

**IN THE UNITED STATES COURT APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	APPELLANT'S ANSWER TO
Appellee/)	APPELLEE'S PETITION FOR
Petitioner)	RECONSIDERATION
v.)	
)	Crim. App. No. 200800393
Lawrence G. Hutchins III,)	
Appellant/)	USCA Dkt No. 12-0408/MC
Respondent)	
)	

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

COMES NOW Appellant, pursuant to Rule 31 of this Court's Rules of Practice and Procedure, and opposes the Petition for Reconsideration. Appellant respectfully asks this Court to deny Petitioner's request.

A petition for reconsideration is discretionary. [T]he petition shall state with particularity the points of law or fact which, in the opinion of the party seeking reconsideration, the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the party desires to present. Petitions are not to contain merely a restatement of arguments already presented. "[T]o be successful on a petition for reconsideration, the petitioner must demonstrate that the Court misconstrued or overlooked an issue of law or fact."

In re Buber, 62 M.J. 227, 228 (C.A.A.F. 2005) (citations omitted). Relatedly, Rule 32 states:

The petition shall state with particularity the points of law or fact which, in the opinion of the party seeking reconsideration, the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the party desires to

present. **Petitions are not to contain merely a restatement of arguments already presented.**

C.A.A.F. R. 32. (emphasis in the original). That is what the Government did here.

The Government's Petition for Reconsideration, in direct contradiction to *Buber* and Rule 32, simply restates arguments already presented and rejected by this Court. Indeed, Petitioner fails to even make a *prima facie* claim that it is offering new argument, and never specifically alleges that this Court "misapprehended" or "overlooked" facts or law. C.A.A.F. R. 32. This Court should therefore summarily dismiss the petition for non-compliance with Rules 31 and 32.

1. Petitioner's First Argument: Whether the majority opinion should have assessed if the NCIS agent's communication with the Appellant was an interrogation, and found that it was in fact not an interrogation.

This argument was raised by the Government in its prior brief to the Court. (See Appellee's Answer Br. at 37.) And Judge Ryan's concurring opinion explicitly assessed this issue. *United States v. Hutchins*, -- M.J. ---, 2013 CAAF LEXIS 642, at *18-24 (2013) (Ryan J., concurring). Chief Judge Baker also assessed it. *Id.* at *31-53 (Baker, C.J., dissenting). Accordingly, as this argument was already presented by the Government and does not differ in any appreciable way from the analysis in either Judge Ryan's concurrence or Chief Judge

Baker's dissent, it fails to articulate a proper basis for reconsideration.¹

2. Petitioner's Second Argument: Whether the majority opinion erred in assessing whether NCIS or the Appellant initiated a communication related to the investigation under *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

The Government next argues that the majority opinion "breaks from decades of precedent by focusing its inquiry on whether 'the Government or Hutchins . . . reinitiated further communications,' rather than on whether the Government's communication to Hutchins on May 18, 2006, constituted the functional equivalent of an interrogation." (Appellee's Pet. at 2 (citations omitted).) But this sentiment should be contrasted with the Government's Answer brief, where the Government stated: "The ultimate issue here boils down to who initiated the conversation about making another statement." (Appellee's Answer Br. at 35.)

Setting aside the Government's cognitive dissonance, its Petition does not offer any new arguments which differ from those already referenced in the majority opinion and extensively discussed in the concurring and dissenting opinions. Hence,

¹ As discussed in more detail *infra* and in Appellant's briefs, Appellant agrees with the majority that Special Agent Connelly's actions were an improper communication under *Oregon vs. Bradshaw*. Further, Appellant also agrees that Special Agent Connelly's actions and statements qualify as an interrogation under *Rhode Island vs. Innis*, 446 U.S. 291 (1980).

this argument fails to articulate a proper basis for reconsideration.²

Conclusion

The Petition for Reconsideration fails to comply with the standards set forth in this Court's Rules and applicable case law. It should therefore be summarily dismissed.

² That said, a simple logical analysis shows the flaw in the Government's argument on the merits. To wit, the Government concedes that, under *Edwards v. Arizona*, a re-interrogation is only permissible if a custodial suspect himself first initiates communications or exchanges with the police, related directly or indirectly to the investigation. Thus, broken down into its essential pieces, for a re-interrogation to pass constitutional muster, the Government must satisfy three prerequisites:

- (1) suspect initiates
- (2) communications or exchanges with the police
- (3) related directly or indirectly to the investigation.

Hence, if a communication is not initiated by a suspect, but is instead initiated by the police, it does not meet the first prerequisite. As a result, it falls outside the avenue for re-interrogation offered by *Edwards*. Although the Government seeks to maintain focus on whether police action is an interrogation, the question of interrogation does not even arise unless the Government can first show that a communication was initiated by the suspect.

Here, there is no dispute that the communication which led to the waiver of rights began with NCIS Special Agent Connelly unexpectedly walking through Sgt Hutchins' door at 2230 and talking to him about the ongoing investigation (by discussing the search). To hold under these facts that Sgt Hutchins "initiated" the underlying communication with NCIS defies the factual record. As held by the majority, Sgt Hutchins did not initiate the communication; the communication was initiated by NCIS **seven days** after he invoked his right to counsel and was "essentially [kept in] solitary confinement in a trailer" *Hutchins*, 2013 CCA LEXIS 624, at *11-12 n.5. Accordingly, the interrogation and subsequent confession violated Sgt Hutchins' Fifth Amendment rights.

WHEREFORE, the Appellant respectfully requests that this Court deny the Petition for Reconsideration.

/S/

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Major David N. Roberts, U.S. Marine Corps, Appellate Government Counsel, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 9, 2013.

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