] 686 F. App'x at 569-70.
[262] J.A. 18.

D. The evidence from the searches of Appellant's room as well as his interrogation should have been suppressed as tainted by the illegal apprehension.

The Supreme Court explained that the Fourth Amendment prohibits the use at trial of both physical evidence and verbal statements closely related to an unlawful arrest.[263] The question is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[264]

In *Brown v. Illinois*, the Supreme Court clarified *Wong Sun* by explaining that *Miranda* waivers alone do not cure the taint of an unlawful arrest.[265] It explained that *Miranda* warnings ensure against forced self-incrimination, but that the Fourth Amendment vindicates a separate liberty interest: deterring unlawful police conduct.[266]

The Court stated the proper test as follows: "[t]he temporal proximity of the

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[263] *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) ("Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion.").
[264] *Id*. at 488.
[265] *Brown v. Illinois*, 422 U.S. 590, 602 (1975).
[266] *Id*. at 601 ("The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth.").

arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct."[267]

In *United States v. Conklin*, this Court applied this rule to consent searches following illegal arrests by stating: "Although the subsequent consent may be a good treatment for the poison, it is not a panacea."[268]

1. The lower court erred by finding dispositive that Appellant signed a consent form following the illegal apprehension.

The lower court agreed that Agent Perry illegally apprehended Appellant but found dispositive that Appellant signed the consent form voluntarily.[269] It did not apply any Fourth Amendment analysis or the standard from *Brown.* Rather, it applied a Fifth Amendment voluntariness standard from this Court's decision in *United States v. Olson*, which did not involve a Fourth Amendment violation before consent was given.[270] As both the Supreme Court and this Court have made clear, this was error.

2. The results of the first search warranted suppression since the consent was immediately tied to the unlawful seizure.

This Court should find a recent Seventh Circuit case instructive on the application of *Brown* to a momentary illegal *Terry* frisk—even less intrusive than

[267] *Id*. at 603-04 (citations omitted).
[268] 63 M.J. 333, 334 (C.A.A.F. 2006).
[269] J.A. 18-19.
[270] J.A. 18 (citing 74 M.J. 132, 134-35 (C.A.A.F. 2015)).

the one in this case—followed by a voluntary consent search.[271] In *Palomino-Chavez*, police followed a car whose owner had a pending charge for narcotics trafficking and in which Appellant was riding.[272] After the car was parked at a house, police waited for a while before approaching the house and spotting appellant lying in a backyard hammock.[273] An officer "raised his badge, and motioned [the appellant] over" and conducted "a quick pat-down" of him.[274]

The officers then handed appellant a form seeking his consent to search the house but also stating that he could refuse the search.[275] He was not restrained.[276] He ultimately signed the form.[277] The police found cocaine under his shed.[278]

On appeal, the Seventh Circuit found appellant was "seized" in that a reasonable person in his position would not have felt free to leave when he signed the form.[279] The Court noted that officers approached him down his driveway wearing vests with holstered weapons visible and that one officer "physically touched" him during the pat down.[280] The Court also noted that no one said

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[271] *United States v. Palomino-Chavez*, 761 F. App'x 637-39 (7th Cir. 2019).
[272] *Id*. at 639.
[273] *Id*. at 640.
[274] *Id*.
[275] *Id*. at 640-41.
[276] *Id*.
[277] *Id*. at 641.
[278] *Id*.
[279] *Id*. at 642.
[280] *Id*.

appellant was "free to leave."[281] The Court found "a single episode leading up to [appellant] giving his consent, beginning with the police ordering him to approach them on the driveway and ending with his signature on the consent form."[282] The Court found that "[n]othing that occurred in between those events—a brief protective sweep, a nonconsensual frisk, and a short discussion with [the officer] about the form—amount[ed] to intervening circumstances."[283] It noted that the officers discussed the form with appellant, but found this was "not independent" from the consent but rather "was the means through which the officers obtained it."[284] The Court suppressed the evidence despite finding no flagrant misconduct.[285]

The same result should apply here, especially since the agents' conduct was more flagrant. In *Brown*, the Supreme Court found suppression especially warranted since the illegal arrest "had a quality of purposefulness."[286] It also noted that the police "virtually conceded" the arrest was improper by acknowledging that its purpose was "'for investigation' or for 'questioning.'"[287] As the Arizona Supreme Court has explained, "[a]n arrest, knowingly made without probable

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[281] *Id*. at 643.
[282] *Palomino-Chavez*, 761 F. App'x at 644.
[283] *Id*.
[284] *Id*.
[285] *Id*. at 644-45.
[286] *Brown*, 422 U.S. at 605.
[287] *Id*.

cause, is precisely the type of misconduct that *Brown* seeks to deter."[288]

This describes the agent's actions. Both admitted they lacked probable cause.[289] Agent Perry claimed he had safety concerns yet did not ask for help.[290] Rather, he handcuffed Appellant and told him he wanted to "discuss things"[291] and "talk to him some more[.]"[292] Agent Perry escorted Appellant up to his second-floor barracks where he knew the shoes were.[293] Agent Thompson was waiting there with a search form—aware that she could not get a search authorization.[294]

And from an attenuation standpoint, like in *Palomino-Chavez*, the agents handed Appellant the search form almost simultaneously.[295] This is not sufficient to cure the taint of a preceding illegal apprehension.

3. <u>The interrogation also warranted suppression since Appellant remained in continuous custody with the same agents, and they referenced the evidence seized during the search in the interrogation</u>.

In *Brown*, the Supreme Court held that appellant's second interrogation given after *Miranda* warnings by a different interrogator hours after his first

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[288] *State v. Monge*, 173 Ariz. 279, 281-82 (1992).
[289] J.A. 69, 126.
[290] J.A. 67.
[291] J.A. 118.
[292] J.A. 219.
[293] J.A. 288 ("I recall someone sticking their head out of the room after we had made contact with Corporal Metz.").
[294] J.A. 69.
[295] J.A. 223.

interrogation still warranted suppression.[296] The Court explained why the second interrogation was "clearly the result and the fruit of the first" statement:

> The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers in the search for [his accomplice], with his anticipation of leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination.[297]

This principle was also on display in *United States v. Ceballos*.[298] There, officers approached the appellant at work and told him they wanted to speak with him at the police station.[299] They did not handcuff him, and explicitly said he was not under arrest.[300] But they also did not allow him to drive to the station in a separate vehicle.[301] In the police car, they questioned him about suspected counterfeiting, at which point he volunteered that they search his house and his brother's house.[302] After the agents found incriminating evidence in both houses, the officers took him to the station and interrogated him before he made incriminating statements.[303] The Second Circuit suppressed both the physical evidence and the statements, reasoning that the officers unlawfully seized appellant

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[296] *Id*. at 591-92.
[297] *Id*. at 605 n.12 (citation omitted).
[298] 812 F.2d 42 (2d Cir. 1987).
[299] *Id*. at 44-45.
[300] *Id*. at 45.
[301] *Id*.
[302] *Id*.
[303] *Id*. at 45-46.

at his workplace and finding "the consents to search were given within a few minutes of the illegal arrest" and the interrogation began immediately after.[304]

Professor LaFave has also explained why suppression of statements following improperly seized evidence warrants suppression:

> There is little, if any reason, to assume that the *Miranda* warning neutralizes the inducement to confess furnished by the confrontation of the defendant with the illegally obtained evidence which shows his guilt and the futility of remaining silent. If *Miranda* warnings were held to insulate from the exclusionary rule confessions induced by unlawfully obtained evidence, the police would be encouraged to make illegal searches in the hope of obtaining confessions after *Miranda* warnings even though the actual evidence seized might later be found inadmissible.[305]

This same rationale applies to Appellant's interrogation. Like in *Ceballos*, the interrogation immediately followed the search and after Appellant remained in continuous custody without even stopping for food.[306]

Additionally, the same agents who searched Appellant's barracks room played leading roles in the interrogation and repeatedly referenced the seizure of evidence from his room.[307] For example, Agent Thompson's repeated references to the clothing were key to obtaining Appellant's numerous incriminating

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[304] *Id*. at 48-50.
[305] 6 Wayne R. LaFave, Search and Seizure 403 § 11.4(c) (5th ed. 2012) (quoting *People v. Johnson*, 70 Cal.2d 541, 550 (1969)).
[306] J.A. 71, 223; J.A. 674 at 06:53:37.=.
[307] *Cf. Oregon v. Elstad*, 470 U.S. 298, 310 (1985) (explaining that "the change in identity of the interrogators" is relevant to attenuation of prior statements).

statements.[308] That she bootstrapped her prior conversations with Appellant from earlier that day—even on mundane topics like Appellant's family[309]—to try to get him to confess further underscores why Appellant would not have viewed the interrogation as a break in the causal chain such that the interrogation was obtained "'by means sufficiently distinguishable to be purged of the primary taint.'"[310]

4. Appellant's consent to search the room again the next day did not cure the taint of the earlier illegality, especially since the duty officer told him he would not be allowed to go back to his room.

In *United States v. Shetler*, the Ninth Circuit found that the passage of thirty-six hours between a Fourth Amendment violation and a subsequent interrogation was insufficient to cure the taint of the prior illegality.[311] As it explained:

> The relevant question for attenuation purposes is whether this passage of time would have in any way dissipated Shetler's perception that the searches had produced evidence such that his remaining silent would be useless, or decreased the extent to which the government's confronting Shetler with the illegally seized evidence induced his statements.[312]

Similarly, in another case, the Ninth Circuit wrote that "a person might reasonably think that refusing to consent to a search of his home when he knows that the police have, in fact, already conducted a search of his home, would be a bit

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[308] *See, e.g.*, J.A. 674 at 7:58:22-7:58:55 ("Like, if I were you, I'd peg me for it too.").
[309] J.A. 674 at 7:13:00, 7:19:47, 7:31:35; 7:42:00, 7:52:56.
[310] *Wong Sun*, 371 U.S. at 488.
[311] 665 F.3d 1150, 1159 (9th Cir. 2011).
[312] *Id*.

like closing the barn door after the horse is out."[313]

The same logic applies here. When the agents brought Appellant back to NCIS the next day, he knew incriminating evidence had already been seized from his room and had sat through an interrogation in which the agents confronted him with this evidence. The second consent search form did not explain that the first search was defective in any way.[314]

Additionally, as Appellant explained in his declaration, the duty officer told him he would not be allowed to return to his room that day before taking him to NCIS.[315] This is further supported by the agents' notes. When they were finished searching Appellant's room, they wrote that it was released it back to Appellant's chain of command.[316] This undermines the notion that Appellant even had control over the room by the time the agents requested his consent to search it.[317]

a. Appellant was also ordered back to NCIS, supporting the notion the second day was an extension of the first day.

In *United States v. Darnall*, the appellant was illegally apprehended, taken into custody, and advised of his rights before he waived them and made

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[313] *United States v. Jones*, 286 F.3d 1146, 1153 (9th Cir. 2002) (citation omitted).
[314] J.A. 706.
[315] J.A. 729.
[316] J.A. 681.
[317] J.A. 31 (explaining that "[a] person may grant consent to search property when the person exercises control over that property.").

incriminating statements.[318] The next day, after the agent held on to his phone and searched it pursuant to an authorization, appellant voluntarily returned to the station at the agent's request and made more statements.[319]

On appeal, this Court held there were no "intervening factors sufficient to attenuate the taint of the illegal apprehension on the evidence derived from the phone or from the first or second interviews."[320] This Court wrote:

> Though Appellant did leave the building overnight between the first and second interviews, the fact that [the agent] told him to return and that the agent still possessed Appellant's phone indicate the second interview is best characterized as an extension of the first rather than a fresh start.[321]

The same analysis applies here. Appellant did not return to NCIS voluntarily but rather was escorted there the next morning.[322] Corporal Taylor testified he saw Appellant under command escort "outside the PX" when he "went in for morning coffee."[323] Likewise, Appellant's declaration states that a duty officer awoke him at 0700 telling him he needed to report to the command headquarters, where he waited until being taken to NCIS.[324] Indeed, Agent Perry explained that he brought

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[318] 76 M.J. 326, 328 (C.A.A.F. 2017).
[319] *Id*. at 329.
[320] *Id*. at 331.
[321] *Id*.
[322] J.A. 704.
[323] J.A. 591.
[324] J.A. 729.

Appellant back "to continue to gather more facts in our investigation."[325]

While Corporal Taylor testified Appellant met with him overnight and told him to later lie to NCIS—conduct to which Appellant pleaded guilty in a subsequent court-martial[326]—the question is not merely whether appellant engaged in any voluntary conduct in the interim.[327] Rather, the question is whether the agents obtained Appellant's consent "by means sufficiently distinguishable to be purged of the primary taint."[328]

Given that even Agent Perry viewed the second day as a continuation of the first, Appellant did not return voluntarily, and the agents were seeking permission to search the same area they had seized evidence only a day before, the Government cannot satisfy its burden under *Darnall*.

E. The inevitable discovery and independent source exceptions do not apply.

The inevitable discovery exception allows the Government to avoid the exclusionary rule if it can show "the evidence would have been obtained even if such unlawful search or seizure had not been made."[329] The Government must show that "*when the illegality occurred* the government agents possessed, or were

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[325] J.A. 95.
[326] J.A. 742-43.
[327] J.A. 588.
[328] *Wong Sun*, 371 U.S. at 488.
[329] MCM, M.R.E. 311(c)(2).

actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred."[330] This doctrine, "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings."[331] The doctrine is "generally, if not always" applied to physical evidence that "will remain where left until discovered" as opposed to statements since "a statement not yet made is, by its very nature, evanescent and ephemeral."[332]

The independent source doctrine allows a court to admit "evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source."[333] As the Supreme Court has explained, this "may well be difficult to establish where the seized goods are kept in the police's possession[.]"[334]

Here, the Government cannot meet either exception. The agents both stated that when they approached Appellant's room, they were merely conducting

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[330] *United States v. Hoffman*, 75 M.J. 120, 125 (C.A.A.F. 2016) (emphasis in original) (citation omitted).
[331] *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).
[332] *United States v. De Reyes*, 149 F.3d 192, 196 (3d Cir. 1998).
[333] *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (citation omitted).
[334] *Murray v. United States*, 487 U.S. 533, 542 (1988).

screening interviews and did not view him as a suspect.[335] They both admitted they lacked probable cause to obtain a search authorization.[336] Short of speculation, the Government cannot point to any other investigation that would have led the agents to the evidence. For the same reason, the independent source exception does not apply. The Government's investigation was flowed from first search of Appellant's room. For example, the agents explained during Appellant's interrogation that they were going to examine the keycard reader outside his door in response to his claims during the interrogation.[337] Similarly, Agent Thompson stated in the interrogation that she planned to contact Corporal Taylor only after Appellant told her he was with him on the night in question.

1. Corporal Taylor's testimony should not be viewed as an independent source since the agents only learned about him through Appellant's interrogation and he did not appear voluntarily at trial.

As the Court of Military Appeals noted in *United States v. Kaliski*, "[t]he exclusionary rule generally bars admission of live-witness testimony obtained through exploitation of police illegality."[338] This Court cited *United States v. Ceccolini*, where the Supreme Court stated that "the degree of free will exercised by a witness is relevant in determining whether to apply the exclusionary rule to

[335] J.A. 62, 82, 89, 126.
[336] J.A. 69, 119.
[337] J.A. 674 at 8:38:35.
[338] 37 M.J. 105, 108 (C.M.A. 1993) (citation omitted).

the witness' testimony."[339] In *Kaliski*, the witness' testimony was suppressed after this Court noted that there was "no evidence that [she] was independently motivated 4 months later to testify consistently with her statement to the security police," which she explained she made after they confronted her with evidence she was in an inappropriate sexual relationship with appellant.[340]

The same logic applies here. The agents only interviewed Corporal Taylor after Appellant told Agent Thompson he was with Corporal Taylor on the night of the incident.[341] Corporal Taylor's immunity agreement acknowledged he "[would] likely refuse to testify on the basis of [his] privilege against self-incrimination if ordered to appear as a witness."[342] Thus, like in *Kaliski*, the Government cannot show that Corporal Taylor "was independently motivated" to testify against Appellant at trial.[343]

F. Civilian defense counsel's failure to move to suppress the evidence based on Agent Perry's illegal handcuffing was prejudicially deficient performance.

The standard for ineffective assistance of counsel based on the failure to file a motion to suppress based on a Fourth Amendment follows *Strickland v.*

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[339] *Id*. at 109 (citing 435 U.S. 268, 277 (1978)).
[340] *Id*.
[341] J.A. 591; J.A. 674 at 7:19:50.
[342] J.A. 739.
[343] *Kaliski*, 37 M.J. at 108.

Washington.[344] An appellant must demonstrate "that his trial counsel's performance was deficient and that the deficiency deprived him of a fair trial."[345] This requires an appellant to show "that there is a reasonable probability that such a motion would have been meritorious."[346] In the context of defense counsel's failure to file a Fourth Amendment motion to suppress, an appellant can show prejudice if there "is a reasonable probability that the [trier of fact] would have had a reasonable doubt as to [appellant's] guilt" had the evidence been suppressed.[347]

In *Grumbley v. Burt*, the Sixth Circuit found that defense counsel provided deficient performance even without reviewing counsel's reasons for failing to file a motion to suppress based on an illegal arrest.[348] The Court observed: "[I]t is difficult to conceive of a legitimate trial strategy or tactical advantage to be gained by *not* filing a motion to suppress."[349]

1. <u>It is difficult to conceive of a reasoned tactical basis not to move to suppress the evidence based on Agent Perry's handcuffing</u>.

   At the suppression hearing, Agents Perry and Thompson admitted they did

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[344] *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007) (citing 466 U.S. 668 (1984)).
[345] *Id*. (citation omitted).
[346] *Id*. (citation omitted).
[347] *Kimmelman v. Morrison*, 477 U.S. 365, 391 (1986).
[348] 591 F. App'x 488, 499 (6th Cir. 2015).
[349] *Id*. (emphasis in original).

not have probable cause when Agent Perry handcuffed Appellant.[350] This alone should have signaled to civilian defense counsel that he needed to move to suppress the evidence based on an unlawful seizure.

Civilian defense counsel's skepticism toward the agents' conduct also should have alerted him to the issue. At one point, counsel challenged need to frisk Appellant. He contrasted Agent Perry's explanation that Appellant's hands were in his pockets with Agent Perry's concession that a frisk was unnecessary when Appellant had his hands in his pockets in his room.[351] Counsel also appeared to question Agent Perry's decision to tell Appellant he wanted "to discuss things" up in his room while Appellant was handcuffed.[352] He asked Agent Perry: "You asked that to a man who was in cuffs?"[353]

Likewise, during Agent Thompson's testimony, counsel suggested she tried to conceal the fact that Agent Perry escorted Appellant back to his room his handcuffs. He stated: "That wasn't just in your direct testimony. You didn't include that, that he was handcuffed at that time, did you?"[354] Counsel also seemed to question the voluntariness Appellant's consent by asking Agent Thompson

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[350] J.A. 69, 126.
[351] J.A. 117.
[352] J.A. 118.
[353] J.A. 118.
[354] J.A. 80.

whether she threatened Appellant with a search authorization otherwise.[355]

During argument on the motion, trial counsel acknowledged "several different, sort of, *Fourth Amendment* issues regarding the fact pattern[.]"[356]

The military judge even appeared to give counsel a chance to challenge the effect of the handcuffing on the validity of the search. For example, at one point, he asked counsel if he was "contesting this issue" when trial counsel asked Agent Thompson about Appellant's demeanor as he signed the consent form.[357] Similarly, he asked defense counsel how the "clothing and things like that" could be derivative evidence of an Article 31(b) violation.[358]

Despite numerous reasons suggesting the need to file a motion to suppress based on the handcuffing, civilian defense counsel failed to do so.

2. <u>There is a reasonable probability the motion would have been meritorious</u>.

Appellant must "demonstrate a reasonable probability that a motion to suppress [the evidence] would have had merit."[359] For the reasons stated in Argument Sections F-G *supra*., there is a reasonable probability a motion to suppress would have been meritorious.

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[355] J.A. 83.
[356] J.A. 136 (emphasis added).
[357] J.A. 70.
[358] J.A. 142.
[359] *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

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

The Government's entire case against Appellant derived from the evidence seized in Appellant's room and his statements during the interrogation. As the agents admitted, when Agent Perry brought Appellant back to his room in handcuffs, the agents had suspicion against Appellant but not enough to get a search authorization.[360] This obviously changed when the agents seized the items in his room and interrogated him.

a. Appellant would meet his burden even if this Court found that only the interrogation warranted suppression.

Even if this Court were to find attenuation by the second day, this would not affect Appellant's interrogation—whose damaging nature could not be overstated.

Appellant made numerous statements effectively amounting to admissions of guilt in the interrogation. Though he denied starting the fires, he repeatedly agreed with the agents when they suggested to him that he started the fires, even to the point of saying "Like, if I were you, I'd peg me for it too."[361]

The interrogation was also enhanced by the false exculpatory statements instruction, which allowed the members to find guilt based on Appellant's

[360] J.A. 90.
[361] *See, e.g.*, J.A. 674 at 7:58:22-7:58:55.

contradicted statements alone.[362] And in fact, the Government called witnesses to contradict Appellant's factual claims in his interrogation.[363]

In closing argument, trial counsel argued Appellant's "deception" was key to his guilt, referring explicitly to Appellant's statements in the interrogation.[364]

In short, while the physical evidence was certainly probative, it was not conclusive: Appellant worked around fuels in the shop regularly. The interrogation is what closed the deal for the Government by providing direct evidence of Appellant's consciousness of guilt as well as his numerous claims that were later refuted by the investigation. Without the interrogation, there is a reasonable probability the members would have harbored a reasonable doubt.

Conclusion

This Court should set aside the findings and sentence.

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[362] J.A. 613-14.
[363] J.A. 458-60, 585-89.
[364] J.A. 615, 618-19, 621, 626-27, 649, 652-53.

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