IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence includes a bad-conduct discharge. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of arson, housebreaking, and unlawful entry, in violation of Articles 126, 130, and 134, UCMJ, 10 U.S.C. §§ 926, 930, 934 (2012). The Members sentenced Appellant to one year of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed at the lower court on March 27, 2019. Appellant and the United States submitted briefs. On September 23, 2020, the lower court found no prejudicial error and affirmed the findings and sentence.

United States v. Metz, No. 201800268, 2020 CCA LEXIS 334, at *43 (N-M. Ct. Crim. App. Sept. 23, 2020).

On November 20, 2020, Appellant petitioned this Court for review, which this Court granted on February 22, 2021. Appellant filed his Brief on March 31, 2021.

Statement of Facts

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

The United States charged Appellant with setting fire to "lawnmowers, a facilities building, and maintenance office," as well as housebreaking and unlawful entry of the Facilities Building. (Charge Sheet, July 17, 2018.)

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

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

Before trial, Appellant moved to suppress statements he made to law enforcement when they interviewed him in his barracks room allegedly in violation of Article 31, UCMJ. (J.A. 683–84.) He also sought suppression of "all derivative statements and evidence thereof," including two searches of his barracks room and statements made during an interrogation later that day. (J.A. 683–84.)

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

The United States presented consent forms signed by Appellant and the testimony of Special Agents Thompson and Perry. (J.A. 58, 85, 700, 703, 706.)

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

On May 20, 2018, the Agents began investigating a suspected arson at the Facilities Building. (J.A. 58–59, 86.) Because there was no sign of forced entry, Special Agent Thompson made a list of the four individuals, including Appellant, who were key holders. (J.A. 59–60, 86–87, 711–712.) A Marine told the Agents that the key holders lived in a nearby barracks and Appellant was "kind of, a problem child within the shop." (J.A. 61, 63, 86–87.)

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

The Agents travelled to the barracks to conduct screening interviews of the key holders. (J.A. 62.) The first room they approached turned out to be Appellant's room, and he invited the Agents inside. (J.A. 63–64, 88.) Special Agent Thompson had to ask Appellant multiple times to remove his hands from his pockets before he complied. (J.A. 92, 117.) Special Agent Perry noticed Appellant's shoes, which appeared recently washed and smelled like fuel. (J.A. 65–66, 89–90.) The shoes made the Agents' "suspicion level . . . raise a little bit higher," (J.A. 78), and gave them a "hunch" Appellant was involved in the fire, (J.A. 66).

The Agents returned to their vehicle to "follow[] through with [their] investigative lead" by surveilling the area to see if Appellant would try to dispose of the shoes. (J.A. 66, 78, 90–91.)

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

After twenty to thirty minutes, the Agents returned to Appellant's room, but he did not answer. (J.A. 66–67, 91.) Special Agent Perry found Appellant near the smoke pit and told him to remove his hands from his pockets. (J.A. 67–68, 92.) Because Appellant was slow to do so, the Agent became nervous, placed Appellant in handcuffs, and frisked him for weapons. (J.A. 92, 117–18, 127.) The Agent asked if Appellant would talk to them, and he agreed. (J.A. 92.) They walked to Appellant's room, which took "[s]econds, maybe a minute," and the Agent removed the cuffs. (J.A. 80, 92, 117–18, 127.) Appellant then gave written consent to a search of his room. (J.A. 68, 93, 127, 700.)

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

After the search, the Agents drove Appellant to their offices. (J.A. 71, 93.) They placed Appellant in handcuffs during the thirty-minute ride and removed them when they arrived. (J.A. 71.) Agent Thompson provided Appellant with a Rights Advisement Form and read each line aloud; Appellant confirmed he understood each right, asked clarifying questions, initialed the Form, and signed it. (J.A. 93 703; *see also* J.A. 674 at 7:14:38–7:18:55.)

After the interrogation, Appellant went home for the night and returned the next day, where he again gave written consent to search his room. (J.A. 95.)

3. The Military Judge denied Appellant's Motion.

The Military Judge found the Agents went to the barracks, found a door propped open, knocked, and Appellant invited them inside, where they saw a pair of damp shoes that smelled of "fuel or gasoline." (J.A. 716–17.) Later that day, the Appellant consented in writing to a search of his barracks room. (J.A. 717–18.)

The next day, two other Special Agents attempted to interview Appellant, seizing his smartphone and smartwatch before the interview. (J.A. 719.) Appellant gave written consent to a second search of his barracks room, as well as his financial records. (J.A. 719.) Appellant did not consent to search his cell phone and invoked his right to speak with an attorney. (J.A. 719.)

The Military Judge denied the Motion because Article 31, UCMJ, warnings were not required and the discovery of the evidence was inevitable. (J.A. 716.)

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

The United States presented thirty pieces of documentary and physical evidence, as well as the testimony of fifteen witnesses. (*See* J.A. 161, 186, 354, 414, 430, 453, 493, 512, 517, 532, 577; Prosecution (Pros.) Exs. 1–5, 7–12, 14–18, 20–27, 29–33, 35.)

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

A fire began in the Facilities Building around 0335 on May 20, 2018. (J.A. 164, 591, 595, 597, 610; Pros. Exs. 30, 31, 32.) An expert testified (1) there was no sign of forced entry, (2) the fire was not caused by an external source, (3) the fire was intentionally set using ignitable liquids, and (4) the fire could have been set by one person. (J.A. 357, 362, 366–67, 379, 382, 411–13.)

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

The Agents went to the barracks building 0.35 miles away, where they made contact with Appellant and noticed a pair shoes emitting an odor of fuel. (J.A. 202–03, 212, 216–17.) Appellant said he was unaware of any incident at the Facilities Building and had lost his keys. (J.A. 214–16.) Appellant gave the Agents permission to search his room, and they found clothes that smelled like fuel and a lighter. (J.A. 219–20, 226.) Outside Appellant's room, they found the same fuel-soaked shoes they had seen earlier. (J.A. 218, 657–59.)

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

The Agents interrogated Appellant on May 20, 2018, and before being confronted with any evidence from the search of his room, Appellant said that he spent the night of the fire with a friend, who dropped him off at the barracks at 0020, and Appellant fell asleep around 0100. (J.A. 674 at 7:19:15, 7:24:24,

7:27:05, 7:31:00.) Appellant denied entering the Facilities Building and claimed he previously reported his keys as lost. (J.A. 674 at 7:34:52, 7:55:45.) Appellant said his clothes smelled like gasoline because he recently worked on a fuel leak on his car. (J.A. 674 at 7:31:58, 7:32:25.)

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

The key reader showed Appellant accessed his barracks room at 2014 on May 19, 2018, and again at 0336 on May 20, 2018. (J.A. 438, 676–77.) Appellant was the only one with a key to his room. (J.A. 431, 445.)

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

Agents searched Appellant's room the next day and found a pair of gloves that smelled like fuel and a keyring hidden in a tissue box. (J.A. 280, 404–05, 458–60, 706; Pros. Exs. 23, 29.) The keys were to the Facilities Building, and a Marine confirmed they belonged to Appellant. (J.A. 466, 472–74, 498; Pros. Exs. 17, 18.) Appellant never reported his keys as missing. (J.A. 508.)

The other key holders testified about their whereabouts at the time of the fire; they all had verifiable alibis. (*See* J.A. 493–512, 532–77; R. 953–63.)

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

Appellant's friend, Corporal Taylor, testified he was with Appellant until 1900 on the evening of the fire. (J.A. 580–81.) After his interrogation, Appellant

met with Corporal Taylor and asked him to lie and "tell [law enforcement] a specific story," including that they went to Corporal Taylor's hotel room. (J.A. 586–89.)

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

Special Agent Perry inspected Appellant's car but saw no signs of recent work. (J.A. 264–66; Pros. Ex. 10.) He observed a uniform layer of "road grime" covering the entire undercarriage. (J.A. 347.)

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

An expert testified a combination of fuels were found on Appellant's insoles, shoes, gloves, and clothes, as well as the burned debris from the fire. (J.A. 420, 427–28; Pros. Ex. 27 at 1–2.) The Members were provided Appellant's clothing, gloves, and shoes to smell the still-present fuel odor. (J.A. 408; Pros. Exs. 23–25.)

9. Appellant had several disciplinary issues before the arson.

A sergeant testified he counseled Appellant on multiple occasions. (J.A. 496.) That same sergeant's Marine Corps notebook and hard hat were found placed so that they would be burned in the fire. (J.A. 197, 507, 570; Pros. Ex. 14.)

D. The Members convicted and sentenced Appellant.

The Members convicted Appellant of arson, housebreaking, and unlawful entry, and sentenced him to confinement for one year, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (J.A. 655–56.)

E. Appellant submitted a Declaration about the investigation.

On appeal, the lower court attached Appellant's Declaration to the Record. (J.A. 726.) Appellant claimed Special Agent Perry handcuffed him and asked him to walk up to his room, to which Appellant responded, "Okay." (J.A. 738.) Appellant alleged the walk took three minutes. (J.A. 727.) Special Agent Thompson asked Appellant if he had "anything against" the Agents searching his room and he said he "did not." (J.A. 727.) The Agents then removed the handcuffs and gave Appellant a Consent Form, which he signed. (J.A. 727.) The Agents searched Appellant's room for about two hours, handcuffed him, and took him to "NCIS headquarters" for questioning. (J.A. 728.)

The Agents released Appellant around 2300, and he returned to his room. (J.A. 728.) The next morning, two Marines escorted him to "NCIS headquarters," where he refused to consent to a search of his phone. (J.A. 729–30.)

F. The lower court affirmed, finding no ineffective assistance.

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

The lower court found that when Special Agent Perry approached Appellant, he "called out to him and asked him to take his hands out of his pockets." *Id.* at *6. "When [Appellant] was slow to comply," the Agent was reminded that during

his initial encounter, Appellant had to be asked multiple times to remove his hands from his pockets. *Id.* at *6, *37. The Agent then handcuffed [Appellant] and frisked him" and said, "Hey, you're making me real nervous right now, and we want to talk to you some more." *Id.* at *6. Special Agent Perry asked Appellant if he was willing to talk to the Agents in his room, and he agreed. *Id.*

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

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

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

Argument

THE LOWER COURT ERRED BY FAILING TO APPLY *BROWN V. ILLINOIS*, SO THIS COURT SHOULD ANSWER THE GRANTED ISSUE IN THE AFFIRMATIVE AND REMAND WITH INSTRUCTIONS TO APPLY THE CORRECT LEGAL STANDARD. IF THIS COURT ADDRESSES APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE, IT SHOULD AFFIRM BECAUSE THE CLAIM WOULD HAVE FAILED REGARDLESS OF WHETHER *BROWN* WAS APPLIED: (1) COUNSEL WAS NOT DEFICIENT—A MOTION TO SUPPRESS WOULD NOT HAVE BEEN MERITORIOUS; AND (2) APPELLANT HAS NOT PROVEN PREJUDICE—THE OTHER EVIDENCE OF HIS GUILT WAS OVERWHELMING.

A. Standard of review.

Whether a lower court applied the correct standard is a question of law that is reviewed de novo. *See United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005).

B. The lower court erred by failing to apply the *Brown* attenuation test after finding Appellant was illegally apprehended.

"Evidence derivative of an unlawful search, seizure, or interrogation is . . . generally not admissible," *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006), but where an "appellant's consent to search was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion,'" the fruit of a subsequent consensual search is admissible, *United States v. Khamsouk*, 57 M.J. 282, 290 (C.A.A.F. 2002) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

Voluntariness is "a threshold requirement," but "*Wong Sun* [nevertheless] mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment." *Brown*, 422 U.S. at 602, 604. This "mandate[d] consideration" from *Wong Sun* is accomplished through application of the attenuation test established in *Brown*. *See id.* at 602.

In *Khamsouk*, the Court held the *Brown* attenuation test must be conducted not only where statements are elicited after a Fourth Amendment violation but also when consent follows a violation. *See* 57 M.J. at 290–91; *see also Conklin*, 63 M.J. at 338 (same).

Therefore, after finding Appellant was illegally apprehended, the lower court erred by failing to conduct the *Brown* attenuation test to determine whether Appellant's consent was "sufficiently an act of free will," as required by *Khamsouk*. *See* 57 M.J. at 290; *see also Brown*, 422 U.S. at 602; *Conklin*, 63 M.J. at 338.

C. After answering the Granted Issue in the affirmative, this Court should remand to the lower court to apply *Brown*.

When a Court of Criminal Appeals applies the wrong legal standard or fails to conduct a full analysis, this Court routinely remands the case to allow the lower court to apply the correct test. *See, e.g.*, *United States v. Baier*, 60 M.J. 382, 382–83 (C.A.A.F. 2005) (finding application of "incorrect standard for determining sentence appropriateness"); *United States v. Dubose*, 47 M.J. 386, 388 (C.A.A.F. 1998) (finding misapplication of clear and convincing standard). *But see United*

States v. Dooley, 61 M.J. 258, 262–65 (C.A.A.F. 2005) (correcting lower court's misapplication of abuse of discretion in Article 62, UCMJ, case).

In *United States v. Spurling*, 74 M.J. 261 (C.A.A.F. 2015), the lower court denied the appellant's claim of ineffective assistance based on the failure to file a motion to suppress. *Id.* at 261. The Court found the lower court applied two incorrect legal standards: (1) the lower court relied on subjective beliefs rather than an objective standard, and (2) the lower court equated the "reasonable probability" standard with a preponderance of the evidence. *Id.* Rather than address the merits of the ineffective assistance claim, this Court reversed and remanded to allow the lower court to apply the correct standard. *Id.* at 261–62.

Here as in *Spurling*, the lower court failed to apply the correct legal standard when evaluating Appellant's claim of ineffective assistance of counsel. *See id.* After finding Appellant was illegally apprehended and addressing the "threshold requirement" of voluntariness, the lower court failed to apply the *Brown* attenuation test to determine whether Appellant's consent was "sufficiently an act of free will." *See supra* Section B. As in *Spurling*, this Court should "remand to the Court of Criminal Appeals for further review . . . utilizing the standards of review set forth in [*Brown*] and [*Khamsouk*]." *Spurling*, 74 M.J. at 261–62.

Moreover, unlike *Dooley*, this is not an Article 62, UCMJ, appeal that requires "priority over other proceedings," 10 U.S.C. § 862(b) (2012), and thus a remedy other than remand. *See Dooley*, 61 M.J. at 258–59; (J.A. 50–52).

Finally, remand is appropriate because the ineffective assistance claim may require additional fact finding, and the lower court is the more appropriate forum for addressing factual disputes. *Cf.* Art. 67(c), UCMJ, 10 U.S.C. § 867(c) (2012) ("The Court of Appeals for the Armed Forces shall take action only with respect to matters of law."). For instance, if the presumption of competence is overcome, Civilian Defense Counsel must be given an opportunity to rebut the alleged deficiency. *United States v. Melson*, 66 M.J. 346, 347, 351 (C.A.A.F. 2008).

Thus, this Court should remand the case with instructions to reevaluate the ineffective assistance claim in light of *Brown*. *See Spurling*, 74 M.J. at 261–62.

D. If this Court chooses to address ineffective assistance, it should affirm because the lower court's error in failing to apply *Brown* was not prejudicial: Civilian Defense Counsel was not deficient, and regardless Appellant fails to prove prejudice.[1]

"[T]he rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong

[1] Despite responding to this claim, the United States maintains the question of ineffective assistance falls outside the scope of the Granted Issue. (*Compare* Order Granting Review, Feb. 22, 2021 (asking "[d]id the lower court err by failing to apply *Brown*"), *and* Suppl. Pet. for Grant of Review at 28–30, Dec. 14, 2020 (same), *with, e.g.*, *United States v. Furth*, No. 20-0289, 2021 CAAF LEXIS 395, at *2 (C.A.A.F. Apr. 26, 2021) (granting review of "[w]hether Appellant received

reason." *United States v. Leiffer*, 13 M.J. 337, 345 n.10 (C.A.A.F. 1982) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)). Thus, if this Court finds the lower court reached the right result for the wrong reason—that is, rejecting Appellant's claim of ineffective assistance but failing to apply *Brown*—it may affirm.

"Ineffective assistance of counsel claims involve mixed questions of law and fact: '[t]his Court reviews factual findings under a clearly erroneous standard, but looks at the questions of deficient performance and prejudice de novo.'" *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (quoting *United States v. Gutierrez*, 66 M.J. 329, 330–31 (C.A.A.F. 2008)).

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

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effective assistance of counsel").) Unlike other cases where related or inherent issues must be addressed in order to answer the granted or certified issues, *see, e.g.*, Brief on Behalf of Appellee/Cross-Appellant at 19–22, *United States v. Cooper*, No. 21-0150/NA (C.A.A.F. Mar. 22, 2021); Reply on Behalf of Appellee/Cross-Appellant at 4–8, 15–18, *United States v. Cooper*, No. 21-0150/NA (C.A.A.F. May 17, 2021), here, this Court can answer the Granted Issue without delving into the claim of ineffective assistance, *see supra* Section B. Therefore, this Court should limit its review to the Granted Issue. *See, e.g.*, *United States v. Simpson*, No. 20-0268, 2021 CAAF LEXIS 235, at *10–11 (Mar. 10, 2021) (declining to address arguments outside granted issue); *United States v. Bodoh*, 78 M.J. 231, 233 n.1 (C.A.A.F. 2019) (same).

1. Even applying *Brown*, Civilian Defense Counsel was not deficient because a motion to suppress would have failed: Appellant's consent was "the product of a free will."

"Judicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, and "[t]he *Strickland* standard is 'highly demanding,'" *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986)). Appellate courts "make every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (citing *Strickland*, 466 U.S. at 489). An appellant must prove "they have been denied a fair trial by the gross incompetence of their attorneys." *Morrison*, 477 U.S. at 382.

"Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious . . . ." *Id.* at 375; *see also United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). The term "meritorious" is synonymous with "successful." *United States v. Jameson*, 65 M.J. 160, 164 (C.A.A.F. 2007). Thus, the "relevant question" under *Strickland* is whether "no competent attorney would think a motion to suppress would have failed." *Premo v. Moore*, 562 U.S. 115, 124 (2011).

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

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

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

Likewise, in *United States v. Cornelius*, 391 F.3d 965 (8th Cir. 2004), as two officers approached, the appellant changed directions and put his hand in his pocket. *Id.* at 966. An officer asked the appellant to remove his hand from his

pocket, but he failed to comply. *Id.* The court found the officers were justified in conducting a *Terry* frisk based on these circumstances. *See id.* at 967–68.

Here, as in *Williams* and *Cornelius*, Special Agent Perry had a reasonable belief Appellant was "armed and presently dangerous" based on his "unusual conduct." *Terry*, 392 U.S. at 30. During their initial encounter, Appellant had to be asked multiple times to remove his hands from his pockets. (J.A. 92, 117); *see Williams*, 403 F.3d at 1192. When Special Agent Perry re-engaged Appellant, he was once again slow to remove his hands from his pockets, which made him justifiably nervous. (J.A. 92); *see Cornelius*, 391 F.3d at 967–68. This "unusual conduct" gave Special Agent Perry reasonably believed Appellant may have been "armed and presently dangerous." *See Terry*, 392 U.S. at 30.

Appellant's citation to *United States v. Williams*, 731 F.3d 678 (7th Cir. 2013), is inapposite. (Appellant's Br. at 41, Mar. 31, 2021.) The appellant in *Williams* demonstrated "compliant behavior" by "*immediately* remov[ing] his hands from his pockets at the officer's request." *Id.* at 690 (emphasis added). By contrast here, Appellant was slow to remove his hands and had been reluctant to remove his hands during the initial encounter. (J.A. 92, 117.)

Nor are Appellant's challenges to Special Agent Perry's motivations availing. (Appellant's Br. at 40–41.) As the lower court found, the frisk "pertained to officer safety." *Metz*, 2020 CCA LEXIS 334, at *40. This finding is

not clearly erroneous because Special Agent Perry testified he became nervous for his safety when Appellant was slow to remove his hands from his pockets—especially in light of Appellant's reluctance to remove his hands earlier. (J.A. 92.) This fear was further justified by Special Agent Perry's knowledge that Appellant had recently been confronted by law enforcement, which can trigger an unpredictable response. (*See* J.A. 92 (noting "we may have spooked him a little bit, and we were concerned that potentially something bad was happening").)

Thus, in response to his "unusual conduct," *Terry*, 392 U.S. at 30, it was "lawful for [Special Agent Perry] to stop and frisk Appellant, and even to place handcuffs on him while doing so," *Metz*, 2020 CCA LEXIS 334, at *37. The only illegal apprehension was keeping Appellant handcuffed "extremely brief[ly]" as they walked up the stairs for "seconds, maybe a minute." *Id.* at *39.

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

When a confession or a consent to search follows a Fourth Amendment violation, courts must determine whether the statement or consent "is the product of a free will under *Wong Sun*." *Brown*, 422 U.S. at 602; *Khamsouk*, 57 M.J. at 290. The question "must be answered on the facts of each case. No single fact is dispositive." *Brown*, 422 U.S. at 603. The receipt of *Miranda* warnings remains an

"important factor," but the Court identified three relevant factors (1) "[t]he temporal proximity of the arrest and the confession," (2) "the presence of intervening circumstances," and (3) "particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603–604 (citations omitted).

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

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

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

In *Brown*, the police misconduct was both purposeful and flagrant. Officers "broke into" and searched the defendant's apartment without probable cause. 422 U.S. at 592. When the defendant arrived, the police pointed a gun at the defendant and arrested him without probable cause. *Id*. The police testified they did so "for the purpose of questioning [the defendant] as part of their investigation." *Id*. Finding the arrest "investigatory," "both in design and in execution," the Court noted the actions of police in arresting the defendant gave "the appearance of having been calculated to cause surprise, fright, and confusion." *Id*. at 605.

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

Here, the first two *Brown* factors favor Appellant, but the third factor, which is "'particularly' important," strongly favors the United States.

i. The purpose of the apprehension was officer safety.

As the lower court found, the purpose of the initial handcuffing was for officer safety, *see Metz*, 2020 CCA LEXIS 334, at *37, much like the violation in *Khamsouk*, 57 M.J. at 292–93; *see also United States v. Whisenton*, 765 F.3d 938, 943 (8th Cir. 2014) (noting "the agents' safety concerns also motivated their decision to enter"). That the Agent failed to remove the handcuffs for, at most, a minute longer than was required does not establish his actions were "designed to achieve any investigatory advantage he would not have otherwise achieved" if he had simply walked with Appellant—uncuffed—back to his room. *Khamsouk*, 57 M.J. at 293.

Moreover, even if Special Agent Perry was entirely unjustified in handcuffing Appellant at any point during their encounter, his mistaken belief that he was justified did not transform his articulated reason for his actions—officer safety—into an exploitation of the unlawful arrest. In *Khamsouk*, the Court found important that the agent did not believe he was committing a constitutional violation when he entered the residence to arrest the appellant: his actions did "not suggest flagrant or purposeful conduct of the sort the Court in *Brown* was attempting to address." 57 M.J. at 293.

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

The Agent's actions were thus not the type of conduct "the policy underlying the exclusionary rule was intended to deter," *Khamsouk*, 57 M.J. at 293, and are in stark contrast to the purposeful and deceptive practices in *Brown*, *see* 422 U.S. at 605.

ii. The apprehension was not flagrant.

The lower court noted the apprehension was "extremely brief and without incident," lasting for a period of "seconds, maybe a minute." *Metz*, 2020 CCA LEXIS 334, at *40; (J.A. 127). The Agents did not "use[] threatening or abusive tactics," and the illegality of the brief extension of the lawful frisk was "far from obvious." *United States v. Smith*, 919 F.3d 1, 12 (1st Cir. 2019). Nor was the momentary apprehension exploited by the Agents as an "expedition for evidence in the hope that something might turn up." *Brown*, 422 U.S. at 605. As in *Khamsouk* and unlike *Brown*, the brief apprehension was not flagrant because it did not include "more severe police misconduct . . . than the mere absence of proper cause

for the seizure," *Strieff*, 136 S. Ct. at 2064; *see Brown*, 422 U.S. at 605; *Khamsouk*, 57 M.J. at 293. (Appellant's Br. at 46 (noting lack of probable cause).)

Moreover, as in *Khamsouk*, the Agents provided Appellant with a Consent Form that he initialed, signed, and dated, *Metz*, 2020 CCA LEXIS 334, at *39–40; (J.A. 700), which reflects the "absence of purposeful or flagrant conduct" by Special Agent Perry. *Khamsouk*, 57 M.J. at 292; *cf. also Brown*, 422 U.S. at 603 (noting *Miranda* warnings is an "important factor"); *United States v. Fox*, 600 F.3d 1253, 1261 (10th Cir. 2010) (providing consent form may help dissipate taint).

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

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

By contrast here, the *Terry* stop of Appellant was legal, and the only illegality was the brief extension of the valid stop. *Supra* Section D.1.a; *Metz*, 2020 CCA LEXIS 334, at *37. This difference in both purpose and flagrancy distinguishes this case from *Palomino-Chavez*. (Appellant's Br. at 46.)

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

Thus, even if the lower court had applied *Brown*, Appellant would have failed to prove deficient performance because a motion to suppress would not have been meritorious. *See Morrison*, 477 U.S. at 375.

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

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

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

F.3d 559, 562–64 (8th Cir. 2010) (finding attenuation despite "three or four minutes"). Thus, the nearly four hours between the apprehension and Appellant's interrogation must favor attenuation, at least marginally. (*See* J.A. 700, 703.)

ii. There were significant intervening circumstances.

The most notable intervening circumstance was Appellant's review of the Waiver of Rights Form, during which he confirmed he understood each line—including asking about his right to terminate the interview at any time, (J.A. 674 at 7:16:39); *cf. Whisenton*, 765 F.3d at 942 (noting appellant's "questioning of the agents as to the manner of their search demonstrates his deliberate consideration of the situation")—initialed the Form twelve times, and signed it. (J.A. 674 at 7:14:38–7:18:55; *see also* J.A. 700.)

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

Other intervening circumstances included the two-hour search, during which Appellant was not restrained, (*see* J.A. 69, 727); *cf. Fox*, 600 F.3d at 1261 (noting "release from custody" can be intervening circumstance (quoting *United States v.*

Washington, 387 F.3d 1060, 1074 (9th Cir. 2004))), and the thirty-minute car ride away from the scene of the brief apprehension, (J.A. 71); *cf. Smith*, 919 F.3d at 11 (noting "an opportunity to pause and reflect, to decline consent, or to revoke consent help demonstrate that the illegality was attenuated" (citation omitted)). Taken together, these intervening circumstances indicate Appellant's interrogation was attenuated from his apprehension. *See Fox*, 600 F.3d at 1261.

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

The purpose and flagrancy of the misconduct remain unchanged. *See supra* Section D.1.c. Moreover, any concern that the Agents "exploit[ed]" the illegality is further diminished: the Agents did not pressure or threaten Appellant into waiving his rights; rather, the Agents were friendly and made small talk during the drive to law enforcement spaces, where they calmly and thoroughly advised Appellant of his rights after giving him food. *See* (J.A. 674 at 6:53:38, 7:14:38–7:18:55); *Smith*, 919 F.3d at 12 (noting officers were "professional and polite"); *Whisenton*, 765 F.3d at 943 (noting "interaction was cooperative and calm").

iv. Appellant's arguments are unavailing.

In *United States v. Ceballos*, 812 F.2d 42 (2d Cir. 1987), agents asked the appellant to come with them, but they did not allow him to take his own vehicle. *Id*. at 44–45. The agents then read him his rights, told him he was not under arrest, and questioned him. *Id*. The appellant consented to searches of his house and his

brother's house and made incriminating statements. *Id.* at 45–46. The court concluded the agents had taken custody of the appellant without probable cause and "the consents to search and the statements given were too closely connected in context and time to the illegal arrest to break the chain of illegality." *Id*. at 50. As a result, the court suppressed the evidence.

Appellant's citation to *Ceballos* is inapt because it is factually distinguishable. In *Ceballos*, the agents' misconduct was plainly investigatory and flagrant: they arrested the appellant without probable cause in order to interrogate him. *See id*. at 44–45, 50. By contrast here, Special Agent Perry possessed a non-investigatory purpose—officer safety—for the "extremely brief," non-flagrant, apprehension. *Metz*, 2020 CCA LEXIS 334, at *40; *see also supra* Section D.1.c. Thus, *Ceballos* does not support Appellant's claim.

Likewise, Appellant's concerns about the Agents confronting him with evidence from the search are unsupported by the Record and distinguishable from case law. (Appellant's Br. at 48–50.) First, the incriminating portion of Appellant's interrogation—his false alibi story involving Corporal Taylor, (*see* J.A. 618–19)—occurred before Appellant was confronted with any evidence from the first search, (*compare* J.A. 674 at 7:21:30 (telling false alibi), *with* J.A. 674 at 7:31:45 (asking about fuel-soaked clothes for first time)). Any references to the

small talk between the Agents and Appellant earlier in the day were not products of the search. (Appellant's Br. at 48–49.)

Second, the case law and secondary sources Appellant cites are distinguishable. (*Id.*) Those sources are concerned with whether "the *Miranda* warning neutralizes the inducement to confess furnished by the confrontation of the defendant with the illegally obtained evidence." 6 Wayne R. LaFave, Search and Seizure 403 § 11.4(c) (5th ed. 2012) (citation omitted); *see also United States v. Shetler*, 665 F.3d 1150, 1158–61 (9th Cir. 2011) (analyzing voluntariness of confession). Here, that question is moot because Appellant did not confess; rather, he denied his involvement in the fire at least a dozen times and told a false alibi. (*See* J.A. 674.)

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

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

In *United States v. Cherry*, 794 F.2d 201 (5th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987), the appellant's identification was found at a murder scene. *Id.* at 203. Agents found the appellant, illegally arrested him, and transported him to their headquarters. *Id.* The appellant denied his involvement and consented to a search of his barracks. *Id.* The search did not yield anything, but the victim's

wallet was found nearby, and the agents learned the victim's final dispatch was to the appellant's barracks. *Id.* The appellant spent the night in a holding cell. *Id.* The next morning, when agents confronted the appellant with new evidence against him, he then confessed and gave a second consent to search his barracks. *Id.* at 203–04.

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

i. The second consent was not temporally proximate.

As in *Cherry*, a full day passed between the illegal apprehension and Appellant's second grant of consent, (*see* J.A. 700, 706, 718, 719); *Cherry*, 794 F.2d at 206. In fact, Appellant had sufficient time to meet with Corporal Taylor to ask him to tell a fabricated story to law enforcement. (J.A. 586–88.)

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

ii. There were significant intervening circumstances.

Second, several intervening circumstances occurred between the illegal apprehension and the second grant of consent, including (1) two hours for the first search, (J.A. 700); (2) thirty minutes for the drive to law enforcement spaces, (J.A. 71, 718.); (3) a detailed Article 31, UCMJ, rights advisement, (J.A. 703, 718; *see also* J.A. 674 at 7:14:38–7:18:55); *Smith*, 919 F.3d at 11; (4) a multi-hour interview, (J.A. 674, 728); (5) Appellant's return to his room for the night, (J.A. 728–29), *cf. Cherry*, 794 F.2d at 203 (noting appellant spent night in holding cell); (6) a several-hour wait the next morning, (J.A. 729); and (7) another rights advisement, (J.A. 704–10, 719).

Moreover, the Agents used the time between interviews to "finalize the scene processing" and "continue to gather more facts." (J.A. 95); *cf. Cherry*, 794 F.2d at 206 (finding discovery of new evidence was intervening circumstance).

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

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

The purpose of Appellant's apprehension the day before was legitimate—officer safety—and the violation was not flagrant—"seconds, maybe a minute." *See supra* Section D.1.c. In fact, Appellant returned to his barracks room for the night, (J.A. 728–29), whereas in *Cherry* the appellant was confined for twenty-four

hours, *see* 794 F.2d at 206–07. Finally, Appellant exercised his right to silence and declined to consent to a search of his phone, which demonstrates his consent was not burdened by the prior violation. *See* (J.A. 704–10); *cf. Fox*, 600 F.3d at 1261 (noting knowledge of right to refuse supports attenuation).

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

In *United States v. Shetler*, 665 F.3d 1150 (9th Cir. 2011), the appellant's confession was not sufficiently an act of free will because his confession was "induced or influenced" by the illegal search. *Id.* at 1158. By contrast here, Appellant was not "induced or influenced" to grant a second consent: he refused a search of his cell phone and invoked his right to silence. (J.A. 719.)

In *United States v. Jones*, 296 F.3d 1146 (9th Cir. 2002), law enforcement illegally seized the appellant's office and secured it until the consent was given, which made the seizure "so connected to the subsequent consent so as to render the consent ineffective." *Id.* at 1153 (citation omitted). Here, unlike in *Jones*, any connection between the illegal apprehension and the second consent was broken: the first search of Appellant's room was over, the room was not secured, and Appellant returned to his room for the night—during which he was free to take stock of what evidence remained there. (*See* J.A. 728–29.)

Similarly, *Darnall* is distinguishable. In *Darnall*, law enforcement handcuffed and transported the appellant to an interrogation room without probable

cause, where he gave consent to search his room and car but not his phone. 76 M.J. at 328, 330. Law enforcement nevertheless seized the appellant's phone, and using information provided during the appellant's interview, they obtained a command authorization to search the phone. *Id.* at 328–29. An agent also directed the appellant to return the next day, at which time the agent leveraged information from the cell phone search to obtain a confession. *Id.* at 329.

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

Darnall is distinguishable for two reasons. First, the connection between the first and second days in *Darnall* was much stronger: the same agent conducted both interviews, and the appellant's phone was seized overnight against his will. *Id.* Here, two different agents interviewed Appellant the second day, and his phone was not held overnight. (J.A. 719.)

Second, in *Darnall*, the connection to the illegality was strong: "the interview took place directly following the arrest," and the first interview "provided the basis for the search of his phone" and "led directly to his return" the next day. 76 M.J. at 331. The agent "openly 'exploited the original illegality,' using information obtained from Appellant in his post-apprehension interview to obtain a warrant for his phone." *Id.* at 332. By contrast here, the momentary apprehension happened hours before Appellant's interview, and the interview did not "le[a]d directly to his return," as the Agents continued to seek evidence between the two interviews. (*See* J.A. 95, 716–19.)

Finally, Appellant's claim that "[Special] Agent Perry viewed the second day as a continuation of the first" is neither supported by the Record nor dispositive. (Appellant's Br. at 51–52.) First, Special Agent Perry's testimony is more fairly understood to mean he viewed the second day to be part of the same investigation—not a continuation of the same interrogation. (*See* J.A. 95.) This explains why the Agents sought a fresh consent from Appellant, rather than continuing their questioning. (J.A. 704–06.) Second, even assuming Special Agent Perry viewed the second day as a continuation of the first, his opinion does little prove a lack of attenuation: two different Agents interacted with Appellant on the second day, (J.A. 719), and the analysis of temporal proximity and intervening

circumstances is objective, *cf. Darnall*, 76 M.J. at 331 (conducting objective analysis).

Thus, Appellant's consent to a search his room the next day—after numerous intervening circumstances had occurred—was not tainted by the momentary apprehension the day before. *See Brown*, 422 U.S. at 603–04. Civilian Defense Counsel was not deficient for failing to file a motion. *See Morrison*, 477 U.S. at 375.

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

"Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." Mil. R. Evid. 311(c)(2). The United States must "demonstrate by a preponderance of the evidence that when the illegality occurred, [its] agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner." *United States v. Mitchell*, 76 M.J. 413, 420 (C.A.A.F. 2017) (citation omitted).

"'Active pursuit' does not require that police have already planned the particular search . . . . The government must instead establish that the police would have discovered the evidence 'by virtue of ordinary investigations of evidence or leads already in their possession.'" *United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir. 2015) (citation omitted). "When the routine procedures of a law

enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation." *United States v. Owens*, 51 M.J. 204, 210–11 (C.A.A.F. 1999).

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

Despite assuming a Fourth Amendment violation, the court found the discovery was inevitable. *Id.* at 1231–39. The agents were already suspicious of the appellant and had discussed visiting her house before the tracker started working, and there was no reason to believe the appellant would have reacted any differently when questioned. *Id.* at 1235–36. The evidence "would have been discovered through ongoing investigation and the pursuit of leads that were already in the possession of the agents." *Id.* at 1238.

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

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

Here, as in *Watkins* and unlike in *Darnall*, when the illegality occurred, the Agents possessed and were actively pursuing leads and evidence that would have inevitably led to the evidence. As in *Watkins*, Appellant had become the focus of the Agent's investigation: the Agents (1) knew there were no signs for forced entry at the Facilities Building, (J.A. 59–60); (2) were conducting screening interviews of a short list of key holders, (J.A. 62); (3) had been told Appellant was a "problem child," (J.A. 61); (4) had smelled Appellant's fuel-soaked shoes in his room, which made the Agents' "suspicion level . . . raise a little bit higher," and gave them "a hunch," (J.A. 66, 78); (5) "were following through with [their] investigative lead"—the fuel-soaked shoes—by surveilling Appellant, (J.A. 66, 78); and (6) had re-discovered Appellant's fuel-soaked shoes outside his room, (J.A. 718). *See Watkins*, 981 F.3d at 1238.

Unlike in *Darnall*, where the "investigation probably would have . . . not been continued," 76 M.J. at 333, if Appellant had not consented, the investigation would not have stopped: the Agents testified they planned to conduct screening interviews with the other key holders, (J.A. 62, 82), all of whom had verifiable alibis, (*see* J.A. 493–512, 532–77; R. 953–63). This would have led the Agents back to Appellant, and the key reader showing Appellant returned to his room shortly after the fire—disproving his alibi—would have justified a search. (*See* J.A. 78, 677–78.)

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

ii. Appellant would have inevitably given his false alibi.

Even assuming the Agents would not have inevitably searched Appellant's room, Appellant's false alibi statements were inevitable. Appellant had already expressed a willingness to talk to the Agents, and he was keen to distance himself from the fire. (*See* J.A. 63–64, 81, 88, 716–17.) Thus, there is no reason to believe Appellant would not have agreed to an interview and presented his false alibi. *See Watkins*, 981 F.3d at 1236 (noting "[t]here is no reason at all to believe" an individual's statements would be different if contacted "an hour or two later").

Unlike other cases where appellants were coerced into confessing using evidence from an illegal search, *see, e.g.*, *Shetler*, 665 F.3d at 1158–59, Appellant

continued to deny his involvement, even after being confronted with the evidence against him, *see supra* Section D.1.d.iv. If Appellant was willing to maintain his innocence even after knowing the Agents had inculpatory evidence, a preponderance of the evidence indicates Appellant would have inevitably denied his involvement and offered his false alibi.

iii. Appellant's arguments against inevitable discovery are flawed.

Appellant misapplies the test for inevitable discovery in two ways. (Appellant's Br. at 53–54.) First, Appellant inappropriately focuses his analysis on "when [the Agents] approached Appellant's room," (Appellant's Br. at 53), but the proper timeframe is "when the illegality occurred," *Mitchell*, 76 M.J. at 420. The Agents acquired additional evidence during their first trip to Appellant's room that increased their suspicion of him—most notably observing Appellant's fuel-soaked shoes. (J.A. 716–18.) By the time the illegality occurred, their suspicion of him had been "raise[d]," and they had a "hunch" he was involved: this explains why the Agents chose to surveil him. *See* (J.A. 66, 78, 90–91); *supra* Section D.1.f.i.

Second, Appellant notes that the Agents did not possess probable cause at the time of the apprehension, (Appellant's Br. at 54), but that too is not the proper question. The test is whether the Agents "possessed, or were actively pursuing, evidence or leads" that would have led them to the evidence. *Mitchell*, 76 M.J. at 420. As in *Watkins*, at the time of the apprehension, the Agents had already begun

to focus their investigation on Appellant, regardless of whether their suspicion had risen to probable cause. *See Watkins*, 981 F.3d at 1235–36; *supra* Section D.1.f.i.

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

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

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

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

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

(J.A. 182, 191, 357, 368, 373, 411); (2) the Facilities Building was burned using the same ignitable fluids found on Appellant's shoes and gloves, (J.A. 420, 426–28; Pros. Ex. 27); (3) the fire began shortly before the alarm triggered at 0335, and Appellant re-entered his barracks room, 0.35 miles away, at 0336, (J.A. 438, 522; R. 236; Pros. Ex. 15, 30); (4) Appellant was frustrated with his sergeant, whose belongings were found on the fire, (J.A. 197, 496, 507–508, 534, 537, 570–71; Pros. Ex. 14); (5) Appellant lied about his whereabouts, losing his key, and fixing his car, (J.A. 215–16, 264–66, 347, 460, 508, 580–81, 674–79); and (6) Appellant asked Corporal Taylor to lie for him, (J.A. 588–89).

Thus, suppression of the evidence from the first search would not have left the Members with reasonable doubt of Appellant's guilt. Appellant has failed to establish prejudice under *Strickland*. *See Morrison*, 477 U.S. at 391.

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

Even assuming the interrogation was suppressed, there is not a reasonable probability the Members would have possessed reasonable doubt because the United States would have been able to show: (1) the fire was started intentionally using ignitable fluids, (J.A. 182, 191, 357, 368, 373, 411); (2) those same fluids were found on Appellant's shoes and gloves, (J.A. 420, 426–28; Pros. Ex. 27); (3) Appellant arrived at his barracks mere minutes after the fires began, (J.A. 438, 522; R. 236; Pros. Ex. 15, 30); (4) Appellant lied about losing his key, (J.A. 215–

16, 460, 508); and (5) items belonging to Appellant's sergeant, with whom Appellant was upset, were placed on top of the fire, (J.A. 197, 496, 507–508, 534, 537, 570–71; Pros. Ex. 14).

The question under *Strickland* is not whether a piece of evidence "closed the deal for the Government" or was "damaging in nature." (Appellant's Br. at 59–60.) Rather, the proper question is whether Appellant has proven that there is a reasonable probability the Members would have possessed reasonable doubt. *Morrison*, 477 U.S. at 391. Appellant has failed to do so because even without the evidence from the first search and the interrogation, the Members would not have possessed reasonable doubt as to his guilt. *See id.*

Conclusion

The United States respectfully requests that this Court remand the case with instructions to apply *Brown*. Alternatively, this Court may affirm the lower court's decision after applying *Brown*.

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on May 21, 2021.

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