3 July 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Technical Sergeant (E-6) SAMUEL A. WICKS, USAF, *Appellant.*	) ANSWER TO THE SUPPLEMENT) TO PETITION FOR GRANT) OF REVIEW))) USCA Dkt. No. 13-6004/AF)) Crim. App. No. 2013-08

ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

TYSON D. KINDNESS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4806
Court Bar No. 33631

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

3 July 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	ANSWER TO THE SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
Technical Sergeant (E-6) SAMUEL A. WICKS, USAF, *Appellant.*	)	USCA Dkt. No. 13-6004/AF Crim. App. No. 2013-08

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING LAW ENFORCEMENT'S REPEATED WARRANTLESS SEARCHES OF APPELLANT'S IPHONE DID NOT VIOLATE THE FOURTH AMENDMENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 62, UCMJ. This Court has discretionary jurisdiction to review this case under Article 67(a)(3), UCMJ, "upon petition of the accused and on good cause shown." *See also* United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

TSgt Roberts and Appellant were military training instructors (MTI) at Joint Base San Antonio, Texas. TSgt Roberts and Appellant engaged in a causal dating

relationship from May through November 2010. (R. at 65, 96.) In November 2010, TSgt Roberts viewed "disturbing text messages" on Appellant's cell phone while he was sleeping. (R. at 65.) One text message was from a girl named ["D.W.,"] which discussed being assigned to Appellant's flight, observing him in his flight office, and discussing the possibility of seeing each other. (R. at 66.) After reviewing the messages, TSgt Roberts revealed that she felt the conversations were inappropriate, and she suspected Appellant was engaging in personal relationships with trainees. (Id.)

In December 2010, TSgt Roberts and Appellant ended their personal relationship. (Id.) In May 2011, TSgt Roberts stole Appellant's cell phone, an iPhone, while it was left unattended in the "C.G." area at work because she felt he was being inappropriate. (R. at 67, 96.) TSgt Roberts was confronted by her supervisor, MSgt Dostart, and Appellant to inquire whether she knew the whereabouts of the missing cell phone. (R. at 67, 68.) TSgt Roberts denied possessing Appellant's cell phone or having knowledge of its whereabouts.

At home, TSgt Roberts viewed the text messages from Appellant's cell phone. (R. at 69; *see also* R. at 97 (confirming with the military judge that she only viewed the text messages)). TSgt Roberts testified that she "saw text messages to trainees that were previously assigned to our

squadron," and "a video of [Appellant] masturbating that he had sent to one of the former trainees in our squadron," which was included in the text messages. (R. at 69.) TSgt Roberts stated that she knew the communications were made with trainees because she recognized their faces from photos contained in the text messages. (Id.) TSgt Roberts specifically observed the names ["D.W. and B."] contained in the text messages. (Id.)
TSgt Roberts confirmed that she believed the female who received the masturbation video was a trainee because of the context of the text messages, which included a discussion that Appellant was an MTI. (R. at 84.) When questioned by the military judge, TSgt Roberts established that she believed the females involved in the text conversations with Appellant were trainees because "their faces looked real familiar." (R. at 99.) TSgt Roberts confirmed, "I was almost positive they were in our squadron." (R. at 100.)

Approximately three weeks after taking Appellant's cell phone and after returning from leave, TSgt Roberts confronted Appellant in the training office at work about the text messages she had viewed. (R. at 69, 102, 201, 203.) TSgt Roberts asked Appellant if he had sent the text messages, inquired why he had sent the masturbation video, and asked him what his parents and the leadership would think about the text messages. (R. at 70.) TSgt Roberts advised Appellant that she believed his behavior

was inappropriate. (Id.) TSgt Roberts stated that she specifically referenced the names ["D. W."] and ["B."] when confronting Appellant about the text messages. (R. at 272.) In response to TSgt Roberts accusations, Appellant confessed, "yes, I did it, so what. This is me. This is who I am. Get out of my face. I don't have time for this shit." (R. at 70.) TSgt Roberts did not reveal to Appellant that she had stolen his cell phone, and Appellant did not ask. (R. at 202.)

TSgt Roberts confirmed that when she took Appellant's cell phone she was acting in her private capacity because she was angry at Appellant and that she was not acting in a governmental capacity as part of a law enforcement investigation. (R. at 74.)

On 10 January 2012, approximately seven-to-eight months after taking Appellant's cell phone and in response to a general inquiry from command whether anyone had information regarding MTI misconduct, Detective Arlene Rico from Security Forces interviewed TSgt Roberts after she had disclosed that she had information regarding MTIs who were involved in sexual relationships with trainees. (R. at 71, 101, 122.) During the interview, TSgt Roberts stated that she had evidence that could prove Appellant had engaged in inappropriate relationships with trainees, but she did not provide the cell phone; she only provided a verbal description of the contents of the text

messages on the phone. (R. at 71-72.) During the oral interview, TSgt Roberts revealed to Detective Rico that she had personally observed text messages between Appellant and trainees. (Id.) Specifically, TSgt Roberts stated that she remembered the names ["J., D.W., and B."] from the text messages. (R. at 72, 122.) TSgt Roberts stated that she believed the females from the text messages were trainees from the context of the messages and because she recognized their pictures. (R. at 139, 251.) TSgt Roberts also advised Detective Rico that she had confronted Appellant about the text messages and that he had admitted to having the information on his phone. (R. at 146.) Prior to this interview, Appellant was not suspected of any misconduct.

TSgt Roberts told Detective Rico that she still had access to the text messages because she had downloaded the data from Appellant's cell phone to her iTunes account. (R. at 123.) The next day, TSgt Roberts provided a SIM card to Detective Rico, which purportedly contained the evidence that she had discussed the previous day. (R. at 123.) Detective Rico sent the SIM card to a civilian law enforcement agency to have it analyzed and quickly learned that no data or information was contained on the card. (R. at 253.)

Meanwhile, a few days after the first interview with TSgt Roberts and before she had received the cell phone,

Detective Rico conducted her own investigative step by obtaining the flight roster for ["B."] (R. at 252, 257.) Detective Rico requested flight rosters for everyone named ["B."] in the 331st Training Squadron within the last five years. (R. at 257-58.) Detective Rico explained that the flight roster would have contained the individual's name and social security number, which would have allowed her to locate potential witnesses even without the cell phone. (R. at 252-53, 257-58.)

A few days later, on 17 January 2012, TSgt Roberts returned to provide Detective Rico an iPhone that she said was borrowed from her friend, and that she had successfully transferred the Appellant's data onto the phone. (R. at 124.) Despite TSgt Roberts' statement that the phone was borrowed from a friend, the cell phone, in fact, was Appellant's cell phone. On 17 January 2012, Detective Rico did not know that the iPhone was Appellant's cell phone. (R. at 135, 254.)

After TSgt Roberts provided the cell phone, Detective Rico scrolled through the text messages. (R. at 267-68.) The record demonstrates that she only viewed the text messages before sending the phone off for analysis. (R. at 147, 267-68.) Detective Rico then provided the cell phone to Detective Mike Allen from the Bexar County Sherriff's Office to analyze the contents of the phone. (R. at 124.) Detective Rico did not secure search authorization to view the text messages herself or

to have the phone analyzed by Detective Allen. (R. at 131.) She did, however, coordinate with the legal office and was advised that it was important to get the information from the phone. (R. at 131, 134.) Detective Allen analyzed the contents of the cell phone and prepared a report for Detective Rico. (R. at 125.) Sometime after this first analysis, the cell phone was sent to a civilian computer forensics firm, Global Compusearch. (Id.) No search authorization was obtained before sending the cell phone to Global Compusearch. Even though search authorization was never obtained, Detective Rico testified that she believed probable cause existed to obtain search authorization for Appellant's cell phone on 10 January 2012. (R. at 152.)

After Detective Allen prepared the report from his analysis, Detective Rico started to suspect that the iPhone provided by TSgt Roberts was not borrowed from a friend, but was, in fact, Appellant's cell phone. (R. at 136.) Around November 2012, TSgt Roberts admitted that the cell phone she had provided was actually Appellant's cell phone. (R. at 126.)

After Detective Rico received the evidence from Appellant's cell phone from Detective Allen, she interviewed SrA B. in Monterey, California. (R. at 139.) During the interview, SrA B. confirmed that she communicated with Appellant over the telephone and through text messaging, but they had never met

after she had left basic training. (Id.) Detective Rico had placed the text messages between SrA B. and Appellant on the table during the interview, but she did not show them to SrA B. (R. at 140.) SrA B. was very forthcoming about her relationship with Appellant without having to show the text messages to her. (Id.) SrA B. explained that Appellant was her training instructor in BMT, which ended in February 2011, and then she went to technical training. (R. at 113, 114, 116.) She also stated that Appellant had previously contacted her and said that his co-worker had stolen his phone, which was going to cause an investigation to be initiated. (R. at 114.) Appellant instructed SrA B. not to tell anyone that they were in contact after basic training. (Id.)

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY DECIDED THAT LAW ENFORCEMENT'S WARRANTLESS SEARCH OF APPELLANT'S IPHONE DID NOT VIOLATE THE FOURTH AMENDMENT.

Standard of Review

In ruling on an appeal under Article 62, UCMJ, this Court conducts a de novo review of matters of law. Article 62(b), UCMJ; R.C.M. 908(c)(2); United States v. Cossio, 64 M.J. 254, 256 (C.A.A.F. 2007). An appellate court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. United States v. Freeman, 65 M.J. 451, 453

(C.A.A.F. 2008) (citing United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995.))

Law and Analysis

1. Appellant has failed to establish good cause for why this Honorable Court should review AFCCA's decision on interlocutory appeal.

AFCCA properly applied the law as articulated by the Supreme Court of the United States in United States v. Jacobsen, 466 U.S. 109 (1984) and Walter v. United States, 447 U.S. 649 (1980), when holding that the military judge abused his discretion by excluding evidence from the government's search of Appellant's cell phone and all derivative evidence therefrom. The decision demonstrates that AFCCA properly relied on and applied Supreme Court precedent when reaching its decision. This is evinced by the Court's recognition that "When, as here, law enforcement personnel take possession of evidence from a third party following a private search, the Government's subsequent actions are examined and tested under the Fourth Amendment." United States v. Wicks, Misc. Dkt. No. 2013-08, slip op. at 6 (A.F. Ct. Crim. App. 24 June 2013) (unpub. op.) citing Jacobsen, 466 U.S. at 115 (finding "additional invasions of [the owner's] privacy . . . must be tested by the degree to which they exceeded the scope of the private search"). Further demonstrating its reliance on Supreme Court precedence, AFCCA advised that "We read the Supreme Court precedent to be more

concerned with the scope of the private party's search and the corresponding frustration of the [appellant's] right to privacy rather than creating an uncompromising rule based only on examining the Government's success in precisely replicating the physical intrusion already perpetrated by the private party." Wicks, slip op. at 7 (unpub. op.).

Contrary to Appellant's claims, AFCCA did not solely rely on Fifth and Eleventh Circuit jurisprudence to reach its decision. Instead, the Court fully embraced the legal precepts established by the Supreme Court in Walter and Jacobsen, and used the Fifth Circuit's decision in United States v. Runyan, 275 F.3d 449 (5th Cir. 2001) and the Eleventh Circuit's decision in United States v. Simpson, 904 F.2d 607 (11th Cir. 1990) as persuasive authority to demonstrate the correct application of Supreme Court precedent. This Court has not previously reviewed the specific facts of Appellant's case in light of the Supreme Court's precedent in Walter and Jacobsen, but this Court has previously acknowledged Walter and Jacobsen are controlling in military law. *See* United States v. Reister, 44 M.J. 409, 415-16 (C.A.A.F. 1996); United States v. Portt, 21 M.J. 333, 334 (C.M.A. 1986) (finding that after an Airman opened a locker in his private capacity and summoned AFOSI after finding evidence of drug use, "subsequent opening of the locker was simply a continuation of that entry.").

Thus, AFCCA applied a rule of law consistent with Supreme Court guidance and the law generally recognized in the trial of criminal cases in the United States district courts. Furthermore, AFCCA's decision does not conflict with decisions of the Supreme Court, this Court, the Courts of Criminal Appeals, or another panel of the same Court of Criminal Appeals. Therefore, there is no need for this Court to intervene at this interlocutory stage of Appellant's prosecution.

2. AFCCA correctly applied the law when deciding that TSgt Robert's private search frustrated Appellant's expectation of privacy in Appellant's cell phone.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. The Supreme Court has consistently construed the protections provided by the Fourth Amendment as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." United States v. Jacobsen, 466 U.S. 109, 113 (1984) (citation omitted); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); *see also* United States v. Reister, 44 M.J. 409, 415-16 (C.A.A.F. 1996). Mil. R. Evid. 311(a) directs that the exclusionary rule for unlawful searches applies only to

searches made by someone "acting in a governmental capacity." Hence, the Fourth Amendment and the exclusionary rule are not implicated by a private search. Reister, 44 M.J. at 415. "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information . . . ." Jacobsen, 466 U.S. at 117. Additional invasions of privacy in the seized evidence by the government agent must be tested by the degree to which the scope of the private search was exceeded. Id. at 115; *see also* Walter v. United States, 447 U.S. 649 (1980); Reister, 44 M.J. at 415-16; United States v. Portt, 21 M.J. 333, 334 (C.M.A. 1986). In evaluating the degree in which the government exceeded the scope of the search, the Supreme Court has required a "**significant expansion**" of the private search before the government's actions will be characterized as a separate search. Jacobsen, 466 U.S. at 116 (explaining the Supreme Court's decision in Walter).

Although Runyan and Simpson are instructive, this case can be decided in favor of the government by solely applying Jacobsen and Walter. The military judge embraced an erroneous view of the law when he excluded evidence from Appellant's cell phone. The government's additional searches of Appellant's cell phone after TSgt Roberts had already frustrated his expectation of privacy did not result in a "significant expansion" of the private actor's search. AFCCA relied on Runyan and Simpson to

demonstrate this exact point. Even if law enforcement agents exceeded the scope of TSgt Robert's initial private search of the text messages to some degree, the additional searches resulted in a de minimus infringement upon Appellant's Fourth Amendment rights because law enforcement agents did not acquire any additional knowledge that they did not already obtain from the underlying private search and frustrated no expectation of privacy that had not already been frustrated by TSgt Roberts.

When viewing the text messages, TSgt Roberts observed "disturbing text messages" between Appellant and females that she had reason to believe were military trainees. (R. at 65.) She explicitly recalled viewing text messages between Appellant and females named ["D.W. and B.,"] (R. at 66, 69), as well as a video of Appellant masturbating, which was sent to another female that she recognized as a trainee. (Id.) After Appellant's expectation of privacy had been frustrated by TSgt Roberts, the government operated within its scope of authority when viewing the text messages between Appellant and SrA B. and SrA R. Therefore, AFCCA correctly concluded that the military judge abused his discretion by ruling that the government committed unlawful searches of Appellant's cell phone when either Detective Rico viewed the text messages, Detective Allen analyzed and consolidated the text messages, or Mr. Jelinek from Global Compusearch analyzed the text messages related to SrA B.

and SrA R. To the extent that TSgt Roberts had already viewed this information, the subsequent viewing of these text messages merely constituted a continuation of the original private search by TSgt Roberts. *See* Portt, 21 M.J. at 334; Reister, 44 M.J. at 415-16.

The military judge's decision rested heavily on Walter without acknowledging one key distinction. In Walter, the employees from L'Eggs Products, Inc. observed sexually suggestive drawings on the outside of the video boxes and viewed explicit descriptions of the contents of the videos, but they did not view the videos themselves. Walter, 447 U.S. at 651-52. Thus, although the law enforcement agents reasonably suspected the videos contained obscene material, the private actors had not frustrated the respondents' expectation of privacy in the contents of the videos. A clear line was drawn by the Supreme Court at the point where the law enforcement agents significantly exceeded the scope of the original private search by projecting the previously unviewed pornographic images.

Unlike Walter, TSgt Roberts actually viewed the text messages contained in Appellant's cell phone. In this respect, this case is aligned with Jacobsen because the government agents did not have to speculate as to the contents of the text messages because TSgt Roberts had already viewed them and provided a detailed description of their contents. This

scenario is more akin to the actions of the employees from the private freight carrier in Jacobsen who had actually opened and exposed the contents of the box, including the inner container, and provided a generic description of the white, powdery substance contained within. Jacobsen, 466 U.S. at 111-13.

Furthermore, the military judge clearly erred by reaching inconsistent conclusions of law regarding the legality of Detective Rico's actions when viewing the text messages. For example, in paragraph 21 of the supplemental ruling, the military judge concluded that on 17 January 2012 Detective Rico would have been able to provide details of her "own observations of the text messages on the phone turned over by TSgt Roberts." (App. Ex. XL at 4.) Naturally, this finding cannot be reached without concluding that Detective Rico's personal observations of the text messages did not exceed the scope of the original search. In paragraph 40, the military judge concluded that before the cell phone was turned over "for analysis, in theory, there was no violation of the accused's Fourth Amendment rights." (Id. at 7.) Then, the military judge incongruously concluded that Detective Rico's search of the phone "potentially" violated the accused's Fourth Amendment rights because it was "likely" beyond the scope of the private search conducted by TSgt Roberts. (Id. at 7, ¶ 41.) On the one hand, the military judge concluded that Detective Rico's actions in

viewing the text messages fell within the scope of TSgt Roberts' original private search. On the other hand, the military judge surmised that Detective Rico's actions in viewing the text messages "potentially" or "likely" exceeded the scope of TSgt Roberts' search of the text messages. Without reconciling this significant inconsistency, the military judge summarily held that the "Government . . . failed to establish the propriety of this governmental examination" and suppressed the evidence derived from the text messages on Appellant's cell phone. (Id.) Although the military judge flirted with the concept that Detective Rico's examination of the phone exceeded the scope of the original search, he never concluded that Detective Rico's examination of the text messages was illegal. Therefore, it was inconsistent for the military judge to find that the search violated the Fourth Amendment when he never expressly found that the government's actions constituted legal error.

Therefore, AFCCA correctly found that the military judge abused his discretion when he concluded that the government's examination of Appellant's cell phone exceeded the scope of TSgt Roberts' initial private search of Appellant's text messages and by finding that Appellant's Fourth Amendment rights were violated.

3. Even if this Court were to find that the warrantless search of the text messages within Appellant's cell phone violated the Fourth Amendment, the evidence inevitably would have been discovered by the government.

Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is admissible against the accused if the evidence would have been obtained even if such unlawful search or seizure had not been made. *See* Mil. R. Evid. 311(b)(2). This exception to the exclusionary rule is consistent with controlling case law. Nix v. Williams, 467 U.S. 431, 441 (1984); United States v. Kozak, 12 M.J. 389, 391-94 (C.M.A. 1982); United States v. Wallace, 66 M.J. 5, 7-10 (C.A.A.F. 2008); United States v. Dease, 71 M.J. 116, 121-22 (C.A.A.F. 2012); United States v. Owens, 51 M.J. 204, 211 (C.A.A.F. 1999).

This Court has upheld the legality of a warrantless search of an appellant's car and seizure of stolen stereo equipment because overwhelming probable cause and routine police procedure made discovery of the evidence inevitable. *See* Owens, 54 M.J. 210-11. This standard was recently affirmed in Dease where the majority found that no probable cause existed to search the appellant's urine for the presence of drugs, nor had the government engaged in any parallel investigation that would lead to the discovery of the evidence. Dease 71 M.J. at 121-22.

The military judge abused his discretion by holding that the inevitable discovery doctrine was inapplicable. First, the military judge acknowledged that overwhelming probable cause existed to believe that Appellant's cell phone contained evidence proving that Appellant had engaged in inappropriate relationships with trainees. (*See* App. Ex. XL at 4, ¶ 21.) As of 17 January 2012, Detective Rico could have relied on the verbal information learned from TSgt Roberts, "including TSgt Roberts' observations of matters on the phone, the text messages, pictures of females TSgt Roberts recognized as being part of the 331st TRS, the names of people which could be crossed-referenced with old personnel rosters, the accused's confirmation that he had sent the texts, and Det. Rico's own observations of the text messages on the phone turned over by TSgt Roberts." (Id.) At the time TSgt Roberts met with Detective Rico she provided a description of the contents of the text messages, she had provided a basis for why she believed the females were military trainees, she had expressly confirmed that she believed the females, including SrA B. and SrA R., were former trainees assigned to the 331st TRS because she recognized their faces in the pictures, she personally observed the name ["B."] in the text messages, and she had confronted Appellant about the inappropriate text messages. In this respect, the

government had established a stronger basis for application of the inevitable discovery exception than in Wallace.

The government also had taken parallel investigative steps, which inevitably would have led to the discovery of the evidence. Detective Rico already knew that Appellant had engaged in inappropriate conversations with a female named ["B."] regardless of whether she obtained the cell phone or not. TSgt Roberts had already stated that, based on the context of the text messages, she believed ["B."] was a trainee. Moreover, TSgt Roberts had confronted Appellant about the text messages explicitly referencing ["B."] and he admitted to engaging in inappropriate conversations with trainees. This information drove Detective Rico to pull ["B.'s"] flight roster, which contained her name and social security number. From this information, Detective Rico testified that she would have conducted an interview of SrA B. with or without the evidence from the cell phone. When SrA B. was interviewed, she was extremely open about her personal relationship with Appellant without even reviewing the text messages that had been compiled. The military judge plainly ignored the parallel investigative steps taken by the government to independently identify the trainees with whom Appellant was communicating. This was error.

In searching the cell phone to find text messages between Appellant and SrA B., investigators would have had to sift

through all the captured data to find relevant text message conversations. As such, the text messages with SrA B., SrA R., and A1C K.R. would have been discovered. *See* Wallace, 66 M.J. at 10 (finding the investigators would have had to sift through all captured data to find relevant emails; therefore, the files containing child pornography inevitably would have been discovered). Based on TSgt Roberts' description of the contents of the phone, Appellant's admission that incriminating evidence of inappropriate personal relationships resided on the phone, and the government's independent steps to discover SrA B.'s identity even without the phone, the government had easily demonstrated that the text messages from Appellant's phone inevitably would have been discovered even if the alleged constitutional violation had not occurred.

The military judge erred by placing too much emphasis on the fact that the government "made no effort to secure a warrant" when deciding that the inevitable discovery exception did not apply. (App. Ex. XL at 9, ¶55.) Relying on the military judge's rationale, the government would never be able to establish the applicability of the inevitable discovery doctrine unless the government provided evidence that it was in the process of seeking search authorization. This interpretation of the case law also constituted an erroneous view of the law.

The military judge ignored the fact that TSgt Roberts had continuously misled Detective Rico regarding the location and form of Appellant's data. First, TSgt Roberts indicated the information resided on her iTunes account. Then she stated the information was contained on a SIM card. Next, she led Detective Rico to believe that she had secured a cell phone from a friend and transferred Appellant's data to her cell phone. At that time, TSgt Roberts had not revealed that she had stolen Appellant's cell phone. This disclosure did not occur until November 2012. Thus, Detective Rico did not believe she needed to seek search authorization because she did not know the cell phone belonged to Appellant. Therefore, it is reasonable that Detective Rico viewed the analysis of the cell phone more akin to a "consent" search consistent with the testimony from Detective Allen. The record is very clear that Detective Rico did not suspect that the cell phone provided by TSgt Roberts was, in fact, Appellant' cell phone until after the analysis had been conducted by Detective Allen. Contrary to how the military judge construed Detective Rico's actions in not securing a search warrant, these facts underscore that the law enforcement agents proceeded on the belief that TSgt Roberts had consented to the search of the cell phone and that it was not necessary to secure search authorization. This was not a deliberate attempt to evade the warrant requirement.

For these reasons, the military judge abused his discretion when concluding that the government had failed to satisfy its burden of showing that the inevitable discovery exception was applicable. Therefore, even if this Court were to find that the warrantless search of the text messages within Appellant's cell phone violated the Fourth Amendment, the evidence inevitably would have been discovered by the government.

4. Even if the search of Appellant's cell phone violated the Fourth Amendment, the enormous cost of invoking the exclusionary rule under the specific circumstances of this case substantially outweighs the benefit of suppression.

The military judge abused his discretion when he whistled past the necessary and separate step of analyzing whether the severe sanction of exclusion should appropriately be imposed in this case. Instead, the military judge determined that Detective Rico's failure to obtain a search warrant required automatic exclusion of the challenged evidence and all derivative evidence therefrom. This per se exclusion also reflected an erroneous view of the law.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," but "contains no provision expressly precluding the use of evidence obtained in violation if its commands." Herring v. United States, 555 U.S. 136, 139 (2009) (citation omitted). Nonetheless, the Supreme Court's

decisions established an exclusionary rule that, when applicable, is designed to safeguard Fourth Amendment rights generally through its deterrent effect. *See* Weeks v. United States, 232 U.S. 383, 398 (1914); United States v. Calandra, 414 U.S. 338, 348 (1974). The fact that a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies. Illinois v. Gates, 462 U.S. 213, 223 (1983). While early Supreme Court decisions viewed Fourth Amendment violations as synonymous with the application of the exclusionary rule, the Court's more recent decisions clarify that exclusion "has always been our last resort, not our first impulse." Hudson v. Michigan, 547 U.S. 586, 591 (2006). Today, whether exclusion is an appropriate remedy in a particular case is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." United States v. Leon, 468 U.S. 897, 906 (1984). Current Supreme Court precedent requires a more contextual approach to application of the exclusionary rule.

"[T]he exclusionary rule is not an individual right and applies only where it 'results in appreciable deterrence.'" Herring, 555 U.S. at 141 (citation omitted). The benchmark for assessing the propriety of exclusion is whether the benefits of deterrence outweigh the costs. Leon, 468 U.S. at 910. Even a

marginal deterrent effect does not require the application of the exclusionary rule. Herring, 555 U.S. at 141. "'To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial costs.'" Id. (citation omitted). The principal cost of applying the rule is letting guilty and possibly dangerous defendants go free--a notion that "offends basic concepts of the criminal justice system." Id. citing Leon, 468 U.S. at 908. "'The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" Id. (citation omitted).

The record illustrates that the military judge was aware of the narrow applicability of the exclusionary rule:

> MJ: I do have a question for you. [referring to the senior defense counsel] With regards to just the general proposition of the exclusionary rule -- you know, you talked about I'm supposed to narrowly interpret inevitable discovery, aren't I supposed to also narrowly interpret the exclusionary rule in terms of -- essentially the exclusionary rule exists to punish bad government actions, right?
>
> SDC: Yes, Your Honor.
>
> MJ: It's a sanction against the government; a societally accepted sanction against the government.

(R. at 181-82.)

Despite his acknowledgement of the narrow application of the rule, the military judge failed to narrowly analyze and explain why the unique circumstances of this case warrant application of the harsh exclusionary rule. When taking that additional step, it is clear that Appellant failed to satisfy his burden of showing the drastic sanction of exclusion is warranted.

In Illinois v. Krull, 480 U.S. 340, 348-349 (1987), the Supreme Court determined that evidence should only be suppressed if it can be shown that the law enforcement agent had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the Fourth Amendment. As explained in Herring, to "trigger the exclusionary rule, police misconduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. Id. The pertinent analysis of deterrence and culpability is objective. Id.

Detective Rico's conduct was not deliberate, reckless, or grossly negligent; in fact, her conduct was extremely appropriate. The facts demonstrate that TSgt Roberts, a private actor, stole Appellant's cell phone. Her actions were motivated

by anger and her personal relationship with Appellant, and she was not acting in an official law enforcement capacity. The cell phone languished in TSgt Roberts' possession for approximately eight months before being turned over to the police. When she disclosed that she possessed evidence to prove that Appellant had engaged in inappropriate relationships with trainees, TSgt Roberts misled Detective Rico into believing the incriminating data had been transferred to her own iTunes account. Next, TSgt Roberts further misled Detective Rico by claiming that she had transferred the data from her own iTunes account onto her friend's cell phone, which she was using as an electronic storage device so Detective Rico could access the data. At the time the cell phone was turned over to the police, Detective Rico did not know that TSgt Roberts had actually seized and provided Appellant's cell phone.

The military judge strongly emphasized his disapproval of Detective Rico's decision not to seek search authorization before examining the cell phone. (*See* R. at 275-77.) This concern is normally well-founded considering that warrantless searches of personal effects have been viewed as presumptively unreasonable unless an exception to the warrant requirement applies. This case, however, implicates a fact pattern that is extraordinarily complex. When objectively analyzing Detective Rico's actions using the information that was available to her

at the time the cell phone was provided, it was reasonable for Detective Rico not to seek search authorization before examining the phone or submitting it for analysis.

Given the facts as they existed at the time, Detective Rico was led to believe that she was examining replicated data removed from Appellant's cell phone during a private search and, then re-replicated data. This data was stored on a device that was provided to law enforcement through consent. An analogous situation would arise if, instead of involving a cell phone, the case involved the copying of information from a DVD onto another DVD. TSgt Roberts' act of downloading Appellant's cell phone data to her iTunes account would be analogous to her burning a duplicate DVD, which replicated the information from the original DVD--essentially mirroring the data. TSgt Roberts' act of transferring the cell phone data from her iTunes account to another cell phone would be analogous to burning a copy of a copy of the original DVD. Since the initial private search by TSgt Roberts did not implicate Fourth Amendment concerns, no reason existed for Detective Rico to believe that Appellant maintained an expectation of privacy or possessory interests in the twice replicated data.[1] Under these unique circumstances, it

[1] This is not to say that Appellant does not maintain a privacy interest or possessory interest in the data that is resident on his cell phone; however, at the time TSgt Roberts provide the cell phone to Detective Rico, she misled Detective Rico into believing Appellant's data had been replicated and transferred onto another device. Detective Rico's knowledge at the time of

was reasonable for Detective Rico to believe that the replicated cell phone data could be analyzed without a search warrant. Although TSgt Roberts acted deliberately when misleading the police, the police did not engage in deliberate, reckless, or grossly negligent behavior by not seeking search authorization before examining the cell phone.

Next, if the failure to secure a search warrant constituted error, it is extremely unlikely the error will recur. This case presents an extraordinary fact pattern, which is only likely to repeat itself in a law school criminal procedure examination. Unlike a violation of the "knock-and-announce" rule, *see* Herring, *supra*, or a data entry error made by a law enforcement agency that erroneously indicated that an outstanding warrant existed for a suspect, *see* Hudson, *supra*, circumstances which are likely to recur, but where the Supreme Court still refused to apply the exclusionary rule, it is extremely unlikely that law enforcement agents will routinely encounter private citizens who steal incriminating evidence from unknowing criminals, who voluntarily and unexpectedly turn over the incriminating evidence in their private capacity, and who wildly mislead law enforcement agents regarding the nature of the incriminating evidence to conceal their own impropriety. This is not to say

---

the seizure of the cell phone is critical in determining whether her conduct was deliberate, reckless, or grossly negligent and therefore worthy of the draconian judicial remedy of exclusion and deterrence. Under these circumstances, she acted reasonably.

that this fact pattern will never repeat itself; however, the risk of repetition is so remote that the draconian remedy of exclusion of the evidence is not warranted under these circumstances. Furthermore, this error is not the result of widespread systemic negligence; rather it is confined to an isolated incident.

Exclusion of the evidence in this case would not even have a marginal deterrent effect in the field of law enforcement and the cost of exclusion to society would be substantial. Society has a strong interest in holding persons who commit crime accountable for their actions, and not let them evade justice based on de minimus Fourth Amendment violations. The Air Force has a strong interest in ensuring that our military justice system fairly adjudicates the merits of this case. Appellant was appointed to a special position of trust within the Air Force by serving as an MTI. He was the face of the Air Force when inducting and training new Airmen. Engaging in unprofessional personal relationships with trainees erodes the very fabric of good order and discipline that the training environment is meant to instill, has the disastrous effect of causing vulnerable young Airmen to be violated by those who wield vast authority over them, and brings great discredit upon our service in the eyes of a trusting public.

In conclusion, even if this Court were to find that the search of Appellant's cell phone violated the Fourth Amendment, the military judge abused his discretion by failing to address the separate question of whether the exclusionary rule should be applied in this case. Appellant has failed to meet his burden to establish good cause for review by this Court. The petition should be denied, and AFCCA's order returning the case to trial should stand. Appellant's due process rights will be sufficiently protected by the normal course of appellate review governed by Articles 66 and 67, UCMJ.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court deny Appellant's petition for grant of review.

TYSON D. KINDNESS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4806
Court Bar No. 33631

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 3 July 2013.

TYSON D. KINDNESS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency United
States Air Force
(240) 612-4800