IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant and Cross-Appellee,

v.

AARON M. BUFORD,
Senior Airman (E-4), USAF
Appellee and Cross-Appellant.

Crim. App. No. 2013-26
USCA Dkt. No. 14-6010/AF

ANSWER TO CERTIFIED ISSUE

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USAF,	)	
Appellee and Cross-Appellant.	)	

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

Certified Issue

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY SUPPRESSING EVIDENCE FROM THE DELL LAPTOP, HEWLETT-PACKARD LAPTOP, AND CENTON [SIC] HARD[1] DRIVE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2006). This Honorable Court has jurisdiction to review this case under Article 67(a)(3),UCMJ.

Statement of the Case

Appellant is charged with one charge and one specification of committing an indecent act with a minor, in violation of Article 120, UCMJ, and one charge and six specifications relating to receipt, possession (on three separate devices: a Dell laptop, a Hewlett-Packard (HP) laptop, and a Centon flash drive), access, and distribution of child pornography, in

[1] This is a flash drive, not a hard drive. Appellant's brief correctly calls it a flash drive.

violation of Article 134, UCMJ. J.A. at 25-27. The charges and specifications were preferred on 11 July 2013 and referred to a general court-martial on 6 August 2013. *Id*.

On 17 September 2013, trial defense counsel filed a motion to suppress evidence of child pornography contained on the Dell laptop, HP laptop, and Centon flash drive, for violating his Fourth Amendment statutory rights under the UCMJ. The government responded on 24 September 2013.

On 3 October 2013, the military judge had a motions hearing. J.A. at 28. On 5 October 2013, the military judge granted the defense motions, issuing written findings of fact and conclusions of law. J.A. at 99, 182. On 7 October 2013, the government filed a motion to reconsider the ruling, and also requested an opportunity to present additional evidence on their motions. J.A. at 183. On the same day, the military judge allowed the presentation of additional evidence and an evidentiary hearing again commenced. J.A. at 99.

On the evening of 7 October 2013, after the reconsideration motion hearing was closed, the military judge denied the government's motion for reconsideration. J.A. at 195. The military judge issued written findings of fact and conclusions of law specifically addressing the motion for reconsideration, as well as addressing the additional evidence presented by the government. J.A. at 191-95. In her written findings, the

military judge again ordered that "evidence resulting from the search and seizure of the Dell laptop, the HP laptop and the Centon thumb drive [be] suppressed." J.A. at 195.

The government appealed the military judge's ruling to AFCCA. J.A. at 1. On 4 April 2014, AFCCA granted the government's appeal under Article 62 in regards to the Dell laptop and the Centon Thumb drive and denied the government's appeal in regards to the HP laptop. J.A at 9. On 18 April 2014, the government asked for reconsideration and reconsideration *en banc* at AFCCA. J.A at 10. AFCCA denied the government's request on 9 May 2014. *Id*.

Statement of Facts

Appellee's Wife (AB) did not testify during the motions hearing. The government attached her Air Force Form 1168 statement to their response to the defense motion to suppress. J.A. at 129. In AB's statement she alleged that she found pornographic pictures on Appellee's cell phone in September 2009. J.A. at 131. In December 2009, she alleged she found texts Appellee sent to other women asking them to send nude photos of themselves. *Id.* In March 2012, AB alleged she found a fake Facebook account, using Appellee's email address. J.A. at 132. On or about 17 May 2012, AB was at the home of friends James and Courtney Hammond. J.A at 59. Appellee was not present at the house. *Id.*

Airman First Class (A1C) Ryan Marlow, then a law enforcement officer, was also present at the home. J.A. at 61. A1C Marlow had some training in conducting automobile searches. J.A at 127. Before 17 May 2012, A1C Marlow and AB did not have much interaction. J.A at 60. A1C Marlow noticed AB appeared distraught while looking at a Dell laptop. J.A at 61. AB, knowing that A1C Marlow worked for law enforcement, asked him to look at the laptop. *Id.* In addition, AB did not want to look at the computer anymore. *Id.* A1C Marlow does not remember any specific comments made by AB before he searched the laptop. J.A at 81. He was told AB was looking at a fake Facebook account using Appellee's email address. J.A at 61.

A1C Marlow began to search this Facebook account. *Id.* Originally, A1C Marlow thought there might be information about Appellant cheating on his wife and proceeded to search the laptop for further information. *Id.* A1C Marlow went into the Facebook messages and saw conversations with three different females, pictures of male genitalia and other sexually explicit communications. J.A. at 63. A1C Marlow began to take screen shots because he "knew it could possible [sic] go some more places than just cheating" and to preserve evidence. *Id.* He testified his cop training kicked in and he went off instincts to preserve evidence. J.A. at 83. He placed the screenshots on a USB drive. J.A. at 69. A1C Marlow asked AB to sign into the

email account used to create the Facebook account and she complied. J.A. at 64-65. AB signed into Appellee's email with his username and password. J.A. at 65. A1C Marlow's purpose in looking in the email account was to see if there were any photos in the account. *Id.*

A1C Marlow found pictures in the email of alleged underage females. J.A. at 66-67. He took screenshots of the pictures, because he knew "there was something a lot more than cheating, and that because of the appearance of the females looking under age, that it should be taken to investigations." J.A. at 67. One of the emails A1C Marlow saw said something about the sender being 13. J.A. at 65.

AB did not know what to do. *Id.* A1C Marlow encouraged her to go to the law enforcement office and offered to take her there. J.A. at 67, 86. After A1C Marlow's encouragement, AB agreed to go to law enforcement. J.A. at 68. A1C Marlow felt responsible for the situation as a law enforcement member and took control of the situation. J.A. at 86.

Security Forces contacted the Air Force Office of Special Investigations (OSI). J.A. at 70. A1C Marlow drove AB to OSI the next day. J.A. at 71. AB signed an AF Form 1364, consenting to OSI searching the Dell laptop, a PNY 8GB flashdrive and 1GB memory card. J.A. at 142. OSI searched Appellee's house later that day. J.A. at 54.

While searching Appellee's home, AB became upset with OSI. J.A. at 72. A1C Marlow asked them to produce a warrant, because he knew AB was uncomfortable with OSI searching the house without a warrant. J.A. at 88-89. The search stopped until one of the agents left and obtained a search warrant. J.A. at 88.

Around 3 or 4 June 2012, A1C Marlow called OSI and told them he found a thumb drive. J.A. at 36. A1C Marlow received the thumb drive from either AB or Courtney Hammond, but he does not remember which one. J.A. at 96. OSI told him they would pick up the thumb drive from him the next day. J.A. at 37-38. A1C Marlow had plugged the thumb drive into his computer to see if there was any evidence on it, before he gave it to OSI. J.A. at 76. The thumb drive had files containing Air Force Instructions on it. *Id.* In addition, there were pornographic images of allegedly underage people on the thumb drive. J.A. at 77. OSI asked A1C Marlow to turn over the laptop he used to review the thumb drive. J.A. at 79. A1C Marlow lied to OSI and told them his laptop was destroyed. J.A. at 91. He eventually told them the truth that he still had the laptop. J.A. at 48.

Further facts are discussed in the argument section below.

Argument

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION BY SUPPRESSING EVIDENCE FROM THE DELL LAPTOP, HEWLETT-PACKARD LAPTOP, AND CENTON FLASH DRIVE.

Standard of Review

"In an Article 62, UCMJ, 10 U.S.C. § 862, petition, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial." *United States v. Wicks*, 73 M.J. 93, 98 *reconsideration denied,* 73 M.J. 264 (C.A.A.F. 2014)(citing *United States v. Baker,* 70 M.J. 283, 287–88 (C.A.A.F. 2011). In a motion to suppress, this Court reviews the military judge's " 'factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard.' " *Wicks* at 98, (quoting *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995)).

When this Court reviews "mixed questions of law and fact, a military judge 'abuses [her] discretion if [her] findings of fact are clearly erroneous or his conclusions of law are incorrect.'" *Wicks* at 98, (quoting *Ayala a*t 298). In order for the military judge to abuse her discretion there must be "'more than a mere difference of opinion. The challenged action must be arbitrary ..., clearly unreasonable, or clearly erroneous.'" *United States v. White,* 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd,* 69 M.J. 95, 99 (C.A.A.F. 2010)) (internal quotation marks omitted).

Law and Analysis

The Fourth Amendment guarantees the right to be secure in one's person, "houses, papers and effects, against unreasonable searches and seizures . . ." and "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

In *United States v. Ezell*, the then-Court of Military Appeals held that the Fourth Amendment protection against unreasonable searches and seizures applies to military members. 6 M.J. 307 (C.M.A. 1979). The Fourth Amendment does not prohibit all searches and seizures. Rather, the Fourth Amendment bars "unreasonable" searches and seizures. U.S. CONST. amend. IV. A search does not implicate the Fourth Amendment unless the "government violates a subjective expectation of privacy that society recognizes as reasonable." *United States v. Irizarry*, 72 M.J. 100 (C.A.A.F. 2013) (citing *Kyllo v. United States*, 533 U.S. 27, 33 (2001)).

The U.S. Supreme Court has held that, with few exceptions, a search or seizure without a warrant is per se unreasonable. *See*, *e.g., United States v. Weeks*, 232 U.S. 383, 398-99 (1914). Reflecting this rule, Military Rule of Evidence (M.R.E.) 311(a) provides that evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental

capacity is inadmissible against the accused upon timely objection. The prosecution has the burden of establishing the admissibility of the evidence by a preponderance of the evidence. M.R.E. 311(e)(1). Derivative evidence obtained from the search may be admitted only if the military judge finds by a preponderance of the evidence that (1) the evidence was obtained as a result of an unlawful search or seizure; (2) the evidence ultimately would have been obtained by lawful means even if the unlawful search and seizure had not been made; or (3) the evidence was obtained with good-faith reliance on the issuance of an authorization to search or seize. M.R.E. 311(e)(2).

The Fourth Amendment does not apply to searches or seizures performed by private individuals not acting as agents of the Government or with the participation or knowledge of any Government official. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

A. A1C Marlow acted as an agent of the government.

A1C Marlow was trained and assigned as an Air Force law enforcement officer. His job was to enforce the law. The sole reason Appellee's wife asked for his assistance was because he was a law enforcement officer.[2] When asked by Appellee's wife to

[2] Early in government counsel's brief they aver "AB may have approached him knowing he was a member of security forces . . . " Gov. Br. at 16. However, government counsel acknowledge later that "[AB] purposely showed the Facebook profile and e-mail account to CH and A1C [Marlow], who she knew to be a member of security forces." Gov. Br. at 28.

look at the Facebook page, he conceded that his law enforcement instincts took over. J.A. at 83. He began to collect evidence by taking screenshots. He told Appellee's wife to access Appellee's password protected email. J.A. at 65. A1C Marlow then took screenshots of the pictures in Appellee's email account and put all of this on a thumb drive for future law enforcement use. J.A. at 63, 69.

The government's attempts to make A1C Marlow a private actor fall short. Gov. Br. at 15-18. In *Reister*, this Court held that a house-sitter who was acting out of curiosity did not violate that appellant's Fourth Amendment rights. 44 M.J. at 409. A1C Marlow was no such person. He was not searching the laptop out of curiosity. He was searching to obtain evidence against Appellee. J.A. at 82. Likewise, *United States v. Portt* does not support the government's argument. 21 M.J. 333 (C.M.A. 1986). In *Portt*, two off-duty policemen searched the appellant's locker because they were curious. *Id*. at 334. Upon finding evidence of a crime, they closed the locker and reported it immediately to their flight chief. *Id*. Even if this Court finds—contrary to his articulated intentions from the outset—that A1C Marlow was not initially a government actor, upon finding evidence he continued to search Appellee's computer and therefore placed himself back into the status of a government actor, unlike the police in *Portt*.

Finally, the government's application of *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004), is incorrect. *See* Gov. Br. 14-16. *Daniels* does say "the question of whether a private actor performed as a government agent does not hinge on motivation, but rather on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances." *Daniels*, 60 M.J. at 71 (citing *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 614–15 (1989)) (internal citations omitted). However, it is how this Court applied the case that is relevant to Appellee's issue. In *Daniels*, this Court overruled the lower court's opinion that the appellant's Fourth Amendment rights were not violated. The discussion of motivation centered on whether the government actor was seizing evidence on his own accord or at direction of a superior. This Court said the government actor's motivation did not matter. *Id.* Those are not the facts in Appellee's case. A1C Marlow was a law enforcement officer who had previously conducted searches. His search was solely to collect evidence.

As the Court of Military Review said in *Volante:*

> Plainly, not every search made by persons in the military service is under the authority of the United States. However, we need not attempt to establish categories of persons or situations which will make the search either official or private. Certainly, a search by a person duly assigned to law enforcement duty and made for the sole purpose of enforcing

> military law, is conducted by a person acting under the authority of the United States.

United States v. Volante, 16 C.M.R. 263, 265-66 (1954).

Volante makes it perfectly clear. A1C Marlow was assigned to law enforcement duty and the search he conducted was for law enforcement purposes, i.e. to collect evidence of a crime. A1C Marlow was a government actor.

B. Appellee's Fourth Amendment rights were not frustrated by what Appellee's wife may have seen on Appellee's computer.

"The additional invasions of [Appellee's] privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *United States v. Jacobsen*, 466 U.S. 109, 116 (1984); *see also Walter v. United States*, 447 U.S. 649, 657 (1980).

Appellee wholeheartedly disagrees with the government's interpretation of AB's Air Force Form 1168. First and most important, Appellee's wife's did not testify at trial. The military judge had no evidence in front of her of what Appellee's wife allegedly saw on Appellee's password-protected account. The only evidence in front of the military judge was Appellee's wife's AF Form 1168. In her 1168, Appellee's wife says she found a fake Facebook account in March of 2012. She never says she searched the account in March. Rather, in Appellee's wife's statement she mentions the same email that A1C

Marlow mentioned he saw while illegally searching through Appellee's password-protected accounts. In addition, it is important to note what A1C Marlow was told when he first saw Appellee's wife upset: "I was told she was looking at a Facebook account using [Appellee's] email." J.A. at 61. Notably absent is any mention of any underage pornography.

While the government wants this Court to believe Appellee's wife conducted two independent searches, those are not the facts of the case. Gov. Br. 20-22. The government is asking this Court to do what it cannot do: create facts. Rather, the evidence in front of the military judge was that AB found the fake Facebook account in March 2012 and at some point searched Appellee's password-protected accounts. Based on the lack of clear or contrary evidence, it is most probable that she performed her search when she was told to do so at the behest of a law enforcement officer, A1C Marlow.

This Court is not able to test the degree to which A1C Marlow exceeded the scope of Appellee's wife's search. Rather, the facts at trial support that the search was performed at the instruction of a law enforcement officer. Therefore, Appellee's Fourth Amendment rights were not frustrated and the military judge did not abuse her discretion.

C. Appellee's wife revoked the consent for the search of her home.

The government's brief fails to address the fact that Appellee's wife revoked her consent. As stated at trial by A1C Marlow, Appellee's wife became upset at some point during the search of her home. J.A. at 72-73. The trial counsel elicited from A1C Marlow that Appellee's wife never specifically said she "revoked" consent. J.A. at 73. However, the facts show differently. It took a law enforcement officer, A1C Marlow, to calm Appellee's wife down after she became upset with OSI. J.A. at 87-89. In addition, OSI obviously thought consent was revoked. They stopped searching until they obtained search authorization. J.A. at 88.

Regardless, the military judge correctly found that Appellee's wife did not have consent to search Appellee's password protected Facebook and email accounts. The military judge correctly relied on *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974), for the proposition that "common authority is, of course, not to be implied from the mere property interest a third party has in the property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes[.]" As the military judge correctly pointed out, she had no evidence in front of her that Appellee consented to the search. J.A. at 194. The evidence the military judge did have was Appellee's wife did not know

what to do and the law enforcement officer told her to go to the law enforcement office and report her husband.

Whether there was consent or not, the evidence should be excluded because it was fruit of the poisonous tree when the government violated Appellee's Fourth Amendment rights, as discussed in sections A and B above.[3] As this Court said in *United States v. Conklin*, "if the appellant's consent, albeit voluntarily, is determined to have been obtained through exploitation of the illegal entry, it can not be said to be sufficiently attenuated from the taint of that entry." 63 M.J. 333, 338 (citing *United States v. Khamsouk,* 57 M.J. 282, 290 (C.A.A.F. 2002)). The reason OSI was able to obtain Appellee's wife's consent was because the law enforcement officer illegally searched Appellee's accounts and convinced Appellee's wife to report Appellee to law enforcement. Therefore, the military judge did not abuse her discretion in finding Appellee's wife's consent, whether revoked or not, overcame the taint of the Appellee's violated Fourth Amendment rights.

D. The evidence would not have been inevitably discovered.

"The concept of 'inevitable discovery' is recognized in M.R.E. 311(b)(2), which is based on the Supreme Court's recognition of the 'inevitable discovery exception' to the

[3] Appellant's brief addresses consent for the Dell laptop, HP laptop and Centon flash drive. The government chose to appeal the military judge's ruling to suppress all three, even though AFCCA found the military judge abused her discretion in suppressing the Dell laptop and Centon flash drive.

exclusionary rule in *Nix v. Williams*, 467 U.S. 431, 444 (1984)." *United States v. Owens*, 51 M.J. 204, 210 (C.A.A.F. 1999). The prosecution must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix*, 467 U.S. at 444. After an illegal search, the prosecution must show by a preponderance of evidence that the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence. In addition, the government must show the evidence would inevitably have been discovered in a lawful manner, but for the illegal search. *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982). In addition, the Court of Military Appeals said in *United States v. Kaliski* that after evidence is suppressed based on an illegal search, the government must show by a preponderance of the evidence "that there is (1) a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of the police misconduct and (2) that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." 37 M.J. 105, 109 (C.M.A. 1993) (citing *United States v. Lamas,* 930 F.2d 1099, 1102 (5th Cir. 1991)) (internal citations omitted).

The military judge did not err in finding the government did not meet its burden of proving by a preponderance of the

evidence that, absent the illegal search, the evidence would have been inevitably discovered. As the military judge aptly points out, Appellee's wife had allegedly first found pornographic images on Appellee's phone in 2009. J.A. at 181. In addition, she found the fake Facebook account two months prior to showing a law enforcement officer and allowing him to illegally search through Appellee's password-protected accounts. *Id.* A1C Marlow testified that Appellee's wife went to Security Forces on his urging. J.A at 67-68, 86. There was no indication, and certainly not a preponderance of the evidence, to suggest that this matter would have been brought to authorities or that probable cause to authorize a search would have existed absent the government intrusion by A1C Marlow.

In addition, law enforcement personal were not actively pursuing a case against Appellee. OSI Agent Carag testified they had their initial notification on 17 May 2012. J.A. at 53. The facts of Appellee's case do not meet either the *Kozak* or *Kaliski* tests. Rather, the facts show the opposite. Appellee was not on law enforcement's radar. As Agent Carag testified, if OSI was given the same information that A1C Marlow was originally given, i.e. a fake Facebook profile and potential adultery, OSI would not have pursued an investigation. J.A. at 29. Likewise, the government would not have had access to the two laptops and thumb drive.

The government avers "when AB found the Centon flash drive, A1C [Marlow] would still have turned over to AFOSI absent his cursory 'search' since that is precisely what AB directed him to do." Gov. Br. at 29. There are two issues with that statement. First, A1C Marlow testified he was not sure if AB or Ms. Hammond gave him the flash drive. J.A. at 96. Neither of the women testified during the motions hearing. Second, AB did not direct A1C Marlow to give AFOSI the flash drive. Rather, A1C Marlow's testimony was both women asked him what to do with the flash drive and he said "I would probably take a look at it to see if there was any evidence on it before turning it over to OSI." J.A. at 75. Therefore, it was not inevitable that AFOSI would have found the Centon flash drive, because it could have been Ms. Hammond who found the drive and, regardless, the only reason the flash drive was turned over to AFOSI was because A1C Marlow took it to AFOSI.

Next, turning to search authorization, the government would not have received search authorization, because they did not have probable cause. During the government's motion to reconsider, trial counsel called the military magistrate, Colonel Benza. The defense pointedly asked him if all he had was a fake Facebook account would he grant a search authorization based on probable cause and his answer was "no." J.A. at 105.

Likewise, the government's independent source doctrine argument fails as well. Gov. Br. 26. The only potential independent source there could be would have been Appellee's wife. However, as noted above, she did not do anything for three years. To assume she would do something now defies logic. Rather, she only went to the law enforcement office after being encouraged by a law enforcement officer, A1C Marlow. Perhaps most telling that she would not do anything is her lack of testimony at the motions hearing. If she was truly "hell bent" on reporting Appellee for the alleged actions, it would make sense she would testify to that fact during the motion hearing. Gov. Br. 27.

E. Without a violation of Appellant's Fourth Amendment rights, the government did not have any evidence to present to a magistrate.

All the government's evidence was illegally obtained. This Court has stated,, "If an affidavit contains both illegally-obtained and legally-obtained information, the illegally-obtained information should be excised." *United States v. Camanga*, 38 M.J. 249, 252 (C.M.A. 1993). The affidavit in Appellee's case contained only illegally-obtained information. As AFCCA correctly pointed out, there was no evidence presented showing what Appellee's wife saw, independent of the government actor violating Appellee's Fourth Amendment rights. J.A at 6-7.

As the magistrate testified during the motions hearing, if all he had was a fake Facebook account would he grant a search authorization based on probable cause and his answer was no. J.A at 105. That is all he would have had. Appellee's wife did not provide a statement until after the government violated his rights. In addition, all her statement did was mirror what the government actor said he saw--there was no independent source.

Finally, the government fails to acknowledge the fruit of the poisonous tree doctrine. The use of evidence derived from such a violation, or "fruit of the poisonous tree," is generally prohibited. *Nardone v. United States*, 308 U.S. 338, 341 (1939). This Court should do the same thing as it did in *United States v. Conklin*, 63 M.J. 333, 340 (C.A.A.F. 2006), and find the evidence was fruit of the poisonous tree and, therefore, the military judge was correct in suppressing the evidence.

F. There was not a good faith exception to violating Appellee's Fourth Amendment rights and, regardless, Military Rule of Evidence 311(a) controls.

The government's asserts that the "military judge altogether failed to analyze whether the AFOSI agents acted in good faith reliance upon the search authorization in this case." Gov. Br. 37. However, that is not entirely accurate. The military judge analyzed whether the good faith exception should apply in Appellee's case and found it did not. J.A. at 181-82.

This was not a case like *United States. v. Leon*, 468 U.S. 897 (1984), where the government relied on search authorization and the supporting affidavit did not sufficiently provide probable cause. Rather, this was a case where the *only* information obtained was a violation of Appellee's Fourth Amendment rights and, without the violation, the magistrate himself stated he would not have found probable cause. To put it more succinctly, this was not a case of inadequate probable cause, this was a case of no probable cause, without violating Appellee's rights.

Further, as this Court said in *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004), "[u]nder the Military Rules of Evidence, which implement the Fourth Amendment, evidence illegally seized by government agents from a protected place is inadmissible." *Daniels*, 60 M.J. at 70 (citing *United States v. Hester*, 47 M.J. 461, 463 (C.A.A.F. 1997)); *see also* M.R.E. 311(a). Thus, M.R.E. 311(a) *requires* exclusion because the search violated the Fourth Amendment. The President adopted M.R.E. 311(a) pursuant to his power under Article 36(a), UCMJ. *United States v. Taylor*, 41 M.J. 168, 170 (C.M.A. 1994). Article 36(a) is a congressional delegation of its constitutional authority. U.S. CONST. art. I, § 8, cl. 14. Unless the President amends M.R.E. 311(a) to incorporate these factors, this Court must apply M.R.E. 311(a) as written.

The military judge properly referenced M.R.E. 311 in her ruling and appropriately concluded that she "is not satisfied that the Government has met their burden with respect to this prong under MRE 311," in reference to inevitable discovery. J.A. at 181. The military judge did not abuse her discretion.

G. The exclusionary rule is the cost of doing business when the government violates a citizen's Fourth Amendment rights.

Under the Fourth Amendment, people have a right to be secure in their house, papers and effects. When the government chooses to violate that right there are repercussions. Contrary to the government's assertion that this case deserves preferential treatment, this case actually shows why we have the exclusionary rule. The law enforcement officer failed to do his job. This shows that the government has not learned from its prior mistakes and proves the need for the exclusionary rule.

The government's reliance on *Herring v. United States*, 555 U.S. 136 (2009) is not applicable to Appellee's case. Gov. Br. 30. The obvious distinction is the police in *Herring* relied on a good-faith belief that there was an outstanding warrant on that appellant. *Herring*, 555 U.S. at 137. The government accuses the military judge of "whistl[ing] past" the cost of the exclusionary rule, yet they whistle past the fact that the law enforcement officer did not even consider getting a warrant, the clear mandate of the Fourth Amendment. Gov. Br. 39. All A1C

Marlow thought about was getting evidence.

As the Supreme Court said in *Herring*, "when a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." *Id.* at 139. There was not a probable cause determination made in Appellee's case. The government does not get the benefit they propose.

WHEREFORE, This Court should find the military judge did not abuse her discretion in suppressing the Dell Laptop, HP laptop and Centon flash drive.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 18 July 2014.

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