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

Crim.App. Dkt. No. 201900089(f rev)

USCA Dkt. No. 23-0165/MC

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946

MILITARY RULES OF EVIDENCE (2016)

ISSUES PRESENTED

I.

WAS APPELLANT A SUSPECT, TRIGGERING ARTICLE 31(b), UCMJ, WARNINGS?

II.

DESPITE FINDING APPELLANT WAS ILLEGALLY APPREHENDED, DID THE LOWER COURT ERRONEOUSLY APPLY *BROWN V. ILLINOIS*, 422 U.S. 590 (1975), AND FIND THE TRIAL DEFENSE COUNSEL'S ADMITTED FAILURE TO MOVE TO SUPPRESS EVIDENCE DERIVED AFTER THE APPREHENSION WAS NOT INEFFECTIVE?

INTRODUCTION

The Fourth Amendment traces its conception to colonial America where the British Crown's unchecked authority to conduct searches and seizures caused widespread disdain amongst the colonists. In Federalist No. 84, Alexander Hamilton lobbied support for the Bill of Rights and highlighted the importance of protecting individual rights from government encroachment: "[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[1] Soon after, the Fourth Amendment was ratified, protecting the "inestimable right of personal security [which] belongs as much to the citizen on the streets . . . as to the homeowner closeted in his study."[2] As the Supreme Court has "always recognized, [n]o right is held more sacred."[3] The freedom from "unwarranted instructions into his privacy"[4] is "one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law."[5]

Here, Agent Craig Perry trampled on this hallowed authority and sacred right. Minutes after he asked Appellant questions without administering a rights advisement and knowing he lacked probable cause, Agent Perry ordered Appellant

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[1] THE FEDERALIST NO. 84, p. 444 (G. Carey & J. McCellan eds. 2001).
[2] *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).
[3] *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).
[4] *Jones v. United States*, 357 U.S. 493, 498 (1958).
[5] *Johnson v. United States*, 333 U.S. 10, 17 (1948).

up against a wall and instructed him to spread his legs. After conducting a frisk, Agent Perry handcuffed Appellant (without a basis to do so) and escorted him up to his room. Along with another agent, they asked Appellant to search his room and subsequently un-cuffed Appellant so he could memorialize his "voluntary" permission. But the constitutional violations did not stop there. After the room search, and while still admitting to lack probable cause, the agents handcuffed Appellant again and drove him to their station for a formal interrogation. During this interrogation, the agents used his unadvised statements and fruits from their unlawful search to elicit incriminating responses.

This type of purposeful law enforcement conduct is precisely what the exclusionary rule aims to deter. The rule seeks "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[6] Here, that is exactly what suppression will accomplish. Agent Perry illegally arrested Appellant to continue his investigation while bypassing the warrant requirement. Coupled with the failure to initially provide an Article 31(b) rights advisement, the agents continued to exploit the original illegality during a formal interrogation. All evidence derived from the illegal arrest should have been suppressed.

[6] *Elkins v. United States*, 364 U.S. 206, 217 (1960).

STATEMENT OF STATUTORY JURISDICTION

Appellant's approved sentence includes a punitive discharge and one year of confinement. The Navy and Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b), Uniform Code of Military Justice (UCMJ). Thus, this Court has jurisdiction pursuant to Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Contrary to his pleas, a general court-martial with enlisted representation convicted Appellant of one specification of arson, one specification of housebreaking, and one specification of unlawful entry under Articles 126, 130, and 134, UCMJ, respectively.[7] He was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for one year and a bad-conduct discharge.[8] The convening authority approved the sentence as adjudged.[9] The NMCCA affirmed the findings and sentence.[10]

Appellant invoked this Court's Article 67(a)(3), UCMJ, jurisdiction and this Court granted review. This Court set aside the findings and sentence and remanded the case to the lower court for further Article 66(c), UCMJ, review.[11] In so doing,

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[7] J.A. at 578.
[8] J.A. at 579.
[9] J.A. at 57.
[10] *United States v. Metz*, No. 201900089, 2020 CCA LEXIS 334, at *43 (N-M. Ct. Crim. App. Sept. 23, 2020) [hereinafter *Metz I*]; J.A. at 43.
[11] *United States v. Metz*, 82 M.J. 45, 45 (C.A.A.F 2021) [hereinafter *Metz II*].

this Court ordered the lower court to "conduct the three-pronged approach of [*Brown v. Illinois*] in examining the effects of an unlawful apprehension upon a subsequent search."[12] On remand, the lower court again affirmed the findings and sentence.[13] Appellant timely petitioned this Court on May 1, 2023, and this Court granted review.

STATEMENT OF FACTS

A. Appellant's supervisor gave NCIS agents specific reasons to believe Appellant started fires in an on-base maintenance shop.

Before dawn one morning, Camp Pendleton base firefighters responded to a fire at a facilities maintenance shop.[14] After controlling the fire, the firefighters determined it was set with fuel and notified the Naval Criminal Investigative Service (NCIS) of a suspected arson.[15]

Agents Craig Perry and Katelyn Thompson responded and determined the suspect was someone who had keys to the shop.[16] Additionally, the agents noticed that a logbook and hardhat with sergeant chevrons were "deliberately moved" and placed on a stack of plywood.[17]

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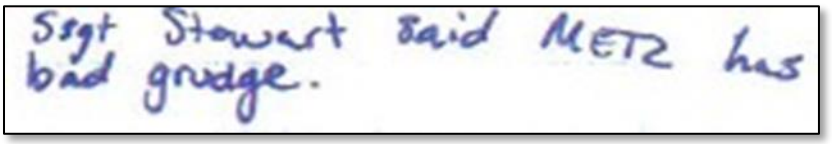
[12] *Id.*
[13] *United States v. Metz*, No. 201900089 (f rev), slip op. at 3, 2023 CCA LEXIS 117 (N-M. Ct. Crim. App. Mar. 3, 2023) [hereinafter *Metz III*]; J.A. at 3.
[14] J.A. at 174.
[15] J.A. at 174, 176.
[16] J.A. at 94.
[17] J.A. at 183.

The agents interviewed Appellant's supervisor, SSgt Jerome Stewart, who had arrived on scene and asked him "who would have done this."[18] In response, after learning the sergeant's hardhat had been deliberately set on fire, SSgt Stewart responded, "Well, that kind of narrows down the playing field some."[19] He knew the hardhat belonged to a sergeant who had recently disciplined Appellant.[20] In fact, of the few people with access to the shop, SSgt Stewart informed the agents that Appellant was the only one recently disciplined.[21] Staff Sergeant Stewart described Appellant as a "problem child."[22] He told the agents, "there was a grudge against the shop with [Appellant]."[23]

The agents wrote what SSgt Stewart told them: "[I]f anyone was going to start the fire, it would of [sic] been [Appellant]."[24] And on a list of people with keys to the building, the agents wrote the following next to Appellant's name:[25]



[18] J.A. at 67-68, 188, 476.
[19] J.A. at 477.
[20] J.A. at 477, 429-30.
[21] J.A. at 667.
[22] J.A. at 69, 667.
[23] J.A. at 70.
[24] J.A. at 69, 85, 191, 667 ("Stewart stated if any one [sic] was suspect as to starting a fire in the building it would be S/METZ[.]").
[25] J.A. at 683.

The agents did not write a similar message next to any other key holder's name.[26]

B. Even after learning of Appellant's specific means, motive and opportunity to commit the arson, the agents claimed to have "no reason to suspect anybody" of the crime and denied going to Appellant's room intentionally.

Even considering the evidence and information collected, the agents said they were not suspicious of Appellant.[27] As Agent Thompson put it: "[o]ther people don't run our investigations, and just because someone may have a problem with [Appellant] does not mean that we do."[28] Agent Perry claimed the same: "there was no reason to suspect anybody at that point," as they "were only there to identify those persons that had access to the building."[29]

After SSgt Stewart gave the agents Appellant's room number, they left the scene of the arson and went to Appellant's barracks.[30] Although Agent Perry stated in his investigation notes that "Stewart provided [Appellant's] room number as 208 specifically,"[31] Agent Perry said he did not intentionally go to his room.[32] He testified it was only by happenstance that the first room they went to was Appellant's

[26] J.A. at 683.
[27] J.A. at 73, 85, 96.
[28] J.A. at 85.
[29] J.A at 97.
[30] J.A. at 71, 667.
[31] J.A. at 667.
[32] J.A. at 96, 121.

room.[33] Not only was his room the first room, but it was the only room the agents visited.[34]

Additionally, during Appellant's eventual interrogation, Agent Thompson candidly told him that the reason they came to his barracks room was because they suspected he started the fires.[35] As she put it: "We have hard evidence that you're our guy. That's why we came to your room, and you gave us permission to come in."[36]

C. The agents questioned Appellant without providing an Article 31(b) warning.

When the agents arrived, Appellant allowed them into his room.[37] Inside his room they asked Appellant a series of questions without advising him of his Article 31(b) rights.[38] Agent Perry asked him "if he was aware of anything that occurred at his workplace that morning" and if he had keys to the maintenance facility."[39] Although the totality of the questions is unknown as this interaction was not recorded, Agent Thompson's later statements to Appellant during his formal

[33] J.A. at 96, 121.
[34] J.A. at 122.
[35] J.A. at 597 at 8:13:16.
[36] J.A. at 597 at 8:13:16.
[37] J.A. at 71.
[38] J.A. at 72-73, 101.
[39] J.A. 72, 41.

interrogation show she had previously asked him for details about where he had been the prior evening.[40]

While Agent Thompson questioned Appellant, Agent Perry looked around the room.[41] Wet shoes in an adjacent bathroom "caught [his] eye."[42] The wet insoles of the shoes, which hung on the toilet paper holder, also stood out to Agent Perry.[43] Still though, he did not advise Appellant of his Article 31(b) rights.[44]

Instead, Agent Perry asked Appellant: "Hey, are those Nikes" and asked to take a closer look.[45] After Appellant agreed, Agent Perry testified that as he moved towards the shoes he smelt an "overwhelming odor" of what he perceived to be "jet fuel or diesel."[46] This testimony conflicted with his investigative report in which he annotated that he smelled the gasoline before asking Appellant to search his shoes.[47]

D. The agents believed probable cause, not a reasonable suspicion, required an Article 31(b) rights advisement.

Agent Thompson testified that an Article 31(b) advisement was necessary when she had "probable cause" to suspect a crime was committed.[48] Agent Perry

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[40] J.A. at 597 at 7:19:47 ("So, I know last night you said that you went and hung out with a friend. What time did you get back?").
[41] J.A. at 97.
[42] J.A. at 97, 667.
[43] J.A. at 667, 98-99.
[44] J.A. at 98, 126-27.
[45] J.A. at 73.
[46] J.A. at 73, 98, 668.
[47] J.A. at 668, 123.
[48] J.A. at 82.

also confused the appropriate standard.[49] When asked if he suspected Appellant of a crime even after smelling the shoes, Agent Perry responded: "I definitely had some indicators that I was moving down the right direction, but as far as having enough to justify probable cause that [Appellant] was indeed my arsonist in this case, no, I wasn't there yet."[50]

E. After leaving Appellant's room, the agents regrouped in their vehicle and surveilled to see if Appellant would discard his shoes before they returned to his room.

After leaving Appellant's room, the agents waited in their vehicle for roughly thirty minutes.[51] They planned to observe Appellant from a distance to see if he tried to discard the shoes.[52] But they aborted this plan because they were unable to get a good vantage point.[53] Instead, they went back to Appellant's room.[54] As they approached, they noticed the fuel-scented shoes had been placed on a ledge outside Appellant's door.[55]

The agents knocked on Appellant's door, but there was no response.[56] The agents decided to have Agent Thompson remain at Appellant's door while Agent

[49] J.A. at 126-27.
[50] J.A. at 127.
[51] J.A. at 74.
[52] J.A. at 74.
[53] J.A. at 74.
[54] J.A. at 74.
[55] J.A. at 99.
[56] J.A. at 74.

Perry contacted the duty officer.[57] Agent Perry later explained he was concerned Appellant may have wanted to hurt himself.[58]

F. Even though Agent Perry admitted to not having probable cause, he nevertheless placed Appellant in handcuffs—and kept him handcuffed—while escorting him to his barracks room to search his room.

Agent Perry never contacted the duty officer.[59] As he later testified, he spotted Appellant near the barracks smoke pit and "called out" to him.[60] Agent Perry claimed Appellant was "slow" to take his hands out of his pockets when asked to do so.[61] Further, Agent Perry testified that he handcuffed Appellant "to control [him], pat him down for weapons, and then . . . released [him]."[62]

But that sequence of events differed from Appellant who swore Agent Perry searched Appellant before placing him in handcuffs.[63] Additionally, Agent Perry did not release Appellant right away as his initial testimony implied.[64] Agent Perry acknowledged that he kept Appellant in handcuffs as he walked him back to his barracks room.[65] When Appellant arrived at his room in handcuffs, Agent Thompson—who was still waiting at his door—told Appellant the agents were

[57] J.A. at 75.
[58] J.A. at 126.
[59] J.A. at 100.
[60] J.A. at 100.
[61] J.A. at 100, 125-126.
[62] J.A. at 125.
[63] J.A. at 709.
[64] J.A. at 88, 126.
[65] J.A. at 126.

"looking into the arson," but once again, did not provide an Article 31(b) warning.[66] She asked him whether he had "anything against" letting them search his room.[67] Shortly after Appellant was released from handcuffs, he signed a permissive search form.[68]

Agent Perry searched the room as Agent Thompson and Appellant stood-by.[69] After the search, Agent Perry seized fuel-scented clothes and shoes, a lighter, and a "crushed red cell phone."[70]

G. The agents again handcuffed Appellant and drove him to the NCIS station for an interrogation.

After the agents completed the search, they told Appellant that the search and the clothes they found raised their suspicion.[71] Agent Thompson told him that she wanted to "talk to him, and in order to do so, we had to take him down to our office."[72] Agent Perry again handcuffed Appellant and escorted him to a squad car.[73] After driving to the NCIS station, an interrogation followed.[74]

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[66] J.A. at 75.
[67] J.A. at 75.
[68] J.A. at 672.
[69] J.A. at 78.
[70] J.A. at 618.
[71] J.A. at 79.
[72] J.A. at 79.
[73] J.A. at 79.
[74] J.A. at 597.

H. Throughout Appellant's formal interrogation, Agent Thompson repeatedly referenced Appellant's earlier unwarned statements to obtain statements the Government used at trial to prove guilt.

When the agents arrived at the NCIS office, Agent Thompson read Appellant his Article 31(b) warnings for the first time.[75] She did not issue a cleansing warning.[76]

Throughout the interrogation, Agent Thompson referred to statements from Appellant that did not originate in the interrogation. This included:

- Referring to his whereabouts the previous night;[77]
- Referring to an earlier question about Appellant reporting his missing keys to his command as well as his denial of having done so;[78]
- Referring to Agent Perry's statement to Appellant while in Appellant's room that he smelled gas on Appellant's clothes;[79]
- Referring to Appellant's statement to the agents in his room that he was a "fuck up Marine;"[80]
- Referring to Appellant's earlier statement that he did not get along with certain Marines;[81]
- Referring to Appellant's statement that he did not enjoy his military duties;[82]
- Referring to Appellant's claim that he had a close relationship

[75] J.A. at 101.
[76] J.A. at 675.
[77] J.A. at 597 at 7:19:47.
[78] J.A. at 597 at 7:55:45.
[79] J.A. at 597 at 7:31:44.
[80] J.A. at 597 at 7:39:15.
[81] J.A. at 597 at 7:31:35.
[82] J.A. at 597 at 7:42:00.

with his father.[83]

Agent Thompson generally used these references to point out inconsistencies in Appellant's story.[84]

Appellant said he had an alibi.[85] He told Agent Thompson he was with a friend, Corporal Caleb Taylor, in the hours before the fire started.[86] 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.[87] He said Corporal Taylor dropped him off at his barracks at around 1220, roughly three hours before the fires broke out.[88] He explained that he did laundry, brushed his teeth, and checked Facebook before going to bed at around 0100.[89] He then woke up around 0900 or 1000.[90]

Appellant continued to deny responsibility, but he gradually made incriminating statements. He admitted his story sounded "shitty" and that he was "disgruntled" before adding: "If I were you, I'd peg me for it too."[91] When Agent Thompson asked him if he was the first Marine "who's gotten drunk and done

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[83] J.A. at 597 at 7:52:56.
[84] *See, e.g.*, J.A. at 597 at 7:55:48 ("So you did report it? Because *I asked you earlier, and you said you hadn't*.").
[85] J.A. at 597 at 7:21:00-7:23:00.
[86] J.A. at 597 at 7:21:00-7:23:00.
[87] J.A. at 597 at 7:21:20.
[88] J.A. at 597 at 7:21:20-7:24:00.
[89] J.A. at 597 at 7:22:50-7:23:02.
[90] J.A. at 597 at 7:31:22.
[91] J.A. at 597 at 7:58:22-7:58:55.

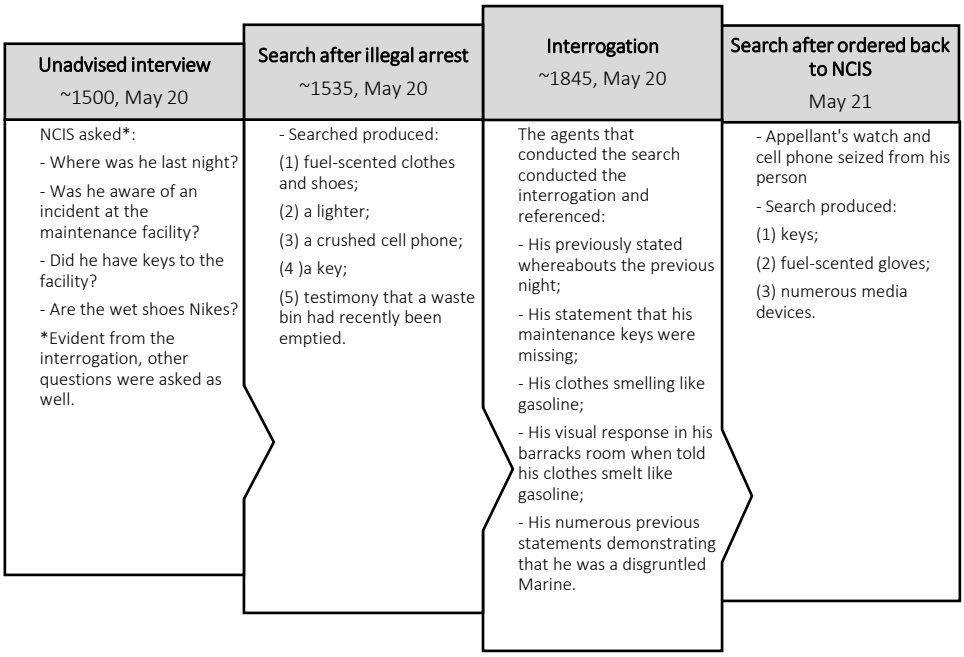
something stupid," Appellant did not deny the facts implied in the question; rather, he simply stated "No."[92]

I. NCIS utilized Appellant's command to escort him from the interrogation and back to the NCIS station the following morning.

After the interrogation, NCIS released Appellant to a command representative.[93] The following morning, members from Appellant's command escorted him back to the station.[94] Appellant signed another search authorization to his room.[95] After he invoked his right to remain silent, his command ordered him into pretrial confinement.[96]

[92] J.A. at 597 at 8:31:30.
[93] J.A. at 597 at 10:42:55.
[94] J.A. at 711.
[95] J.A. at 681.
[96] J.A. at 654.

J. The agents used the fruits of the illegalities in furtherance of their investigation.



J. Although Appellant's civilian defense counsel did not move to suppress evidence derived after the arrest, he did move to suppress Appellant's statements due to an Article 31(b) violation. The military judge ruled Appellant was not a suspect, denied Appellant's motion to suppress his statements, and admitted his interrogation at trial.

In a pretrial motion, the defense argued Appellant was a suspect entitled to Article 31(b) warnings when the agents first approached his room.[97] Agent Perry and Agent Thompson testified that he was not a suspect when they first interviewed him in his barracks room.[98] Contrary to her assertions to Appellant during the formal interrogation, Agent Thompson testified she did not view Appellant as a suspect

[97] J.A. at 659.
[98] J.A. at 85, 97.

when she first approached his room.[99] In denying the defense motion, the military judge concluded that Appellant was not a suspect when the agents first approached his room.[100]

At trial, the military judge admitted into evidence Appellant's formal interrogation and statements he made to the agents when they were in his room.[101] In both its opening statement and closing argument, the Government referred to Appellant's statements.[102] The government's theme was "destruction and deception."[103] Appellant's statements during his formal interrogation formed the Government's argued deception.[104] The military judge instructed the members they could infer Appellant's guilt based on statements Appellant made to the agents that contradicted the evidence at trial.[105]

K. The lower court found Appellant was only a "person of interest," not a "suspect."

The lower court wrote Appellant was only a person of interest—and thus, not a suspect—when the agents first approached his room.[106] Thus, the lower court held,

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[99] J.A. at 85.
[100] J.A. at 691.
[101] J.A. at 247, 597. 200-02.
[102] J.A. at 159, 541-43, 549, 575.
[103] J.A. at 550.
[104] J.A. at 541-42.
[105] J.A. at 536-37.
[106] *Metz III*, slip op. at 14; J.A. at 14.

there was no violation of Article 31(b) when the agents failed to advise Appellant of his rights before questioning him.[107]

Regarding the agent's question—"Hey, are those Nikes?"—the lower court stated this was meant "to establish that Appellant was someone who was authorized to grant consent" to search the shoes—but was not a question regarding the offense for purposes of Article 31(b).[108]

L. On remand, the lower court chose not to obtain additional facts despite the following: (1) this Court ordered the lower court to do so if necessary; (2) a *DuBay* hearing was authorized; (3) Judge Hardy suggested that more facts were needed; and (4) the Government claimed that a remand would allow the lower court to develop more facts.

During oral argument before this Court, Judge Hardy suggested that further fact-finding would help resolve the third factor in *United States v. Brown*[109]—the purpose of the illegality. He said there were "some holes" in the record, including why Agent Perry kept Appellant handcuffed after determining he was not a threat.[110] Judge Hardy said he believed this was "relevant" to the *Brown* analysis, explaining: "It just seems like there are certain holes in the facts that we not only wouldn't normally engage in fact-finding, we can't do it . . . so doesn't that necessitate a

[107] *Id*. at 15; J.A. at 15.
[108] *Id*. at 21; J.A. at 21.
[109] 422 U.S. 590 (1975).
[110] *United States v. Metz*, 21-0059/MC, Oral Argument, at 8:01-8:31, available at https://www.armfor.uscourts.gov/newcaaf/CourtAudio10/20211006A.mp3.

remand?"[111] Judge Hardy later stated that if Agent Perry "had taken [the handcuffs] off, then there wouldn't have been a problem, but he chose to leave them on, creating the issue" before adding that he "didn't see in the Record any fact-finding on why the agent did that."[112]

During the oral argument, Appellant's counsel argued that if this Court remanded, it should also allow for additional fact-finding on matters raised in Appellant's declaration relevant to the attenuation analysis.[113] Relating to the flagrancy of the arrest, Appellant's declaration states that Agent Perry handcuffed him after he had already patted him down.[114]

The Government also suggested there could be a need for fact-finding. In response to Judge Sparks's question regarding why this Court could not decide the case without a remand, appellate government counsel stated: "Well, for one, there is the potential for the need for additional fact-finding."[115] While later claiming more facts were not needed, appellate government counsel added: "frankly, the lower court is better positioned to order any fact-finding, if necessary."[116] The

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[111] *Id.*
[112] *Id.*
[113] *Id*. at 11:00-12:00.
[114] *Id.*; *see* J.A. at 708-09.
[115] *United States v. Metz*, 21-0059/MC, Oral Argument, at 25:45-25:50.
[116] *Id*. at 31:15-31:24.

Government noted that there were "a number of factual questions that could arise depending on how the *Brown* analysis plays out."[117]

Ultimately, this Court instructed the lower court on remand to "order affidavits or a fact-finding hearing, if necessary."[118]

M. The only additional fact-finding came from Appellant in an affidavit from his civilian defense counsel. He admitted he did not consider seeking to suppress the evidence based on an illegal arrest and that he therefore had no tactical reason for failing to do so.

After the case was remanded, civilian defense counsel provided a sworn declaration explaining why he did not move to suppress the evidence collected after the illegal apprehension. He explained:

> I remember feeling that the handcuffing of Appellant and the related treatment of Appellant entitled him to certain legal relief because it appeared that [Appellant's] statements were obtained through a violation of Appellant's rights.[119]

However, civilian defense counsel humbly acknowledged that "[t]here was no strategic purpose in avoiding citation to the 'Fourth Amendment issue' other than having not considered it as a valid basis to rely upon."[120]

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[117] *Id*. at 31:30.
[118] *Metz II*, 82 M.J. at 45 (citing *United States v. DuBay*, 17 C.M.A. 147 (1967)).
[119] J.A. at 729.
[120] J.A. at 729.

N. While finding the agent illegally arrested Appellant, the lower court held the trial defense counsel was not ineffective because a suppression motion was without a reasonable probability of success.

The lower court reviewed whether trial defense counsel were ineffective for failing to move to suppress evidence based on an illegal apprehension. In doing so, it found Agent Perry illegally apprehended Appellant shortly before searching his room.[121] However, the court held Appellant's consent to search his barracks room was voluntary and "an independent act of free will."[122] Thus, Appellant's trial defense counsel was not ineffective for failing to move to suppress the evidence derived from the search.[123]

The lower court's conclusion that Appellant's consent to search was an independent act of free will was largely based on the voluntariness of Appellant's consent: "[W]e hold that Appellant's subsequent consent to search his room cured any constitutional violation resulting from law enforcement's unlawful detention."[124]

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[121] *Metz III*, slip op. at 23; J.A. at 23.
[122] *Id.*; J.A. at 23.
[123] *Id.*; J.A. at 23.
[124] *Id.* at 26; J.A. at 26.

SUMMARY OF ARGUMENT

Appellant was a suspect entitled to Article 31(b) warnings. The military judge erroneously denied the defense motion to suppress all Appellant's unwarned statements and derivative evidence. When the agents first approached Appellant, they knew specific facts about Appellant's means, motive, and opportunity to suspect him of arson. Analyzed by either the objective or subjective standard, the agents had at least a "mere suspicion," requiring Article 31(b) rights to be given.[125] In fact, the agents' testimony indicates why they did not advise Appellant of his rights: they erroneously believed probable cause was necessary before a rights advisement was required.

Additionally, counsel was ineffective for failing to move to suppress derivative evidence of an illegal arrest. Evidence derived after an illegal arrest generally requires suppression. One exception to the general rule applies to evidence attenuated and not causally connected to the illegal arrest. In that event, evidence is admissible when the taint of the violation has dissipated by the time law enforcement discovers the evidence. This shields suppression of remote and unforeseeable consequences of the constitutional violation.

When Agent Perry handcuffed Appellant and escorted him back to his room, a search was anything but remote and unforeseeable. In fact, Appellant was asked to

[125] *United States v. Schneider*, 14 M.J. 189, 193-94 (C.M.A. 1982).

consent to a search while he was still handcuffed. Additionally, after the search and after the agents again handcuffed Appellant, it was obviously foreseeable that a formal interrogation would produce fruits; that was the purpose of driving him to their station. In evaluating the attenuation doctrine's three prongs, all favor suppression of the evidence derived after the constitutional violation.

ARGUMENT

I.

The military judge erred by denying the defense motion to suppress Appellant's unwarned statements and all derivative evidence. The error was not harmless beyond a reasonable doubt.

Standard of Review

For a motion to suppress based on an Article 31(b), UCMJ, violation, this Court reviews the military judge's findings of fact for clear error and his conclusions of law de novo.[126] Appellate courts review prejudice *de novo*.[127]

Discussion

A. When the agents first questioned Appellant, he was a suspect.

Rights warnings are required under Article 31(b), UCMJ, when the person being questioned was suspected, or reasonably should have been suspected, of committing an offense at the time of questioning, and the person conducting the

[126] *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000).
[127] *See United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000).

questioning is engaging in a law enforcement inquiry.[128] There is a "relatively low" quantum of evidence for someone to be a suspect.[129] The standard is "mere suspicion," a lower standard than probable cause.[130] When determining whether mere suspicion exists, the Court reviews the totality of the circumstances.[131]

For example, in *United States v. Muirhead*, the accused brought his daughter to the hospital due to vaginal bleeding and explained to doctors his suspected cause of the bleeding.[132] After a later medical examination, however, the doctor suspected sexual assault and relayed this concern to NCIS, who then questioned Muirhead without Article 31(b) warnings.[133] In a suppression hearing, the agents claimed that they did not view Muirhead as a suspect when they first approached him.[134] This Court disagreed and held that under the totality of the circumstances, Muirhead was a suspect entitled to Article 31(b) warnings, finding the doctor's relayed suspicion particularly relevant.[135]

By contrast, in *United States v. Davis*, this Court's predecessor held an Article 31(b) rights advisement was not required when agents conducted screening

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[128] *Swift*, 53 M.J. at 446 (citation omitted).
[129] *Id.* at 447.
[130] *Schneider*, 14 M.J. at 193-94.
[131] *United States v. Muirhead*, 51 M.J. 94, 95 (C.A.A.F. 1999).
[132] *Id.*
[133] *Id.* at 95-96.
[134] *Id.* at 96-97.
[135] *Id.* at 97.

interviews in the course of their investigation.[136] There, agents investigated a death, presumptively caused by blunt force trauma via a pool cue.[137] The investigation focused on individuals who had access to cues, and Davis fit that requirement.[138] The agents knew Davis had mental health problems and had threatened to shoot a police officer, though the threat was not regarded as "pertinent because '[the agents] were not looking at a victim of a shooting.'"[139] Additionally, the agents knew Davis had information pertinent to the investigation as he told another sailor "he didn't kill [the victim]' but he knew who did . . . .," and Davis knew "intimate information regarding the manner of death."[140] Ultimately, they did not view Davis as a suspect and consequently did not advise him of his Article 31(b) rights.[141]

In holding that Davis was not a suspect, this Court first found that at the time of the interview the agents were still trying to determine who had access to pool cues and were unaware how many people they eventually would find.[142] Additionally, Davis's pool cue was not the first or the last found as the agents continued their investigation and interviewed "a lot of other witnesses" after interviewing Davis.[143]

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[136] *United States v. Davis*, 36 M.J. 337, 340 (C.M.A. 1993).
[137] *Id.* at 338.
[138] *Id.*
[139] *Id.*
[140] *Id.* at 338-39.
[141] *Id.* at 339.
[142] *Id.* at. 340.
[143] *Id.* at 339, 340-41.

Thus, "the investigation had not sufficiently narrowed to make appellant a suspect within the meaning of Article 31."[144]

1. Objectively, Appellant was a suspect.

Contrary to *Davis*, the investigation had "sufficiently narrowed" to make Appellant a suspect. In fact, SSgt Stewart "narrowed down" the list of suspects.[145] The agents knew Appellant was a "problem child" who was recently disciplined and that he had a grudge against the maintenance shop and its personnel.[146] The agents knew that the sergeant who had disciplined Appellant was the same sergeant whose hardhat was intentionally lit aflame.[147]

Even more revealing, they learned this information after the agents asked SSgt Stewart for *suspects.*[148] Staff Sergeant Stewart said he "distinctively" recalled the agents asking him "who would have done this."[149] Just as in *Muirhead*, where a third party's perceived suspicion proved vital, SSgt Stewart's suspicion raised at least the "relatively low" quantum of evidence of a "mere suspicion."[150]

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[144] *Id.* at 341.
[145] J.A. at 477.
[146] J.A. at 46, 667
[147] J.A. at 183.
[148] J.A. at 69, 476.
[149] J.A. at 476.
[150] *Swift*, 53 M.J. at 447; *Schneider*, 14 M.J. at 193-94.

In *Davis*, the agents simply conducted screening interviews and attempted to learn who had access to pool cues.[151] But here, the agents already determined who had access to the maintenance facility.[152] Staff Sergeant Stewart compiled a list of Marines who had keys to the facility.[153] Appellant was one of the few key holders.[154] On the list, the agents wrote next to Appellant's name: "has bad grudge."[155] Tellingly, they did not write a similar message next to any other key holder's name.

Far from providing only a "hunch,"[156] the information SSgt Stewart gave the agents provided Appellant's means, motive, and opportunity to commit the arson. Objectively, the agents possessed at least a "mere suspicion" that Appellant committed the arson. Thus, Appellant was entitled to an Article 31(b) rights advisement before answering the agents' initial questions, and the Government cannot prove the contrary.

2. Subjectively, contrary to the agents' testimony, they suspected Appellant of the arson.

The subjective test evaluates what an investigator believed at the time of questioning and whether the investigator "considered the interrogated person to be

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[151] *Davis*, 36 M.J. at 338.
[152] J.A. at 683.
[153] J.A. at 683.
[154] J.A. at 683.
[155] J.A. at 683.
[156] *Metz III*, slip op. at 12 ("The additional information resulted in 'a hunch' by the Staff NCO.").

a suspect."[157] The analysis is whether the agents had a mere suspicion that Appellant committed the arson. But the agents considered the wrong standard. Although the agents repeatedly denied classifying Appellant as a suspect, that conclusion was based on whether they had *probable cause* to believe Appellant committed the arson. After being asked when Article 31(b) warnings are required, Agent Thompson responded, "When we suspect that we have probable cause to believe that he committed the crime."[158]

Furthermore, the agents' words and actions demonstrate their "mere suspicion" that Appellant committed the arson. During the interrogation, Agent Thompson said: "We have hard evidence that you're our guy. *That's why we came to your room . . . .*"[159] Although Agent Perry would later testify that he only came across Appellant's room by happenstance, he told Appellant:

> We got a shit ton of evidence, *that's why I showed up at your door.* It's not like with all 56,000 Marines on this base, I randomly showed up at your door. And you know, the first time I walked out, I knew it was you. I'm that good at what I do.[160]

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[157] *Muirhead*, 51 M.J. at 96.
[158] J.A. at 82. Agent Thompson also distinguished "suspicion" from "suspect." J.A. at 86.
[159] J.A. at 597 at 8:13:16. (emphasis added).
[160] J.A. at 597 at 9:02:20-9:02:40 (emphasis added).

The agents went to Appellant's room immediately after SSgt Stewart identified him as a suspect and gave them Appellant's room number.[161] The room was the only room they went to.

This Court has held Article 31(b) applies for far less suspicion. In *United States v. Gilbreath*, a sergeant attempted to locate a missing pistol.[162] He discovered the pistol had not been accounted for in over a year and contacted Cpl Gilbreath, the armory custodian at that time, as he "seemed like a logical person to ask."[163] Gilbreath initially claimed the pistol was destroyed but when pushed by the sergeant, he admitted to having the pistol.[164] This Court held a rights advisement was required and, in so doing, noted the sergeant's tactics to discover more information.[165]

Agent Perry employed his own interrogation tactics when the agents first approached Appellant. Agent Perry testified about his training in interrogation techniques. Specifically, he discussed the "Ferrini method," a method that "starts with locking a person into their story, collecting that story, locking it in systematically . . . ."[166] It is no surprise that one of the first questions the agents asked

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[161] J.A. at 71, 667.
[162] *United States v. Gilbreath*, No. 201200427, 2014 CAAF LEXIS 1206 at *5 (C.A.A.F. Dec. 18, 2014).
[163] *Id.*
[164] *Id.* at *6.
[165] *Id.* at *19-20.
[166] J.A. at 214-15.

Appellant was regarding his whereabouts the previous night.[167] Locking Appellant into his alibi—after showing up at his door and giving him no indication that his words could be used against him—is a far cry from the agents' claimed mission of simply ascertaining whether Appellant had a key to the facility.[168]

B. The agents "bootstrapping" Appellant's unwarned statements into his formal interrogation rendered it involuntary. The interrogation and all other evidence derived from his initial unwarned statement should have been suppressed.

When an interrogation follows an earlier unwarned statement, the admissibility of the former depends in part on "whether the admission was made as a result of the questioner[] using earlier, unlawful interrogations."[169] Although not dispositive, whether a cleansing warning was issued before the interrogation is pertinent.[170]

Even oblique references to prior unwarned statements may render subsequent statements involuntary. For example, in *United States v. Phillips*, two members of Phillips's command questioned him in separate interviews without Article 31(b) warnings.[171] One month later, a law enforcement agent uninvolved in the prior

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[167] J.A. at 597 at 7:19:47 ("So, I know last night you said that you went and hung out with a friend. What time did you get back?").
[168] App. Ex. LXXIX at 7.
[169] *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (citing *United States v. Phillips*, 32 M.J. 76, 80-81 (C.M.A. 1991)).
[170] *Id.*
[171] *Phillips*, 32 M.J. at 77-78.

questioning interviewed Phillips after providing Article 31(b) rights—but provided no cleansing warning.[172] The agent did not explicitly reference any prior unwarned statements but informed Phillips that he was aware of the command's previous investigation.[173]

This Court found Phillips's admissions to the agent were involuntary.[174] Even though the agent did not reference the earlier statements, the agent's reference to the prior investigation was "directly the product of one of the earlier interviews" and "bridged the gap between the earlier interviews and the one that was about to begin."[175] Without giving a cleansing warning, the agent created the impression that the accused's earlier statements were "a starting point for the current questioning" and served as a "bootstrapping reference to the earlier interviews."[176] Thus, this Court concluded the government failed to show the appellant's admissions to the agent "were *not* obtained by use of the earlier statements."[177]

Here, during the formal interrogation, Agent Thompson gave no indication that his previous unwarned statements could not be used against him and referenced numerous unwarned statements, including: (1) Appellant's statement that he was

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[172] *Id*. at 78.
[173] *Id.*
[174] *Id*. at 81-82.
[175] *Id.*
[176] *Id.*
[177] *Id*. at 81.

with a friend when the agent asked him where he had been;[178] (2) his denials to the agents of having keys to the shop;[179] (3) his statement during the search that the clothes the agents searched were wet because he had done his laundry;[180] and (4) his numerous admissions that he was a disgruntled Marine.[181]

Like the follow-on interrogation in *Phillips*, Appellant's formal interrogation was rendered involuntary based on Agent Thompson's frequent references that bridged the gap to Appellant's earlier unwarned statements.

C. The Government cannot prove the error was harmless beyond a reasonable doubt.

A constitutional error is harmless if, beyond a reasonable doubt, it "did not contribute to the verdict obtained."[182] "Error of constitutional dimensions requires either automatic reversal or an inquiry into whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence."[183] "'A

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[178] J.A. at 597 at 7:19:47.
[179] J.A. at 597 at 7:55:45.
[180] J.A. at 597 at 7:31:44.
[181] J.A. at 597 at 7:46:10 ("That's not what you said *in the car*. In the car, you said you hated [the Marine Corps] and can't wait to be out of the Marines."); J.A. at 597 at 8:15:20 ("*In the car*, you said the Marines, kind of, took away everything you liked.").
[182] *Chapman v. California*, 386 U.S. 18, 24 (1967); *see Evans*, 75 M.J. at 305-06 (explaining "[w]hether a set of facts gives rise to a 'custodial interrogation' under *Miranda* depends upon whether a suspect 'reasonably believed that his freedom of action [was] curtailed to a degree associated with formal arrest.'").
[183] *United States v. Davis*, 26 M.J. 445, 449 n.4 (C.M.A. 1988) (citing *Chapman*, 386 U.S. at 18; *accord Arizona v. Fulminante*, 499 U.S. 279 (1991).

constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[184] An error "did not contribute to the verdict" when it was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."[185] "The question is whether there is a *reasonable possibility* that the evidence complained of *might have contributed to the conviction*."[186]

The interrogation contributed to the guilty verdict as Appellant's admissions were the linchpin of the Government's case. The Government's theme was "destruction and deception."[187] And Appellant's statements formed the deception. Throughout the closing, the Government argued Appellant's deception, his lies, proved his guilt.[188] The Government referenced a false alibi, Appellant's claim that his keys were lost, and his justification for his clothes smelling like gasoline.[189] Moments before repeatedly hearing that Appellant is a liar, the members also heard

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[184] *United States v. Hoffman*, 75 M.J. 120, 128 (C.A.A.F. 2016) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003); *accord United States v. Ellerbrock*, 70 M.J. 314, 320 (C.A.A.F. 2011) (analyzing whether "there [was] a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction") (citing *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman*, 386 U.S. at 24).
[185] *Hoffman*, 75 M.J. at 128 (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991).
[186] *Chapman*, 386 U.S. at 23 (citation and internal quotation marks omitted) (emphasis added).
[187] J.A. at 538.
[188] J.A. at 541-43.
[189] J.A. at 538-541.

the false exculpatory statement instruction: "You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence."[190]

Appellant's statement also created the argued "motive to start the fire."[191] Appellant admitted he hated his shop,[192] he could not wait to get out the Marine Corps,[193] and described himself as "disgruntled"[194] and a "fuck up Marine."[195] Additionally, Appellant admitted that he was recently disciplined for going UA.[196] In closing, the Government argued these admissions created Appellant's motive: "he is disgruntled, like he says in his interrogation."[197]

The Government is unable to prove the erroneous admission was harmless beyond a reasonable doubt.

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[190] J.A. at 537.
[191] J.A. at 545.
[192] J.A. at 597 at 7:46:20.
[193] J.A. at 597 at 7:46:30.
[194] J.A. at 597 at 7:31:35.
[195] J.A. at 597 at 7:39:15.
[196] J.A. at 597 at 7:49:10, 7:52:05-7:52:30.
[197] J.A. at 545.

II.

Counsel was ineffective for not moving to suppress evidence derived from an illegal arrest. There was a reasonable probability that the motion would have been meritorious.

Standard of Review

Issues of ineffective assistance of counsel are reviewed de novo.[198]

Discussion

"The fruits of police conduct which actually infringes a defendant's constitutional rights must be suppressed."[199] The fruits include both the "primary evidence obtained as a direct result of an illegal search or seizure and . . . evidence later discovered and found to be derivative of an illegality . . . ."[200] However, one of the exceptions to this general rule is the attenuation doctrine.[201] The doctrine requires the government to prove evidence was not causally linked to the constitutional violation.[202] The government meets its burden by satisfying *Brown v. Illinois'* three-pronged approach: (1) "the proximity of illegal conduct and the consent; (2) the

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[198] *United States v. Grigoruk*, 56 M.J. 304, 306 (C.A.A.F. 2002) (citation omitted).
[199] *Vega v. Tekoh*, 142 S. Ct. 2095, 2103 (2022) (citing *Michigan v. Tucker*, 417 U.S. 433, 450-52 (1974) (internal quotation omitted)).
[200] *Utah v. Strieff*, 579 U.S. 232, 237 (2016) (citation omitted).
[201] *Id.* at 238.
[202] *Id.*; *see Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (providing that evidence is admissible under the attenuation exception where, although "a constitutional violation was a 'but-for' cause of obtaining evidence," the casual connection is "too attenuated to justify exclusion").

presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial misconduct."[203]

"Although the subsequent consent may be a good treatment for the poison [the Fourth Amendment violation], it is not a panacea."[204] But the lower court treated Appellant's initial consent to search as just that. On remand, the court—once again—focused its analysis on the voluntariness of his consent to search his barracks room. While citing *Brown* and facially analyzing its three prongs, the court rebranded its voluntariness analysis from its initial opinion as a *Brown* analysis. At times, it did so verbatim.[205] On remand, the lower court held that "Appellant's subsequent consent to search cured any constitutional violation resulting from law enforcement's unlawful detention."[206]

But determining that Appellant voluntarily consented to the initial search of his room fails to complete the analysis. Additionally, because the lower court found

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[203] *Brown*, 422 U.S. at 602; *United States v. Conklin*, 63 M.J. 333, 338-39 (C.A.A.F 2006) (citation omitted).
[204] *Conklin*, 63 M.J. at 334.
[205] *Compare Metz I*, 2020 CCA LEXIS 334, at *40 (emphasis added) ("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. Because Appellant appeared to fully understand his right to refuse consent to search his *barracks* room, we conclude that his consent was voluntary."), *with Metz III*, slip op. at 26 ("Appellant's detention during the stop-and-frisk was minimal in nature and pertained to officer safety, and the ensuing unlawful apprehension was brief and without incident. After the detention was over, Appellant appeared to fully understand his right to refuse consent to search his room.").
[206] *Metz III*, slip op. at 26.

the first search was not causally connected to the illegal arrest, the court failed to analyze the attenuation of the subsequent formal interrogation and the second search.

The lower court erred because: (A) the overarching character of the illegal arrests, *Brown's* third prong, favors Appellant (B) the temporal proximity and the lack of intervening circumstances related to the searches and the interrogation, *Brown's* first and second prongs, favors Appellant; and (C) civilian defense counsel's failure to move to suppress evidence derived from the illegal arrest prejudiced Appellant.

A. The lower court failed to appreciate, or further inquire into, Agent Perry's actions. His investigative purpose warrants suppression of the evidence under *Brown's* third prong.

The third *Brown* prong evaluates police conduct and "whether such conduct has been employed to exploit the illegality."[207] This factor "may be the most important" considering the exclusionary rule's purpose of deterring police misconduct.[208] "When police intentionally violate what they know to be a constitutional command, exclusion is essential to conform police behavior to the law."[209] The "exclusionary rule serves to deter deliberate, reckless, or grossly

[207] *United States v. Khamsouk*, 57 M.J. 282, 291 (C.A.A.F. 2002).
[208] *Id.* (citation omitted); *see United States v. Leon*, 468 U.S. 897, 910-11 (1984) (observing that the attenuation exception incorporates the balance between the exclusionary rule's benefits and costs).
[209] *Khamsouk*, 57 M.J. at 292 (citation omitted).

negligent conduct, or in some circumstances recurring or systemic negligence."[210] Consequently, a showing of "bad motive or intent" is not required.[211] "Unnecessary and unwise" conduct is sufficient to justify the exclusionary rule.[212]

The touchstone of this prong is law enforcement's purpose in violating the Fourth Amendment.[213] An illegality has "a quality of purposefulness" when the goal is to further the investigation.[214] For example, in *Brown*, "the arrest, in both design and in execution, was investigatory" as the detectives' intent was to question Brown.[215] "The detectives embarked upon [their] expedition for evidence in the hope that something might turn up."[216]

Where law enforcement violate the Fourth Amendment for investigatory purposes, "in the hope that something might turn up," the Court has refused to find

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[210] *Herring v. United States*, 555 U.S. 135, 144 (2009).
[211] *Conklin*, 63 M.J. at 339.
[212] *Id*.
[213] *Brown*, 422 U.S. at 605.
[214] *Id.*
[215] *Id.*
[216] *Id.*

attenuation.[217] By contrast, the Court has found attenuation where law enforcement misconduct was not for investigatory purposes.[218]

1. Agent Perry's purpose for arresting Appellant was to continue the investigation without adhering to the warrant requirement.

Quite simply, Agent Perry's purpose was "investigatory."[219] After breaking contact with Appellant and deliberately discussing their next investigative steps in their vehicle, the agents decided to surveil Appellant in the hope that he would discard his shoes.[220] When that plan failed and they realized Appellant was no longer in his room, Agent Perry left to find him, made contact with him, and told him to "come here."[221] Agent Perry ordered Appellant up against a wall and frisked him.[222]

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[217] *See Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (finding no attenuation where the defendant was arrested in order to be questioned); *Taylor v. Alabama*, 457 U.S. 687, 693 (1982) (finding no attenuation where the police transported the defendant to the police station for an interrogation); *Dunaway v. New York*, 442 U.S. 200, 218 (1979) (finding no attenuation where the defendant was "seized without probable cause in the hope that something might turn up"); *Brown*, 422 U.S. at 605 (finding no attenuation where the police acknowledged "that the purpose of their action was 'for investigation or for 'questioning'").

[218] *See Strieff*, 579 U.S. at 241-42 (finding attenuation when a search incident to a lawful arrest produced evidence); *Rawlings v. Kentucky*, 448 U.S. 98, 109-10 (1980) (finding attenuation where the police detained the defendant, not for questioning, but rather "to avoid asportation or destruction" of evidence they believed was present); *United States v. Ceccolini*, 435 U.S. 268 279-80 (1978) (finding attenuation where there was "not the slightest evidence to suggest that [the officer] entered the shop or picked up the envelope with the intent of finding tangible evidence").

[219] *Brown*, 422 U.S. at 605.

[220] J.A. at 74.

[221] J.A. at 708.

[222] J.A. at 708.

Even though Agent Perry confirmed Appellant was unarmed, he handcuffed Appellant and told Appellant he had more questions.[223] But instead of asking the questions there, he escorted Appellant, handcuffed, back to his room.[224] While still handcuffed, the agents asked Appellant if he had "anything against" them searching his room.[225] Just as in *Brown* where the purpose of the illegal arrest was an interview, the purpose of the illegal arrest here was to search Appellant's room for evidence. Agent Perry's actions purposefully exploited the original illegality.

2. The initial stop was not a lawful *Terry* stop because Agent Perry did not have a reasonable belief that Appellant was armed and dangerous.

Police conduct is "flagrant" when the officer detains a person in a clearly unconstitutional manner.[226] When Agent Perry initially handcuffed Appellant, it was glaringly obvious Agent Perry lacked probable cause and was outside the strictures of *United States v. Terry.*[227]

Law enforcement may briefly stop someone without probable cause, but the officer "must be able to point to *specific and articulable* facts which, taken together

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[223] J.A. at 708.
[224] J.A. at 100.
[225] J.A. at 709.
[226] *See Kaupp*, 538, U.S. at 632 (finding flagrancy where "the state does not even claim that the sheriff's department had probable cause to detain [the defendant]"); *Taylor*, 457 U.S. at 691 (finding flagrancy where the defendant "was arrested without probable cause"); *Dunaway*, 442 U.S. at 218 (finding flagrancy where the defendant "was also admittedly seized without probable cause"); *Brown*, 422 U.S. at 605 (finding flagrancy where "the impropriety of the arrest was obvious").
[227] *Terry*, 392 U.S. at 1.

with rational inferences from those facts, reasonably warrant that intrusion."[228] 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."[229] Thus, a frisk requires the officer to have "reason to believe that he is dealing with an armed and dangerous individual[.]"[230] An "inchoate and unparticularized suspicion or 'hunch,'" is not sufficient.[231]

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."[232] For example, 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.[233] While sensitive to the officers' safety, the court found deference to the officers' decision was not warranted since the "[d]efendant had obeyed their directions on at least two separate

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[228] *Id.* at 21 (emphasis added).
[229] *Id.* at 17.
[230] *Id.* at 27.
[231] *Id.*
[232] *Florida v. Royer*, 460 U.S. 491, 504 (1983) (plurality opinion with Brennan, J., concurring).
[233] *United States v. Soza*, 686 F. App'x 564, 569 (10th Cir. 2017).

occasions by that point and had made no threatening gestures or suspicious movements[.]"[234]

Quite simply here, there was no need for Agent Perry to handcuff Appellant because his observations did not give reasonable grounds to believe Appellant was armed. Agent Perry had just spoken with Appellant in his room, where he was cooperative.[235] Without a reasonable belief that Appellant was armed, Agent Perry instructed Appellant to get up against a wall and to spread his legs before frisking him.[236] Even after the frisk proved Appellant to be unarmed, Agent Perry handcuffed Appellant.[237] Confirmation that Appellant was not armed before being handcuffed undercuts Agent Perry's claim that his safety justified the initial seizure.

Agent Perry's alternative justification further undercuts his self-serving testimony. He admitted the "more important[]" reason he handcuffed Appellant was that he "just didn't like this behavior at that point . . . ." This justification is the "inchoate and unparticularized suspicion or 'hunch,'" *Terry* warned against and is far from "*specific and reasonable* inferences . . . ."[238]

Agent Perry's initial arrest violated Appellant's Fourth Amendment right against unlawful seizure, and his conduct—at least—was "unnecessary and

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[234] *Id.* at 569-70.
[235] J.A. at 86-87.
[236] J.A. at 708.
[237] J.A. at 710.
[238] *Terry*, 392 U.S. at 27 (emphasis added).

unwise."[239] The clear constitutional violation from the outset of the arrest compounds Agent Perry's overall flagrant conduct.

3. *United States v. Khamsouk* further shows that *Brown's* third prong favors Appellant.

In *Khamsouk*, a three-judge majority anchored its holding on *Brown's* third prong and represents one of the few holdings, if not the only the only holding, where this Court found the prong favored the government.[240] Although Khamsouk signed a consent-to-search form after an illegal arrest, this Court emphasized the arresting agent's good faith concern and belief.[241] First, this Court reasoned that the basis for the original illegality was a good faith concern of officer safety: the agent's concern was not "misplaced."[242] Second, this Court gave credence to the agent's honest belief that a Department of Defense form was the functional equivalent to an arrest warrant.[243] Though concluding that the agent's belief—as well as the belief of the military judge and lower court—was misguided, this Court found the agent's reliance on the form still demonstrated a lack of flagrancy or purposefulness.[244]

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[239] *Conklin*, 63 at 339.
[240] *Khamsouk*, 57 M.J. at 293 ("While the first two factors are [relevant] to the analysis, ultimately, in this case a decision to exclude the evidence derived from appellant's consent comes down to a resolution of the issue on the third *Brown* factor.").
[241] *Id*. at 292-93.
[242] *Id.*
[243] *Id.* at 293.
[244] *Id*.

Consequently, Khamsouk's consent was not causally connected and attenuated the taint from the prior illegality.[245]

a. Contrary to *Khamsouk*, the purpose of prolonged illegal arrest was not officer safety.

The lower court assumed—without any supporting facts—that officer safety motivated the illegal prolonged arrest and "that the continued, albeit brief detention was for [no] improper purposes."[246] The lower court reasoned that the safety concerns arose from Appellant's alleged hesitancy to remove his hands from his pockets.[247] However, the court noted that the agents had initially asked Appellant "to remove his hands from his pockets" during their first encounter, but made no effort to handcuff or apprehend Appellant then. On this earlier occasion, officer safety must not have been paramount as the agents did not handcuff or apprehend Appellant. "Officer safety" only became a concern after Agent Perry locked Appellant into his alibi, smelled his fuel-laden shoes, and devised a plan to further his investigation.

But regardless of the palpable skepticism of this claim, if the concern was genuinely officer safety, such a concern subsided after Agent Perry completed the stop-and-frisk. Even assuming Agent Perry conducted a legitimate *Terry* stop, there

[245] *Id.* (3-2 Decision).
[246] *Metz III*, slip op. at 26.
[247] *Id.* at 22.

is zero evidence the prolonged illegal arrest was motivated by officer safety. To believe such a motivation requires not only a belief of a legitimate fear of safety even after frisking Appellant, but also believing the fear had subsided when Appellant was back in his room, potentially in proximity to weapons, and no longer handcuffed.

Officer safety did not motivate the prolonged illegal arrest. As evident by Agent Perry's purpose in conducting the initial—unlawful—stop-and-frisk, his purpose remained evidence collection, and his mission became securing authorization to search Appellant's room. Contrary to the agents in *Khamsouk*, Agent Perry's motivation for the prolonged illegal arrest was not officer safety and the record is devoid of facts to find otherwise.

b. Contrary to *Khamsouk*, facts here do not support a good faith belief that the arrest was lawful.

Agent Perry's illegal arrest was not mitigated by an honest belief that the arrest was lawful. While the agent in *Khamsouk* honestly believed the arrest was justified, Agent Perry testified to committing a clear violation of Appellant's Fourth Amendment rights.[248] He admitted to keeping Appellant handcuffed knowing he lacked probable cause: "I definitely had some indicators that I was moving down the right direction, but as having enough to justify probable cause that [Appellant] was

[248] J.A. at 127.

indeed my arsonist in this case, no, I wasn't there yet."[249] Then Agent Perry asked the arrested Appellant "if he would be able [and] willing to go up and discuss things" in his room.[250] Sure enough, after Agent Perry escorted Appellant—handcuffed—back to the room, Agent Thompson gave Appellant a consent-to-search form.[251]

As an additional indictment of the agents' lack of good faith, the agents concealed the illegal arrest. No mention of the problematic fact made it into their investigative action.[252] Had Appellant not informed his counsel of the illegal arrest, Agent Perry's action may have gone unpoliced.

These facts, at a minimum, demonstrate Agent Perry's "unnecessary or unwise" conduct.[253] His actions were certainly "somewhat sloppy," objectively unreasonable and "one type of law enforcement activity we would certainly hope to deter."`[254]

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[249] J.A. at 127.
[250] J.A. at 126.
[251] J.A. at 126.
[252] J.A. at 667-71. Agent Thompson failed to disclose the arrest until asked during her cross-examination during the suppression hearing. J.A. at 88.
[253] *Conklin*, 63 M.J. at 339.
[254] *United States v. Darnall*, 76 M.J. 326, 332 (C.A.A.F. 2017).

4. The prolonged illegal arrest continued after the search.

"A seizure of the person within the meaning of the Fourth [Amendment] occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[255]

In *Kaupp v. Texas*, the Supreme Court suppressed a post-*Miranda* statement following an unlawful arrest.[256] Kaupp agreed to go to a police station after officers woke him up and told him "we need to go and talk."[257] He was then placed in handcuffs and transported to the police station.[258] But neither Kaupp's acquiescence nor his voluntary waiver of his *Miranda* rights changed the nature of his detention.[259] his statements after the illegal arrest warranted suppression.[260] The Court found that the officers offered the suspect "no choice" and his agreement to go to the station was "a mere submission to a claim of lawful authority."[261] The Court concluded, "It cannot seriously be suggested that when the detectives began to question Kaupp, a

[255] *Kaupp*, 538 U.S. at 629 (citing *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991) (internal quotations omitted).
[256] *Id.*
[257] *Id.* at 628.
[258] *Id.* at 631.
[259] *Id.*
[260] *Id.* at 632-33.
[261] *Id.* at 631.

reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed."[262]

The same is true of a junior Marine complying with NCIS agents' request. Agent Thompson stated: "*I told* [Appellant] that we'd like to talk to him and in order to do so, we had to take him down to our office. I informed him that, for safety concerns, before we transport him, he has to be placed in handcuffs."[263] Without a vehicle, thirty minutes away from his barracks, Appellant sat in the interrogation room without "a matter of choice."[264] Just as in *Kaupp*, Appellant's purported acquiescence to go to the NCIS office and his subsequent waiver of his uncleansed Article 31(b) rights failed to change the nature of his illegal arrest.

5. The record remains devoid of facts supporting the lower court's finding that *Brown's* third prong "weigh[s] in favor of the Government."[265]

This Court alluded to the need for more fact-finding.[266] During oral arguments, this Court highlighted the lack of facts showing why Agent Perry kept Appellant handcuffed prior to searching the barracks room and how the evidence derived after the constitutional violation impacted the investigation.[267] As this Court previously noted, such facts are relevant to the *Brown* analysis regarding the

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[262] *Id.* at 632.
[263] J.A. at 79 (emphasis added).
[264] *Kaupp*, 538 U.S. at 632.
[265] *Metz III*, slip op. at 26.
[266] *United States v. Metz*, 21-0059/MC, Oral Argument, at 8:01-8:31.
[267] *Id.*

"purpose" of the apprehension and the effect of the constitutional violation on the investigation.[268]

The lower court's finding that *Brown's* third prong "weigh[s] in favor of the Government" is largely based on conjecture.[269] It failed to critically consider Agent Perry's purpose. Rather, when objectively and critically evaluating the facts supported by the record, his purpose was "investigatory."[270] His intent was to search Appellant's room. In the words of *Brown*, Agent Perry's purpose was to bring Appellant back to the room "in hope that something might turn up."[271] Then Agent Perry took Appellant to his office and exploited the fruits of the search. As *Brown* instructs, this type of illegal seizure triggers the exclusionary rule because it is precisely the type of police conduct that the Fourth Amendment is designed to deter—arrests that have "a quality of purposefulness" and those that are made "for investigation or for questioning."[272] Agent Perry's conduct warrants suppression of the evidence derived from the illegality.

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[268] *See Darnall*, 76 M.J. at 329.
[269] *Metz III*, slip op. at 26.
[270] *Brown*, 422 U.S. at 605.
[271] *Id*. Even the lower court found the agents "were clearly interested in searching Appellant's room prior to handcuffing Appellant." *Metz III*, slip op. at 26.
[272] *Brown*, 422 U.S. at 605.

B. *Brown's* first and second prongs favor Appellant. The fruits derived from the searches of his room and his interrogation warranted suppression because they were causally connected to the illegal apprehensions.

Where discovery of evidence is a direct, foreseeable consequence of the law enforcement conduct at issue, excluding the evidence will deter law enforcement from acting similarly in the future. In *Brown*, the Supreme Court explained that *Miranda* waivers alone do not "attenuate the taint of an unconstitutional arrest."[273] This Court has repeatedly held that the dispositive, preferential treatment of consents and waivers as intervening factors is inappropriate and alone insufficient to attenuate the taint of a constitutional violation.[274] Empowering consents and waivers to purge the taint of an unlawful apprehension "substantially dilute[s]" the effect of the exclusionary rule.[275]

Once incriminating evidence is seized, or incriminating statements are given, the government has a "heavy burden" to prove a subsequent consent was "sufficiently an act of free will to purge the primary taint of the previous unlawful

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[273] *Id.*

[274] *See, e.g.*, *United States v. Black*, 82 M.J. 447, 450 (C.A.A.F. 2022); *Darnall*, 76 M.J. at 333; *Khamsouk*, 57 M.J. at 292.

[275] *See Darnall*, 76 M.J. at 331 n.5 (citing *Brown*, 422 U.S. at 602) ("In *Brown*, the Supreme Court found that the warnings in accordance with *Miranda v. Arizona* [citation omitted], by themselves did not automatically purge the taint of an illegal arrest, stating that 'if *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted.'").

apprehension."[276] The heavy burden requires clear and convincing evidence.[277] Based on the lack of intervening circumstances and proximate timing between the illegal arrest, the searches, and the interrogation, the Government is unable to meet its burden here.

1. Fruits of the first search warrant suppression because the consent was immediately tied to the unlawful seizure.

United States v. Palomino-Chavez expounds the point.[278] There, police approached Palomino-Chavez lying in a backyard hammock.[279] An officer "raised his badge, and motioned [Palomino-Chavez] over" and conducted "a quick pat-down" of him.[280] The officers then handed him a form seeking his consent to search the house, but also explained that he could refuse the search.[281] Palomino-Chavez was not restrained.[282] He ultimately signed the form, and the police found incriminating evidence.[283]

On appeal, the Seventh Circuit found Palomino-Chavez was "seized" because a reasonable person in his position would not have felt free to leave when he signed

[276] *Khamsouk*, 57 M.J. at 302 (Gierke, J., dissenting) (citing *Brown*, 422 U.S. at 602).
[277] *Id.* at 303 (Efron, J., dissenting) (citing Mil. R. Evid. 314(e)(5)).
[278] *United States v. Palomino-Chavez*, 761 F. App'x 637, 639 (7th Cir. 2019).
[279] *Id.* at 640.
[280] *Id.*
[281] *Id.* 640-41.
[282] *Id.*
[283] *Id.* at 641.

the form.[284] The court found that no officer informed Palomino-Chavez that he was "free to leave" and found:

> a single episode leading up to . . . his consent, beginning with the police ordering him to approach them on the driveway and ending with his signature on the consent form. Nothing 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.[285]

The court noted that the officers discussed the form with Palomino-Chavez. But it found this was "not independent" from the consent. Rather, it "was the means through which the officers obtained it."[286]

Here, the same applies. Appellant was asked to consent to a search of his room while handcuffed.[287] Consequently, Appellant was not "free to leave." Only after he agreed to the search was he released from the handcuffs.[288] The subsequent search authorization only served as "the means" through which Agent Perry memorialized Appellant's consent.[289] Nothing between the illegal arrest and the search amounted to intervening circumstances, and the illegal arrest triggered "a single episode" leading to Appellant's consent.[290]

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[284] *Id.* at 642.
[285] *Id*. at 644.
[286] *Id.*
[287] J.A. at 709.
[288] J.A. at 709.
[289] *Palomino-Chavez*, 761 F. App'x at 639.
[290] *Id.*

2. The interrogation also warranted suppression because Appellant remained in continuous custody with the same agents, and during the interrogation they referenced the evidence seized.

"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."[291]

United States v. Ceballos illustrates this salient point.[292] There, officers spoke with Ceballos and told him they wanted to speak with him at the police station. He was not handcuffed, but the officers drove Ceballos to the police station.[293] During the drive, they questioned him about a suspected crime, and Ceballos consented to a search of house.[294] The officers found incriminating evidence during the search, and referenced the evidence during the interrogation.[295] Even though Ceballos consented to a search and was provided *Miranda* warnings, the Second Circuit suppressed both the physical evidence and the statements, reasoning "the consents to search were

[291] 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE 403 § 11.4(c) (5th ed. 2012) (citation omitted).
[292] *United States v. Ceballos*, 812 F.2d 42 (2d Cir. 1987).
[293] *Id.* at 45.
[294] *Id.*
[295] *Id.* at 45-46.

given within a few minutes of the illegal arrest" and the interrogation began immediately after.[296]

The same rationale applies to Appellant's interrogation. The interrogation began immediately after the search, after Appellant was again illegally arrested and brought to the NCIS office.[297] The same agents that conducted the search conducted the interrogation and referenced fruits of the tainted search to elicit responses from Appellant.[298] In particular, Agent Thompson referenced the seized clothing throughout the interrogation, prompting incriminating responses.[299] She continually pressed Appellant 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."[300]

Appellant's Article 31(b) waiver did not "insulate from the exclusionary rule."[301] Otherwise, Agent Perry would be cloaked with the authority to conduct illegal searches "in the hope of obtaining confessions . . . even though the actual evidence seized might later be found inadmissible."[302] To admit Appellant's

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[296] *Id.* at 48-50.
[297] J.A. at 79.
[298] *See generally*, J.A. at 597.
[299] *See, e.g.*, J.A. at 597 at 7:58:22-7:58:55 ("Like, if I were you, I'd peg me for it too.").
[300] J.A. at 597 at 7:40:10.
[301] LAFAVE, *supra* § 11.4(c).
[302] *Id.*

interrogation "would allow law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth."[303] Thus, the agents' use of tainted evidence to elicit responses further underscores why the Government cannot disprove that the interrogation was causally connected to the illegal arrest.

3. No sufficient intervening circumstances attenuated the unlawful arrest from the second consent to search the next morning. The evidence derived warranted suppression.

"[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 like closing the barn door after the horse is out."[304]

The same logic applies here. Appellant was ordered and escorted back to NCIS the next morning.[305] Based on his observation of the search and his interrogation, he knew incriminating evidence was seized from his room. And the second consent form did not explain that the first search was defective in any way.

In *United States v. Darnall*, this Court decided whether numerous consent searches and Article 31(b) rights waivers were sufficient intervening circumstances to break the causal connection from an illegal arrest.[306] Crime Investigations

[303] *Dunaway*, 442 U.S. at 210 (citation and internal quotations omitted).
[304] *United States v. Jones*, 286 F.3d 1146, 1152 (9th Cir. 2002) (citation omitted).
[305] J.A. at 103.
[306] *Darnall*, 76 M.J. at 328.

Division (CID) agents apprehended Darnall without probable cause, but while suspecting him of an offense.[307] After the apprehension, the agents escorted Darnall to the CID office where he waived his Article 31(b) rights and consented to a search of his barracks room and car.[308] The next day, the appellant returned to the CID office and was re-interviewed.[309] This Court found the two rides to the CID office, a night of sleep, Article 31(b) waivers, and consents to search did not cure the constitutional violation: "We do not find any 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."[310] This Court further explained:

> Though [Darnall] 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.[311]

Consequently, the evidence derived after the illegal arrest was inadmissible.[312]

Like the agents in *Darnall*, Agent Perry arrested Appellant without probable cause.[313] Both Darnall and Appellant, after the arrest, the agents executed a search. The agents also brought Appellant and Darnall to their station where they waived

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[307] *Id.*
[308] *Id.*
[309] *Id.* at 329.
[310] *Id.* at 331.
[311] *Id.*
[312] *Id.* at 333.
[313] *Metz III*, slip op. at 23.

their Article 31(b) rights before a formal interrogation. Just as Darnall returned to CID for a second interrogation the following day, Appellant was ordered back to the NCIS office, and his command escorted him there the following morning. Indeed, Agent Perry considered the second day as a continuation of the first as he explained that he brought Appellant back "to continue to gather more facts in our investigation."[314]

Considering the lack of any notice of the previous illegalities, the second consent to search was "an extension of the first rather than a fresh start."[315] The averred intervening circumstances proved insufficient in *Darnall*. Similarly here, the Government is unable to prove the intervening circumstances, or lack thereof, cured the constitutional violation resulting from law enforcement's illegal arrest here.

C. The civilian defense counsel's failure to move to suppress the evidence derived from Agent Perry's illegal arrest prejudiced Appellant.

The test for ineffective assistance of counsel based on the failure to file a motion to suppress follows *Strickland v. Washington*.[316] An appellant must demonstrate "that his trial counsel's performance was deficient and that the deficiency deprived him of a fair trial."[317] "'[W]hen a claim of ineffective assistance

[314] J.A. at 711.
[315] *Darnall*, 76 M.J. at 331
[316] *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).
[317] *Id.* (citation omitted).

of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious.'"[318] 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.[319]

1. The civilian defense counsel's performance was deficient.

In a post-trial declaration, the civilian defense counsel admits to not having a tactical or strategic reason when failing to move for suppression of the evidence based on an illegal arrest.[320] As he explained, he simply did not "consider[] [the Fourth Amendment] a valid basis to rely upon."[321]

2. There is a reasonable probability that the motion would have been successful.

As discussed above in Sections II.A-B, there is a reasonable probability a motion to suppress the fruits of the agents' illegal searches would have been meritorious.

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

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[318] *Jameson*, 65 M.J. at 163-64 (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).
[319] *Kimmelman v. Morrison*, 477 U.S. 365, 391 (1986).
[320] J.A. at 730.
[321] J.A. at 730.

The Government's case was largely derived from the evidence seized in Appellant's room and his statements during the interrogation. As the agents admitted, they suspected that Appellant committed the crime, but they did not have enough evidence to secure a search authorization. The landscape of the investigation changed when the agents seized the items in his room and interrogated him.

Even if this Court found that only the fruits from the first day warranted suppression, there would be a reasonable probability that the members would have harbored a reasonable doubt. The evidence admitted into evidence from the first search included: (1) Appellant's pair of shoes and clothes that smelled of gasoline; (2) a broken cellphone; (3) a lighter; and (4) testimony that a garbage can had been recently emptied.[322]

More importantly, the interrogation's damaging nature cannot be overstated. Although he ultimately 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."[323] The interrogation provided the Government's theory of motive. Appellant repeatedly described himself as a

[322] J.A. at 206, 212, 581-593.
[323] J.A. at 597 at 7:58:20.

disgruntled Marine.[324] He admitted to hating the Marine Corps and recently being disciplined.[325]

Perhaps most critically, the interrogation justified a false exculpatory statement instruction, which allowed the members to find guilt based on Appellant's contradicted statements alone.[326] And in fact, the Government called witnesses to contradict Appellant's factual claims in his interrogation.[327] In closing argument, trial counsel argued Appellant's "deception" was key to his guilt, referring explicitly to Appellant's statements in the interrogation.[328]

In short, while the physical evidence was probative, it was not conclusive: Appellant worked around fuels in the shop regularly. It is certainly reasonable for fuel to get on his clothes. The interrogation is what sealed the deal for the Government by providing direct evidence of Appellant's consciousness of guilt as well as his motive. Without the interrogation, there is a reasonable probability the members would have harbored a reasonable doubt.

[324] J.A. at 597 at 7:58:22-7:58:55.
[325] J.A. at 597 at 46:00, 49:10.
[326] J.A. at 536-37.
[327] J.A. at 507-511.
[328]J.A. at 538, 540-42, 544, 549-50, 572, 575-76.

CONCLUSION

Appellant was a suspect when the agents first asked him questions, and the military judge erred in ruling otherwise. Additionally, Appellant's civilian defense counsel was ineffective for failing to move to suppress evidence derived from the illegal arrest. The errors were prejudicial to Appellant as the Government admitted his statements, the military judge provided a false exculpatory statement instruction, and the Government argued that Appellant's "deception" proved his guilt.

Appellant respectfully asks this Court to set aside the findings and sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 16, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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