IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

Crim. App. No. Misc. Dkt. No. 2013-26
USCA Dkt. No. /AF

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

CHRISTOPHER D. JAMES, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34081
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Christopher.D.James20.mil@mail.mil

Counsel for Appellant

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	)	USCA Dkt. No. /AF
Senior Airman (E-4) **AARON M. BUFORD,** USAF, *Appellant.*	)	Crim. App. No. 2013-26

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

Introduction

COMES NOW Appellant, Appellant, by and through his undersigned counsel, and pursuant to Rule 21 of this Honorable Court's Rules of Practice and Procedure submits this supplement to his petition for grant of review.

Issue Presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY FINDING A.B. CONSENTED TO LAW ENFORCEMENT'S SEARCH OF THE CENTON THUMB DRIVE AND THE DELL LAPTOP.

Statement of Statutory Jurisdiction

AFCCA reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ). Appellant filed a timely petition for grant of review, bringing this case within this Court's statutory jurisdiction under Article 67, UCMJ. *See United States v. Lopez de Victoria,* 66 M.J. 67 (C.A.A.F. 2008).

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 violation of Article 134, UCMJ. R. at 8.1-8.3. 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, Appellant 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. App. Ex. XII. The government responded on 24 September 2013. (App. Ex. XIII.

On 3 October 2013, the military judge had a motions hearing. R. at 1, 9. On 5 October 2013, the military judge granted the defense motions, issuing written findings of fact and conclusions of law. App. Ex. XXX; R. at 254. 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. App. Ex. XXXII. On the same day, the military judge allowed the presentation of additional evidence and an evidentiary hearing again commenced. R. at 254.

On the evening of 7 October 2013, after the reconsideration motion hearing was closed, the military judge denied the government's motion for reconsideration. App. Ex. XXXVIII. 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. *Id.* 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." *Id.*

The government served a notice of appeal on the military judge on 8 October 2013. On 21 October 2013, the government filed its notice of appeal. App. Ex. XLI.

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. *United States v. Buford,* Misc. Dkt. No. 2013-26 (A.F. Ct. Crim. App. 4 April 2014) (unpub. op.) [Appendix A]. On 18 April 2014, the government asked for reconsideration and reconsideration *en banc* at AFCCA. [Appendix B]. AFCCA denied the government's request on 9 May 2014. [Appendix C].

Statement of Facts

Appellant's Wife (AB) alleged she found pornographic pictures on Appellant's cell phone in September 2009. App. Ex.

XXX. In December 2009, she alleged she found texts Appellant 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 Appellant's email address. On or about 17 May 2012, AB was at the home of friends James and Courtney Hammond. *Id.* Appellant was not present at the house. *Id.*

Airman First Class (A1C) Ryan Marlow, then a law enforcement officer, was also present at the home. R. 163. A1C Marlow had some training in conducting automobile searches. R. 307. Before 17 May 2012, A1C Marlow and AB did not have much interaction. R. 162. A1C Marlow noticed AB appeared distraught while looking at a Dell laptop. R. 163. 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. R. 183. He was told AB was looking at a fake Facebook account using Appellant's email address. R. 163.

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. R. 163. A1C Marlow went into the Facebook messages and saw conversations with three different females, pictures of male genitalia and other sexually explicit

communications. R. 163, 165. 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. R. 165. He testified his cop training kicked in and he went off instincts to preserve evidence. R. 185. He placed the screenshots on a USB drive. R. 171. A1C Marlow asked AB to sign into the email account used to create the Facebook account and she complied. R. 166-67. AB signed into Appellant's email with his username and password. R. 167. 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. R. 168-69. 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." R. 169. One of the emails A1C Marlow saw said something about the sender being 13. R. 167.

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. R. 169, 188. After A1C Marlow's encouragement, AB agreed to go to law enforcement. R. 170. A1C Marlow felt responsible for the situation as a law enforcement member and took control of the situation. R. 188.

Security Forces contacted the Air Force Office of Special Investigations (OSI). R. 172. A1C Marlow drove AB to OSI the next day. R. 173. AB signed an AF Form 1364, consenting to OSI searching the Dell laptop, a PNY 8GB flashdrive and 1GB memory card. App. Ex. XIV. OSI searched Appellant's house later that day. R. 81.

While searching Appellant's home, AB became upset with OSI. R. 174. A1C Marlow asked them to produce a warrant, because he knew AB was uncomfortable with OSI searching the house without a warrant. R. 190-91. The search stopped until one of the agents left and obtained a search warrant. R. 190.

Around 3 or 4 June 2012, A1C Marlow called OSI and told them he found a thumb drive. R. 59. A1C Marlow received the thumb drive from either AB or Courtney Hammond, but he does not remember which one. R. 198. OSI told him they would pick up the thumb drive from him the next day. R. 59-60. 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. R. 178. 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. R. 179. OSI asked A1C Marlow to turn over the laptop he used to review the thumb drive. R. 181. A1C Marlow lied to OSI and told them his laptop was destroyed. R. 193. He eventually told them the truth that

he still had the laptop. R. 71.

Further facts are discussed in the argument section below.

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY FINDING A.B. CONSENTED TO LAW ENFORCEMENT'S SEARCH OF THE CENTON THUMB DRIVE AND THE DELL LAPTOP

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 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 AB consented to the search of her house. App. Ex. XXXVIII. The evidence the military judge did have was, AB did not know what to do, a law enforcement officer told her to go to the law enforcement office and report her husband and when she became upset about OSI searching her house a law enforcement officer convinced her to allow OSI to continue to search. *Id.*

AFCCA's analysis does not include, *United States v. Matlock.* Rather, AFCCA relies on this Court's opinion in *United States v. Weston*, 67 M.J. 390, 393 (C.A.A.F. 2009). As this Court is aware, *Weston* cites *Matlock* throughout the opinion. However, *Weston* is a case where the wife consented to the search. In appellant's case, AB revoked her consent when she became upset with OSI. App. Ex. XXXVIII. As stated at trial by

A1C Marlow, AB became upset at some point during the search of her home. R. 174-75. The trial counsel elicited from A1C Marlow that AB never specifically said she "revoked" consent. R. 175. However, the facts show differently. It took a law enforcement officer, A1C Marlow, to calm AB down after she became upset with OSI. R. 189-91. In addition, OSI obviously thought consent was revoked. They stopped searching until they obtained search authorization. R. 190.

While Appellant does not concede AB consented to the search of the Dell laptop, if this Court finds otherwise, the Dell laptop and derivative evidence should still be excluded because it was fruit of the poisonous tree when the government violated Appellant's Fourth Amendment rights.[1] 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 AB's consent was because the law enforcement officer illegally searched Appellant's accounts and convinced AB to report Appellant to law enforcement. However, AFCCA failed to address

[1] AFCCA correctly held Appellant's Fourth Amendment rights were violated. *See* Appendix A.

Conklin and the fruit of the poisonous tree doctrine. Therefore, the military judge did not abuse her discretion in finding AB's consent, whether revoked or not, overcame the taint of the Appellant's violated Fourth Amendment rights and AFCCA erred in finding otherwise.

Perhaps most importantly is AFCCA's failure to address who gave A1C Marlow the Centon thumb drive. As A1C Marlow testified, he does not remember if AB or Courtney Hammond gave him the thumb drive. R. 176. A1C Marlow testified it was possible Courtney Hammond gave him the thumb drive. R. 304. How could the military judge abuse her discretion in suppressing the Centon thumb drive, when the testimony elicited from A1C Marlow is that he does not know who gave him the thumb drive? AFCCA erred in finding the military judge abused her discretion.

WHEREFORE, Appellant requests this Honorable Court grant review of this issue.

Respectfully Submitted,

CHRISTOPHER D. JAMES, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34081
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 8 July 2014.

CHRISTOPHER D. JAMES, Capt, USAF
Appellate Defense Counsel
CAAF Bar No. 34081
Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Christopher.D.James20.mil@mail.mil

Appendix A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2013-26**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Senior Airman (E-4)	)	
AARON M. BUFORD,	)	
USAF,	)	
Appellee	)	**Panel No. 1**

ORR, Senior Judge:

The military judge in this case determined a Security Forces member was acting in an official capacity when, at the appellee's spouse's request, the Security Forces member viewed and collected evidence from the appellee's Facebook account, e-mail account, and thumb drive. In doing so, she ruled the Government violated the appellee's reasonable expectation of privacy under the Fourth Amendment[1] and suppressed all of the images and chat logs found on the appellee's wife's Dell laptop computer, the appellee's Hewlett Packard laptop computer, and the appellee's Centon thumb drive. The military judge further suppressed all derivative evidence. The Government claims the evidence was obtained lawfully, arguing the Security Forces member was not acting in an official capacity. The images and chat logs are the primary source of evidence showing the appellee wrongfully committed indecent conduct and wrongfully received and possessed child pornography in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. After the military judge denied a request for reconsideration, the Government brought an appeal of her ruling under Article 62, UCMJ, 10 U.S.C. § 862. We heard oral argument on this issue on 16 January 2014.[2]

Jurisdiction and Standard of Review

The United States may appeal "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification" in a trial by court-martial in which a punitive discharge may be adjudged. Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A). Each of the dismissed specifications in this case carries a maximum punishment that includes a punitive discharge. *Manual for*

[1] U.S CONST. amend. IV.
[2] Senior Judge Orr took part in oral argument and drafted this opinion prior to his retirement.

Courts-Martial (*MCM*), *United States*, Part IV, ¶ 68b.e. (2012 ed.); *MCM*, A27, ¶ 45.e.; *MCM*, A27, ¶ 87.e.; *MCM*, A28, ¶ 45.f.(6).

We review de novo matters of law in appeals under Article 62, UCMJ. In ruling on issues under Article 62, UCMJ, we "may act only with respect to matters of law." Article 62(b), UCMJ, 10 U.S.C. § 862(b). On matters of fact, we are bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). "Nonetheless, in entering a finding of fact, the military judge must rely on evidence of record which fairly supports that finding; in the absence of *any* such evidence, the finding is error as a matter of law." *United States v. Bradford*, 25 M.J. 181, 184 (C.M.A. 1987) (emphasis in original). We also review the judge's ruling on the suppression motion for an abuse of discretion. *United States v. Cote*, 72 M.J. 41, 44 (C.A.A.F. 2013). "The courts may make a de novo ad hoc judgment on the meaning of relevant facts when dealing with constitutional issues." Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 25-83.00 (2d ed.1999) (citing *United States v. Abell*, 23 M.J. 99, 102-03 (C.M.A.1986)). "Similarly, the appellate courts normally should have the power to reverse when the trial judge misunderstood the legal significance of a fact found by the judge when that misunderstanding causes an error as to the court's ultimate finding." *Id.* (citing *United States v. Shakur*, 817 F.2d 189 (2d Cir.1987)).

We have reviewed the military judge's findings of fact and conclude that the findings are neither unsupported by the record nor clearly erroneous. We are thus bound by the military judge's findings of fact and summarize them below.

Military Judge's Findings

In March 2012, AB[3], wife of the appellee, found a "fake" Facebook account that was associated with the appellee's e-mail address. AB identified the page as a "fake" account because the name and photo associated with the account were not of the appellee, but the e-mail address belonged to him. She became curious and logged onto the appellee's e-mail account.

On or about 17 May 2012, Airman First Class (A1C) RM[4] was an active duty Security Forces member who was at the home of CH. AB was also present in the home, but the appellee was not. At some point that evening, A1C RM noticed AB was distraught while she was looking at the screen of her Dell laptop. AB, knowing that A1C RM was a Security Forces member, asked him to look at the laptop where he saw the appellee's "fake" Facebook page. While A1C RM thought it might involve

[3] While noting that the appellee and his wife both have the initials AB, for the purpose of this order, AB is only in reference to the appellee's wife and not the appellee.

[4] Airman First Class (A1C) RM is no longer on active duty in the Air Force and is now Mr. RM. Nevertheless, during the entire timeframe he was involved in this investigation, he was an active duty Security Forces member. Therefore, for the purpose of this order, he will be referred to as A1C RM.

something like the appellee cheating on his wife, A1C RM proceeded to search further for more information. He went into the "messages" section where he allegedly found multiple conversations with females, pictures of male genitalia, and other sexually explicit communication. A1C RM created "screen shots" of what he saw on the Facebook page as well as what was in the messages section. He saved these screen shots to a portable flash-drive. He then continued his search by going into the "Yahoo" e-mail account associated with the "fake" Facebook page using a password provided by AB.

AB gave A1C RM consent to search her Dell laptop. However, the "fake" Facebook account and the associated e-mail account belonged to the appellee. The e-mail account was password protected. There was no evidence on how AB obtained the password to either of these accounts. Although the Facebook account and the e-mail account were accessed through AB's laptop, they do not physically reside on the laptop.

Based upon his law enforcement background, A1C RM encouraged AB to go to the Security Forces investigations flight chief. A1C RM drove her to the Security Forces Squadron (SFS) and explained to the SFS flight chief what was happening. The SFS flight chief looked at the information on the flash-drive and turned the case over to the Air Force Office of Special Investigations (AFOSI). In an interview with the AFOSI, AB provided a written statement and signed a form consenting to the search and seizure of a Dell laptop, a PN 8GB Flashdrive, and a one gigabyte memory card. Later that day, the AFOSI agents conducted a search of the joint residence of the appellee and AB. A1C RM informed AB, that based on his knowledge and experience investigations could take quite a bit of time, and that during that time she would not have access to any items she gave to the AFOSI. During the search, A1C RM acted as a "conduit" between AB and the AFOSI agents because "he was a cop and he could relate to them." AB became upset when the AFOSI agents were seizing a video camera that contained photos and/or pictures of her son, so A1C RM, on her behalf, asked about a warrant. A1C RM "didn't want [AFOSI] to overstep their bounds." Because of A1C RM's question about a warrant, the AFOSI agents stopped the search and obtained a warrant. After retuning with a warrant, they seized a Hewlett Packard (HP) laptop which belonged to the appellee.

In early June 2012, AB gave A1C RM a Centon thumb drive[5] that AB found behind the television in her home. A1C RM conducted his own "search" to see whether there was actually evidence on it. A1C RM opened multiple folders in the thumb drive, some of which contained work materials such as Air Force Instructions and others which contained pornography. Based on the information on the thumb drive, A1C RM determined it belonged to the appellee. A1C RM contacted an AFOSI agent to turn in the thumb drive. The AFOSI agents took possession of the thumb drive the next day.

[5] We use "Centon thumb drive" or "thumb drive" throughout this order to distinguish it from the flash drive used by A1C RM on 17 May 2012 to save screenshots from his search of the appellee's Facebook and e-mail account, which he conducted on AB's Dell laptop.

Although A1C RM stated he was not acting in his official capacity, his testimony was inconsistent with this position. A1C RM stated, "[AB] asked [me] to look at the laptop because [I] was a cop; that [I] began searching for and collecting evidence; that [I] didn't want evidence to get lost; that [I]was going off [my] instincts as a SFS member; that [I] searched the messages section because [I] knew that's where people hide stuff; that once [I] saw the names associated with the pictures [I] became more curious." He also stated, "[I] encouraged [AB] to go to investigations and that [I] felt responsible until the laptop was turned over to SFOI then OSI."

An AFOSI agent testified that if AB had brought only the information regarding the adultery and "fake" Facebook account to their attention, they were unlikely to open an investigation. The agent's impression of A1C RM was that he "took screen shots to preserve evidence; that he wanted to be involved in the investigation, and that the AFOSI agents actually questioned his motivation and whether or not he 'planted' evidence."

Discussion

We accept the judge's factual findings, which leaves us only to review her application of the law.

> In reviewing a military judge's ruling on a motion to suppress, we review factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard. We apply this standard when reviewing evidentiary rulings under Article 62(b), UCMJ. Therefore, on mixed questions of law and fact, a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. The abuse of discretion standard calls for more than a mere difference of opinion. The challenged action must be arbitrary. . . , clearly unreasonable, or clearly erroneous.

United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014) (internal quotation marks and citations omitted).

The military judge granted the defense motion to suppress after concluding that, although A1C RM stated he was not acting in an official capacity, his testimony led the military judge to believe otherwise. In support this ruling, the military judge stated A1C RM's actions went far beyond those expected of a private citizen. The military judge noted the deficiencies in the Government's argument and concluded that but for the actions of A1C RM, a "conduit" between AB and the AFOSI, the search of the Dell laptop would not have occurred. As a result, the Government had not proven by a preponderance of the evidence that the items seized and ultimately searched (the Dell Laptop, the Hewlett Packard Laptop and Centon thumb drive) were seized in accordance with the Fourth Amendment and the Military Rules of Evidence.

Government Agent

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[6] The Supreme Court has determined that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed[,]" and "a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It is well established that the protection against unreasonable searches and seizures only applies to Governmental action and is not applicable when effected by a private individual who is not acting as a Government agent or with participation or knowledge of any Governmental official. *Id*. When determining whether someone was acting as a Government agent, it does not matter what the person's individual/subjective motivation may have been, you must look at 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.'" *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614-15 (1989)). To trigger the Fourth Amendment in this way, it must be clear that the Government encouraged, endorsed, and participated in the challenged search. *Id*.

Not every search by a military member constitutes a Government search. *United States v. Volante*, 16 C.M.R. 263, 266 (C.M.A. 1954). Our Superior Court has stated, "[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." *Id*. However, not all searches by law enforcement individuals have been deemed Government searches. *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986) (holding that a security policeman acted in his private capacity when he searched the accused's locker out of curiosity while performing janitorial duties). Therefore, A1C RM's status as a Security Forces member does not categorically make him a Government actor for the purpose of the searches at issue. Instead, the analysis is fact specific as to whether A1C RM was acting under the authority of the United States.

Unlike the security policeman in *Portt*, in the case at hand, there is substantial evidence in the record of trial to support the finding that A1C RM was acting as a Government agent. Consistent with the military judge's conclusions and in light of all the circumstances, we are convinced A1C RM acted as a Government agent for several reasons to include: (1) As a Security Forces member his job was to enforce the law; (2) A1C RM and AB were mere acquaintances prior to this investigation; (3) AB asked for A1C RM's help knowing he was a law enforcement officer; (4) He actively inserted himself on multiple occasions into the role of an investigator both prior to and during the formal investigation; and (5) He participated in the challenged search and collected evidence for future law enforcement use.

[6] U.S CONST. amend. IV.

Because we concur with the military judge that A1C RM was acting as a Government agent, we then turn to whether his warrantless search fell within one of the few specifically established and well-delineated exceptions. *Wicks*, 73 M.J. at 99.

Warrantless Search

When the Government obtains evidence in a warrantless search that was conducted pursuant to one of the few specific exceptions allowing such a search, the Government bears the burden of establishing that the exception applies. *Id.* Voluntary consent to search by a person possessing authority is one of the "carefully drawn" exceptions. *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009).

We concur with the military judge's determination on the issue of consent. AB gave consent to the search of the Dell laptop and had both actual and apparent authority over that laptop. Nevertheless, we also agree that consent to search the Dell laptop did not extend to the Facebook and email accounts of the appellee. Consent to search an electronic device does not automatically extend to consent to search all electronic "papers" not contained on the device but accessed through the device. Here, A1C RM had clear indications the "fake" Facebook account and the e-mail account belonged to the appellee. The e-mail account was password protected. The evidence is that A1C RM should have known the e-mail account was not under the authority of AB. *Cf. United States v. Gallagher*, 66 M.J. 250 (2008) ("[A]bsent evidence tending to show that an officer should have known that the closed container was not under the authority of person who consented to the search, the search of a closed container belonging to a third party will be deemed reasonable.") Although AB had knowledge of the password, this does not automatically result in a conclusion that she had actual or apparent authority over an otherwise private separate account maintained by her husband. In an Article 62, UCMJ, appeal for a motion to suppress, we review the evidence in the light most favorable to the prevailing party at trial. *United States v. Barker*, 70 M.J. 283, 288 (C.A.A.F. 2011). A third-party's control over property or effects is a question of fact. *United States v. Rader*, 65 M.J. 30, 33 (C.A.A.F. 2007). We concur with the military judge's ruling that the Government failed to meet its burden of establishing that the consent exception applied to the search of the Facebook and e-mail accounts.

We next consider whether AB's search of the appellee's Facebook account amounted to a private search that frustrated the appellee's expectation of privacy. There are two limitations to the private search exception: (1) The Government cannot conduct or participate in the private search; and (2) The Government may not go beyond the scope of the private party's search, to include expanding the search into a general search. *Wicks*, 73 M.J. at 100. When applied to modern computerized devices such as laptops and cell phones, "[T]he scope of the private search can be measured by what the private actor *actually* viewed as opposed to what the private actor had access to view." *Wicks*, 73 M.J. at 100. AB accessed the appellee's Facebook and email accounts in March 2012

and was accessing his Facebook account again on 17 May 2012 when she asked A1C RM to look at the account. Because the record is not clear about exactly what AB viewed during her private searches of the appellee's Facebook messages and e-mail account, we are not convinced A1C RM's subsequent search mirrored AB's private search. Therefore, because we must review the evidence in the light most favorable to the prevailing party, *Barker*, 70 M.J. at 288, it is impossible for us to conclude the Government met the requirements of this exception. Therefore, the private search exception does not apply to these subsequent searches.

Subsequent Search Warrant

Next, we must determine whether the Government had proper search authority with regards to the HP laptop. The probable cause necessary to warrant a search cannot be based on illegally obtained information or evidence. *United States v. Turck*, 49 C.M.R. 49 (A.F.C.M.R. 1974). The search warrant used for the search of the home of AB and the appellant where the HP laptop was seized was based on information obtained by A1C RM's unconstitutional search of the appellee's Facebook and e-mail accounts. Therefore, the Government cannot rely on the subsequent search warrant as legal authorization to search the HP laptop.

Consent Search

We turn next to the Centon thumb drive. A few weeks after the AFOSI's thorough search of her home, AB found a thumb drive near her television. AB provided the thumb drive to A1C RM. A1C RM then searched the thumb drive to determine if it contained any evidence. The thumb drive was not password protected. Because A1C RM was a Government agent, we examine to see if an exception applies. In this instance, we disagree with the military judge and conclude that AB was authorized to provide consent to the search of the thumb drive. "Where one party has joint access and control to a property and voluntarily consents to a search, the warrantless search is reasonable." *United States v. Weston*, 67 M.J. 390, 393 (C.A.A.F. 2009). "Common authority over a home extends to all items within the home, unless the item reasonably appears to be within the exclusive domain of the third party." *Id.* at 392. Here the thumb drive was in the home AB shared with the appellee. There is no evidence the thumb drive was in the exclusive domain of the appellee. In the context of personal computers and associated digital devices, "[C]ourts examine whether the relevant files were password-protected or whether the [appellee] otherwise manifested an intention to restrict third-party access." *United States v. Rader*, 65 M.J. 30, 34 (C.A.A.F. 2007). Examining the evidence in the light most favorable to the appellee, (1) He had a thumb drive he solely used; (2) He left it in the common area of the house he shared with his wife; and (3) He did not password protect it to prevent her access to the device. The thumb drive is not like a cellphone or a laptop connected to the internet, it is a "static storage container" more akin to an electronic briefcase. *Cf. Wicks*, 73 M.J. at 102. Much like the briefcase in *Gallagher*, the thumb drive "was kept in a common area and opened without manipulation of the

tumblers." *United States v. Gallagher*, 66 M.J. 250, 254 (C.A.A.F. 2008). We conclude AB had common authority over this unsecured device in her home, and like any other unsecured storage device, she had the ability to consent to the search of the thumb drive. Because proper search authority was given by AB's consent, the military judge abused her discretion in the application of the law by suppressing the evidence from the search of the Centon thumb drive.

Similarly, the military judge found that AB gave consent to A1C RM to search the Dell laptop. AB also gave written consent for the AFOSI to search the Dell laptop when she provided it to the AFOSI on 18 May 2012. While there is some evidence that AB became upset as the AFOSI agents searched and planned to seize additional items from her home, there is no evidence that she ever revoked her consent to search her Dell laptop. For the reasons explained above, AB had actual and apparent authority over the Dell laptop and was able to provide consent to search the device. We distinguish the search of the hard drive which is a physical component of the laptop from using the laptop as a conduit to access electronic data through internet based services. We conclude that AB was able to consent to the search of the Dell laptop. The military judge abused her discretion in the application of the law as to AB's consent to the search of the Dell laptop.[7]

Conclusion

We hold the military judge did not err in granting the motion to suppress the evidence derived from the appellee's Facebook account, e-mail account, and HP laptop. The military judge made detailed findings of facts supported by the record, accurately described the applicable law, and reasonably concluded the Government had not met its burden on the admissibility of those items of evidence. As such, with regards to the evidence derived from the appellee's Facebook account, e-mail account, and HP laptop, the military judge did not abuse her discretion.

We hold that the military judge erred when granting the motion to suppress the evidence contained on the Dell laptop and the Centon thumb drive.

We remand the case to the trial court for further proceedings.

On consideration of the Appeal by the United States under Article 62, UCMJ, it is by the Court on this 4th day of April, 2014,

[7] As our fact finding power is limited during an Article 62 appeal, we leave as unresolved the issue as to whether the evidence obtained from the Dell laptop is evidence that was contained on the laptop prior to the illegal search or was derivative evidence that was created by the illegal search.

ORDERED:

That the Government's appeal is hereby **DENIED in part and GRANTED in part.**

The Government's appeal is denied as to the suppression of evidence from the Hewlett-Packard (HP) laptop.

The Government's appeal is granted as to the suppression of evidence from the Dell laptop and Centon thumb drive. .

HARNEY, Senior Judge, and MITCHELL, Judge, concur.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

Appendix B

18 April 2014

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant,*	)	MOTION FOR RECONSIDERATION AND RECONSIDERATION *EN BANC*
v.	)	
	)	Misc. Dkt. No. 2013-26
Senior Airman, (E-4), AARON M. BUFORD, USAF, *Appellee.*	)	Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 17 and 19 of this Court's Rules of Practice and Procedure, the United States respectfully moves this Court to reconsider and to reconsider *en banc* its 4 April 2014 order in the captioned-above case. This Court has jurisdiction to consider this motion because the United States has timely submitted a motion for reconsideration within 30 days of this Court's order. (*See* United States Air Force Court of Criminal Appeals, Rules of Practice and Procedure, Rule 19 (11 October 2010, as amended through 12 April 2013)).

On 4 April 2014, this Court ordered that the "Government's appeal is denied as to the suppression of evidence from the Hewlett-Packard (HP) laptop." United States v. Buford, Misc. Dkt. No. 2013-26, slip. op. at 9 (A.F. Ct. Crim. App. 4 April 2014)(unpub. op.). In reaching this decision, the Court reasoned as follows:

> The probable cause necessary to warrant a search cannot be based on illegally obtained information or evidence. United States v. Turck, 49 C.M.R. 49 (A.F.C.M.R. 1974). The search warrant used for the search of the home of AB and the appellant where the HP laptop was seized was based on information obtained by A1C RM's unconstitutional search of the appellee's Facebook and e-mail accounts. Therefore, the Government cannot rely on the subsequent search warrant as legal authorization to search the HP laptop.

(Id. at 7.) This was the extent of the Court's analysis concerning Appellee's HP laptop.

The United States submits that this Court incorrectly denied the United States' appeal as to the suppression of evidence from Appellee's HP laptop, which contained several images of child pornography, as well as obscene chat logs between Appellee and minor children. (App. Ex. XXII.) With respect, this Court was incorrect for at least three reasons.

First, while the probable cause necessary to justify a search cannot be wholly based on illegally obtained information or evidence, a search authorization based in part on illegally obtained evidence is not *per se* invalid. In this case, the probable cause that served as the basis for the search authorization was based in large part on lawfully obtained evidence. Second, the Air Force Office of Special Investigations (AFOSI) agents were, pursuant to Mil. R. Evid. 311(b)(3), acting in good faith reliance upon the search

authorization that allowed them to search and seize Appellee's HP laptop. Last, Appellee's wife acted as an independent source for law enforcement to pursue and seize Appellee's electronic media, and, further, the lawful search and seizure of Appellee's Centon thumb drive would have led law enforcement to inevitably discover Appellee's HP laptop. Therefore, the military judge below erred in suppressing that evidence and this Court erred in finding that she did not.

As justification for *en banc* consideration, the United States believes that consideration by the full Court is necessary to secure and maintain uniformity of decision. (*See* Rules of Practice and Procedure, Rule 17.1). Simply stated, the decision regarding the HP laptop in this case rests exclusively and erroneously on a forty-year-old service court decision that pre-dates both the Military Rules of Evidence (including Mil. R. Evid. 311), as well as several important Court of Appeals for the Armed Forces (CAAF) and Supreme Court precedents in the area of search and seizure. The Court's holding also ignores, and is inconsistent with, both United States v. Gallo, 53 M.J. 556 (A.F. Ct. Crim. App. 2000), and United States v. Camanga, 38 M.J. 249 (C.M.R. 1993).

ISSUE FOR RECONSIDERATION

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY SUPPRESSING EVIDENCE FROM THE HEWLETT-PACKARD (HP) LAPTOP.

Standard of Review

An appellate court reviews a military judge's evidentiary ruling on a motion to suppress evidence for an abuse of discretion. United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995); United States v. Wallace, 66 M.J. 5, 7 (C.A.A.F. 2008). As this Court stated in its 4 April 2014 order:[1]

> In reviewing a military judge's ruling on a motion to suppress, we review factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard. We apply this standard when reviewing evidentiary rulings under Article 62(b), UCMJ. Therefore, on mixed questions of law and fact, a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect . . . .

Buford, slip. op. at 4 (citing United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014)).

Law and Analysis

1. **The probable cause supporting the search authorization for the HP laptop was based upon lawful evidence.**

The holding in United States v. Turck, 49 C.M.R. 49, 51 (A.F.C.M.R. 1974)--that military law provides that probable cause to search cannot be based on illegally obtained

[1] In the introductory section of its order, this Court also cited to a Second Circuit opinion when it stated "the appellate courts normally should have the power to reverse when the trial judge misunderstood the legal significance of a fact found by the judge when that misunderstanding causes an error as to the court's ultimate finding." Buford, slip. op. at 2 (citing United States v. Shakur, 817 F.2d 189 (2d Cir. 1987)).

information or evidence[2]--originated from the "old" Military Rules of Evidence, contained within the 1969 edition of the Manual for Courts-Martial (MCM):

> [I]f a search is unlawful because [it is] conducted without probable cause and a second search is conducted based on information supplying probable cause discovered during the first search, evidence obtained by the second search is inadmissible against an accused . . . even if the second search would otherwise be lawful.

MCM chapter XXVII, para. 152 (1969 ed.). This rule, contained within the 1969 edition of the MCM, pre-dated several important CAAF and Supreme Court precedents in the area of search and seizure law.

The current state of the law, however, is that probable cause exists when there is sufficient information to provide the authorizing official a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f); United States v. Mix, 35 M.J. 283 (C.M.A. 1992). Whether probable cause exists for a magistrate to issue an authorization to search is determined by the totality of the circumstances presented to the magistrate. Illinois v. Gates, 462 U.S. 213, 233 (1983); *accord*

[2] United States v. Turck, 49 C.M.R. 49 (A.F.C.M.R. 1974), cites to the 1969 edition of the MCM to support this rule, as well as United States v. McCrary, 39 C.M.R. 104 (C.M.A. 1969). McCrary was abrogated on different grounds by United States v. Dohle, 1 M.J. 223 (C.M.A. 1975).

United States v. Hester, 47 M.J. 461, 463 (C.A.A.F. 1998), *cert. denied*, 525 U.S. 850 (1998).

In Gates, the Supreme Court emphasized the fact that the law does not demand that a magistrate make technical, legal determinations when deciding whether to issue a warrant. *See* Gates, 462 U.S. at 231. Instead, only a practical, common sense assessment is required, because the central question is whether there is probable cause, not whether there is proof beyond a reasonable doubt. Id. Searches authorized by magistrates are preferable to searches conducted under other bases. United States v. Gallo, 53 M.J. 556, 561 (A.F. Ct. Crim. App. 2000). Consequently, a magistrate's determination that probable cause existed is entitled to great deference. Id. (citing United States v. Leon, 468 U.S. 897, 914 (1984)). CAAF has interpreted the Supreme Court's guidance to require that resolution of doubtful or marginal cases should be largely determined by the preference for warrants and that "[c]lose calls will be resolved in favor of sustaining the magistrate's decision." United States v. Macomber, 67 M.J. 214, 218 (C.A.A.F. 2009)(citations omitted).

Whenever an affidavit in support of an application for a search authorization or warrant contains both admissible and inadmissible information, the affidavit is tested for sufficiency solely on the basis of the admissible information.

Gallo, 53 M.J. at 562 (citing United States v. Camanga, 38 M.J. 249 (C.M.A. 1993)). If the remaining information is sufficient to establish probable cause, it is deemed to be from an independent source. Id. This approach follows the rationale of Murray v. United States, 487 U.S. 533 (1988), where the Supreme Court noted, "while the Government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied."

In this case, the search authorization allowing AFOSI agents to seize electronic media from Appellee's residence was based on legally sufficient probable cause. On 18 May 2012, AFOSI sought search authorization from Col Scott Benza, the 48th Fighter Wing Magistrate, based on AB's (Appellee's wife) written report. (App. Ex. XIII at 12-17; App. Ex. XXV at 1, 3.) After hearing the evidence and legal advice, Col Benza determined that there was probable cause that evidence of Appellee's crimes would be present at his residence. (Id.) He authorized a search via the Air Force (AF) Form 1176.[3] (Id.) The relevant search authorization permitted the seizure of "[e]lectronic media to include Government Assigned or personal computers; government blackberry/mobile; personnel phones[;] Personal media storage devices and peripheral devices. Documents containing

[3] The original AF Form 1176s were later corrected for minor typographical errors, which explains the duplicate AF Form 1176s contained within Appellate Exhibit XXV.

Screen/Usernames, passwords. Any child pornography images/pictures." (App. Ex. XXV at 3.)

On 18 May 2012, in accordance with the search authorizations and with AB's consent, AFOSI agents began the search at Appellee's residence. (R. at 174.) Although AB became upset at some point during the search since she realized that certain electronic devices would be seized for a long period of time, she never expressly revoked her consent.[4] (R. at 175.) Various electronic storage devices were seized during this search, including the personal laptop of Appellee (the HP laptop). (R. at 76-77, 85.)

The decision in this case to seek a search authorization by AFOSI was independent of A1C Marlow's search or his "screenshots" of Appellee's Facebook profile and e-mail account. The Government had even better proof than this "screenshot" evidence: AB's oral and written statements. In March 2012, AB witnessed first-hand the messages in Appellee's e-mail and Facebook account, and she gave AFOSI a detailed description of what she observed. This was completely independent and separate

[4] This Court rejected the notion that AB lawfully consented to the search of Appellee's e-mail, Facebook, and electronic media. *See* Buford, slip. op. at 8-9; *but see, e.g.*, United States v. Matlock, 415 U.S. 164 (1974) (an individual who is not the owner of the property but has joint access and control over the property may validly give consent to search); United States v. Roder, 65 M.J. 30 (C.A.A.F. 2007)(a third party has authority to consent to a search when she possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected).

from any of A1C Marlow's actions. The following excerpt is from her written to report to AFOSI on 18 May 2012:

> In the beginning of March [2012] was when I found the fake facebook [sic] account. The name and photo are not him. The email address is his valid email account that he uses for everything. The messages in the fake facebook asked how old the girls were, if they wanted to skype, if they could send pictures to help make him cum. The one I remember most clearly was the young girl that he was speaking to. The girl was born in 1996. That's gross. I logged into his email account just to see what was going on. He had several sent messages from a girl who said she was 13 and her friend was 15 . . . the picture folder in his email was filled with pornographic images. Some looked to be of age. Some looked to be under age.

(App. Ex. XIII at 15.)

AB reported Appellee's crimes voluntarily. (R. at 170.) She was not forced to do so by A1C Marlow. (Id.) The search authority, Col Benza, testified that he based probable cause in large part on AB's statement:

> TC: Can you recall generally what the basis for your search authorization, the beginning of this case on the 17th and 18th of May, what that would have been sir? Do you have any factual recollection of what the factual basis was for your granting of probable cause?
>
> Col Benza: Well, what I remember on this case was that the alleged member's spouse reported some concerns about her husband's involvement in some type of child pornography type activity. And that's really the extent of it without reading the affidavit over again.

(R. at 260-61.) (emphasis added.)

Applying Camanga to these facts, it is clear that there was sufficient probable cause to issue the search authorization based only on what AB had witnessed. *See* Camanga, 38 M.J. at 252 ("if the remaining information is sufficient to establish probable cause, it is deemed to be from an independent source."). While it is not fully clear in the record whether the magistrate was influenced at all by A1C Marlow's search (it appears not), assuming, *arguendo*, the magistrate was exposed to information from that search, the search was still proper based on AB's independent observations. Therefore, evidence contained on the HP laptop is admissible at trial.

B. AFOSI Agents acted in good faith reliance upon the search authorization.

This Court failed to analyze whether the AFOSI agents acted in good faith reliance upon the search authorization in this case. Mil. R. Evid. 311(b)(3), otherwise known as the "good faith exception" to the warrant requirement, originally derived from United States v. Leon, 468 U.S. 897 (1984), would permit the admission at trial of Appellee's HP laptop. *See also* United States v. Chapple, 36 M.J. 410 (C.M.A. 1993); United States v. Lopez, 35 M.J. 35 (C.M.A. 1992). Evidence obtained as a result of an unlawful search may be used if "officials seeking and executing [an] authorization [] reasonably and with good faith"

relied on the authorization. Mil. R. Evid. 311(b)(3). The good faith exception will not apply if the information in the affidavit is false or provided recklessly, nor will it apply when the officers' search is not reasonably limited to "only those places and for those objects that it was reasonable to believe were covered by the warrant." United States v. Fogg, 52 M.J. 144, 151 (C.A.A.F. 1999)(citing Leon, 468 U.S. at 914).

Here, the AFOSI agents never directed A1C Marlow to conduct the initial "search." In fact, due to A1C Marlow's continuing interference with the investigation, he was given an order not to contact AB. (R. at 196.) Thus, even if A1C Marlow was acting as an agent of the government (and the United States continues to insist that he was not an agent at the time of his "search"), A1C Marlow was acting without the approval or encouragement from law enforcement--specifically, AFOSI.

The good faith exception should also apply here because there is zero evidence that the agents provided Col Benza, the magistrate, with false or "reckless" information. 468 U.S. at 914. Nor was there evidence provided to show that the agents exceeded the scope of the search authorization. Id. Simply put, when AFOSI agents do the right thing and obtain several search authorizations out of an abundance of caution, even though AB consented to the search of her home, the drastic judicially created remedy of exclusion should not apply.

By seeking a search authorization, the AFOSI agents interjected an orderly procedure by a neutral and detached magistrate who determined what actions could be taken. Fogg, 52 M.J. at 151 ("The officers were not trying to ignore or subvert the Fourth Amendment . . . they were protecting the right to privacy by obtaining a search warrant, rather than making a warrantless entry."). In short, these agents should not be penalized for seeking a search authorization. Therefore, even if the search authorization was not supported by sufficient probable cause, Appellee's HP laptop should be admitted.

C. Because this Court found the Centon thumb drive admissible, Appellee's HP laptop would have been inevitably discovered by law enforcement.

This Court also failed to analyze whether the Government had met its burden to show that the HP laptop would have been inevitably discovered. 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). The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means. United States v. Wallace, 66 M.J. 5, 10 (C.A.A.F. 2008)(finding no abuse of discretion where AFOSI investigators

would have sought and obtained a search authorization based on probable cause). "When the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation." United States v. Owens, 51 M.J. 204 (C.A.A.F. 1999)(citations omitted).

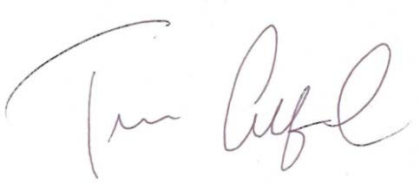
In this case, the military judge abused her discretion by holding that inevitable discovery was inapplicable. First, it is clear AB was hell-bent on making Appellee's activities known after her fight with him on or about 16 May 2012. (App. Ex. XIII at 15.) She purposely showed the Facebook profile and e-mail account to Ms. Hammond and A1C Marlow, who she knew to be a member of security forces. (Id.) While A1C Marlow may have encouraged AB to go to security forces, it is clear, based on the testimony, that it was her choice, and that she was ultimately the one who decided to move the case forward. (R. at 170.) Further, AB finally "came clean" that she had been sexually assaulted, and had decided that she wanted to report the incident the same day A1C Marlow conducted his "search." (App. Ex. XIII at 15.) Based solely on AB's AF Form 1168, it is highly likely, far beyond a preponderance of the evidence standard, that AFOSI would have initiated a search of Appellee's residence, and would have still inevitably found Appellee's HP laptop.

More importantly, because this Court found the Dell laptop and Centon hard drive admissible, AFOSI would have developed overwhelming probable cause based on the child pornography found on those devices. (*See* App. Ex. XXII.) It is impossible to believe that, having found child pornography on the Centon hard drive (which they identified belonged to Appellee), AFOSI agents would have failed to obtain a search authorization allowing them to search Appellee's home and seize any electronic media. It was evident and demonstrated by a preponderance of the evidence that, in accordance with their routine procedures, AFOSI agents would have sought and obtained a search authorization after discovering child pornography on either the Dell laptop or Centon thumb drive. This Court can be quite confident of this fact because that is exactly what AFOSI agents already did in this case: They obtained search authorizations on 18 May, 22 May, and 6 June 2012. (App. Ex. XXV.)

Based on this Court's pre-existing reasoning, AFOSI agents would have inevitably discovered Appellee's HP laptop, and the Government proved this reality well beyond a preponderance of the evidence. The military judge thus abused her discretion when she found that the government did not establish that the evidence would have been inevitably discovered. This Court should correct this error and find that the evidence found on Appellee's HP laptop is admissible.

CONCLUSION

WHEREFORE, the United States respectfully asks this Court to reconsider and reconsider *en banc* its prior decision. The United States once again asks this Court to set aside the military judge's erroneous decision to suppress evidence contained on Appellee's HP laptop, and expeditiously remand the case to the trial court for further proceedings.



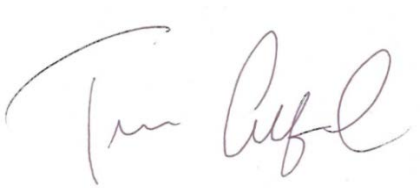
THOMAS J. ALFORD, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

C. TAYLOR SMITH, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

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 18 April 2014.



THOMAS J. ALFORD, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

Appendix C

CORRECTED COPY DESTROY ALL OTHERS

18 April 2014

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant,*	)	MOTION FOR RECONSIDERATION AND RECONSIDERATION *EN BANC*
v.	)	
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DENIED
9 MAY 2014

> The probable cause necessary to warrant a search cannot be based on illegally obtained information or evidence. United States v. Turck, 49 C.M.R. 49 (A.F.C.M.R. 1974). The search warrant used for the search of the home of AB and the appellant where the HP laptop was seized was based on information obtained by A1C RM's unconstitutional search of the appellee's Facebook and e-mail accounts. Therefore, the Government cannot rely on the subsequent search warrant as legal authorization to search the HP laptop.

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Law and Analysis

1. **The probable cause supporting the search authorization for the HP laptop was based upon lawful evidence.**

The holding in United States v. Turck, 49 C.M.R. 49, 51 (A.F.C.M.R. 1974)--that military law provides that probable cause to search cannot be based on illegally obtained

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> [I]f a search is unlawful because [it is] conducted without probable cause and a second search is conducted based on information supplying probable cause discovered during the first search, evidence obtained by the second search is inadmissible against an accused . . . even if the second search would otherwise be lawful.

MCM chapter XXVII, para. 152 (1969 ed.). This rule, contained within the 1969 edition of the MCM, pre-dated several important CAAF and Supreme Court precedents in the area of search and seizure law.

The current state of the law, however, is that probable cause exists when there is sufficient information to provide the authorizing official a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f); United States v. Mix, 35 M.J. 283 (C.M.A. 1992). Whether probable cause exists for a magistrate to issue an authorization to search is determined by the totality of the circumstances presented to the magistrate. Illinois v. Gates, 462 U.S. 213, 233 (1983); *accord*

[2] United States v. Turck, 49 C.M.R. 49 (A.F.C.M.R. 1974), cites to the 1969 edition of the MCM to support this rule, as well as United States v. McCrary, 39 C.M.R. 104 (C.M.A. 1969). McCrary was abrogated on different grounds by United States v. Dohle, 1 M.J. 223 (C.M.A. 1975).

United States v. Hester, 47 M.J. 461, 463 (C.A.A.F. 1998), *cert. denied*, 525 U.S. 850 (1998).

In Gates, the Supreme Court emphasized the fact that the law does not demand that a magistrate make technical, legal determinations when deciding whether to issue a warrant. *See* Gates, 462 U.S. at 231. Instead, only a practical, common sense assessment is required, because the central question is whether there is probable cause, not whether there is proof beyond a reasonable doubt. Id. Searches authorized by magistrates are preferable to searches conducted under other bases. United States v. Gallo, 53 M.J. 556, 561 (A.F. Ct. Crim. App. 2000). Consequently, a magistrate's determination that probable cause existed is entitled to great deference. Id. (citing United States v. Leon, 468 U.S. 897, 914 (1984)). CAAF has interpreted the Supreme Court's guidance to require that resolution of doubtful or marginal cases should be largely determined by the preference for warrants and that "[c]lose calls will be resolved in favor of sustaining the magistrate's decision." United States v. Macomber, 67 M.J. 214, 218 (C.A.A.F. 2009)(citations omitted).

Whenever an affidavit in support of an application for a search authorization or warrant contains both admissible and inadmissible information, the affidavit is tested for sufficiency solely on the basis of the admissible information.

Gallo, 53 M.J. at 562 (citing United States v. Camanga, 38 M.J. 249 (C.M.A. 1993)). If the remaining information is sufficient to establish probable cause, it is deemed to be from an independent source. Id. This approach follows the rationale of Murray v. United States, 487 U.S. 533 (1988), where the Supreme Court noted, "while the Government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied."

In this case, the search authorization allowing AFOSI agents to seize electronic media from Appellee's residence was based on legally sufficient probable cause. On 18 May 2012, AFOSI sought search authorization from Col Scott Benza, the 48th Fighter Wing Magistrate, based on AB's (Appellee's wife) written report. (App. Ex. XIII at 12-17; App. Ex. XXV at 1, 3.) After hearing the evidence and legal advice, Col Benza determined that there was probable cause that evidence of Appellee's crimes would be present at his residence. (Id.) He authorized a search via the Air Force (AF) Form 1176.[3] (Id.) The relevant search authorization permitted the seizure of "[e]lectronic media to include Government Assigned or personal computers; government blackberry/mobile; personnel phones[;] Personal media storage devices and peripheral devices. Documents containing

[3] The original AF Form 1176s were later corrected for minor typographical errors, which explains the duplicate AF Form 1176s contained within Appellate Exhibit XXV.

Screen/Usernames, passwords. Any child pornography images/pictures." (App. Ex. XXV at 3.)

On 18 May 2012, in accordance with the search authorizations and with AB's consent, AFOSI agents began the search at Appellee's residence. (R. at 174.) Although AB became upset at some point during the search since she realized that certain electronic devices would be seized for a long period of time, she never expressly revoked her consent.[4] (R. at 175.) Various electronic storage devices were seized during this search, including the personal laptop of Appellee (the HP laptop). (R. at 76-77, 85.)

The decision in this case to seek a search authorization by AFOSI was independent of A1C Marlow's search or his "screenshots" of Appellee's Facebook profile and e-mail account. The Government had even better proof than this "screenshot" evidence: AB's oral and written statements. In March 2012, AB witnessed first-hand the messages in Appellee's e-mail and Facebook account, and she gave AFOSI a detailed description of what she observed. This was completely independent and separate

[4] This Court rejected the notion that AB lawfully consented to the search of Appellee's e-mail, Facebook, and electronic media. *See* Buford, slip. op. at 8-9; *but see, e.g.*, United States v. Matlock, 415 U.S. 164 (1974) (an individual who is not the owner of the property but has joint access and control over the property may validly give consent to search); United States v. Roder, 65 M.J. 30 (C.A.A.F. 2007)(a third party has authority to consent to a search when she possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected).

from any of A1C Marlow's actions. The following excerpt is from her written to report to AFOSI on 18 May 2012:

> In the beginning of March [2012] was when I found the fake facebook [sic] account. The name and photo are not him. The email address is his valid email account that he uses for everything. The messages in the fake facebook asked how old the girls were, if they wanted to skype, if they could send pictures to help make him cum. The one I remember most clearly was the young girl that he was speaking to. The girl was born in 1996. That's gross. I logged into his email account just to see what was going on. He had several sent messages from a girl who said she was 13 and her friend was 15 . . . the picture folder in his email was filled with pornographic images. Some looked to be of age. Some looked to be under age.

(App. Ex. XIII at 15.)

AB reported Appellee's crimes voluntarily. (R. at 170.) She was not forced to do so by A1C Marlow. (Id.) The search authority, Col Benza, testified that he based probable cause in large part on AB's statement:

> TC: Can you recall generally what the basis for your search authorization, the beginning of this case on the 17th and 18th of May, what that would have been sir? Do you have any factual recollection of what the factual basis was for your granting of probable cause?
>
> Col Benza: Well, what I remember on this case was that the alleged member's spouse reported some concerns about her husband's involvement in some type of child pornography type activity. And that's really the extent of it without reading the affidavit over again.

(R. at 260-61.) (emphasis added.)

Applying Camanga to these facts, it is clear that there was sufficient probable cause to issue the search authorization based only on what AB had witnessed. *See* Camanga, 38 M.J. at 252 ("if the remaining information is sufficient to establish probable cause, it is deemed to be from an independent source."). While it is not fully clear in the record whether the magistrate was influenced at all by A1C Marlow's search (it appears not), assuming, *arguendo*, the magistrate was exposed to information from that search, the search was still proper based on AB's independent observations. Therefore, evidence contained on the HP laptop is admissible at trial.

B. AFOSI Agents acted in good faith reliance upon the search authorization.

This Court failed to analyze whether the AFOSI agents acted in good faith reliance upon the search authorization in this case. Mil. R. Evid. 311(b)(3), otherwise known as the "good faith exception" to the warrant requirement, originally derived from United States v. Leon, 468 U.S. 897 (1984), would permit the admission at trial of Appellee's HP laptop. *See also* United States v. Chapple, 36 M.J. 410 (C.M.A. 1993); United States v. Lopez, 35 M.J. 35 (C.M.A. 1992). Evidence obtained as a result of an unlawful search may be used if "officials seeking and executing [an] authorization [] reasonably and with good faith"

relied on the authorization. Mil. R. Evid. 311(b)(3). The good faith exception will not apply if the information in the affidavit is false or provided recklessly, nor will it apply when the officers' search is not reasonably limited to "only those places and for those objects that it was reasonable to believe were covered by the warrant." United States v. Fogg, 52 M.J. 144, 151 (C.A.A.F. 1999)(citing Leon, 468 U.S. at 914).

Here, the AFOSI agents never directed A1C Marlow to conduct the initial "search." In fact, due to A1C Marlow's continuing interference with the investigation, he was given an order not to contact AB. (R. at 196.) Thus, even if A1C Marlow was acting as an agent of the government (and the United States continues to insist that he was not an agent at the time of his "search"), A1C Marlow was acting without the approval or encouragement from law enforcement--specifically, AFOSI.

The good faith exception should also apply here because there is zero evidence that the agents provided Col Benza, the magistrate, with false or "reckless" information. 468 U.S. at 914. Nor was there evidence provided to show that the agents exceeded the scope of the search authorization. Id. Simply put, when AFOSI agents do the right thing and obtain several search authorizations out of an abundance of caution, even though AB consented to the search of her home, the drastic judicially created remedy of exclusion should not apply.

By seeking a search authorization, the AFOSI agents interjected an orderly procedure by a neutral and detached magistrate who determined what actions could be taken. Fogg, 52 M.J. at 151 ("The officers were not trying to ignore or subvert the Fourth Amendment . . . they were protecting the right to privacy by obtaining a search warrant, rather than making a warrantless entry."). In short, these agents should not be penalized for seeking a search authorization. Therefore, even if the search authorization was not supported by sufficient probable cause, Appellee's HP laptop should be admitted.

C. Because this Court found the Centon thumb drive admissible, Appellee's HP laptop would have been inevitably discovered by law enforcement.

This Court also failed to analyze whether the Government had met its burden to show that the HP laptop would have been inevitably discovered. 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). The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means. United States v. Wallace, 66 M.J. 5, 10 (C.A.A.F. 2008)(finding no abuse of discretion where AFOSI investigators

would have sought and obtained a search authorization based on probable cause). "When the routine procedures of a law enforcement agency would inevitably find the same evidence, the rule of inevitable discovery applies even in the absence of a prior or parallel investigation." United States v. Owens, 51 M.J. 204 (C.A.A.F. 1999)(citations omitted).

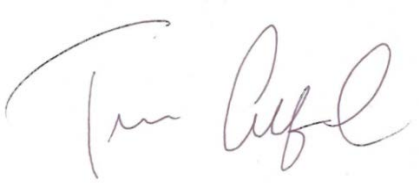
In this case, the military judge abused her discretion by holding that inevitable discovery was inapplicable. First, it is clear AB was hell-bent on making Appellee's activities known after her fight with him on or about 16 May 2012. (App. Ex. XIII at 15.) She purposely showed the Facebook profile and e-mail account to Ms. Hammond and A1C Marlow, who she knew to be a member of security forces. (Id.) While A1C Marlow may have encouraged AB to go to security forces, it is clear, based on the testimony, that it was her choice, and that she was ultimately the one who decided to move the case forward. (R. at 170.) Further, AB finally "came clean" that she had been sexually assaulted, and had decided that she wanted to report the incident the same day A1C Marlow conducted his "search." (App. Ex. XIII at 15.) Based solely on AB's AF Form 1168, it is highly likely, far beyond a preponderance of the evidence standard, that AFOSI would have initiated a search of Appellee's residence, and would have still inevitably found Appellee's HP laptop.

More importantly, because this Court found the Dell laptop and Centon hard drive admissible, AFOSI would have developed overwhelming probable cause based on the child pornography found on those devices. (*See* App. Ex. XXII.) It is impossible to believe that, having found child pornography on the Centon hard drive (which they identified belonged to Appellee), AFOSI agents would have failed to obtain a search authorization allowing them to search Appellee's home and seize any electronic media. It was evident and demonstrated by a preponderance of the evidence that, in accordance with their routine procedures, AFOSI agents would have sought and obtained a search authorization after discovering child pornography on either the Dell laptop or Centon thumb drive. This Court can be quite confident of this fact because that is exactly what AFOSI agents already did in this case: They obtained search authorizations on 18 May, 22 May, and 6 June 2012. (App. Ex. XXV.)

Based on this Court's pre-existing reasoning, AFOSI agents would have inevitably discovered Appellee's HP laptop, and the Government proved this reality well beyond a preponderance of the evidence. The military judge thus abused her discretion when she found that the government did not establish that the evidence would have been inevitably discovered. This Court should correct this error and find that the evidence found on Appellee's HP laptop is admissible.

CONCLUSION

WHEREFORE, the United States respectfully asks this Court to reconsider and reconsider *en banc* its prior decision. The United States once again asks this Court to set aside the military judge's erroneous decision to suppress evidence contained on Appellee's HP laptop, and expeditiously remand the case to the trial court for further proceedings.



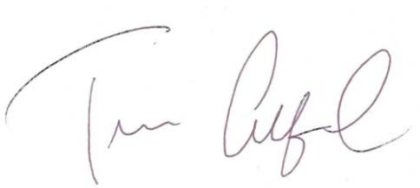
THOMAS J. ALFORD, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

C. TAYLOR SMITH, Lt Col, USAF
Reviewing Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

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 18 April 2014.



THOMAS J. ALFORD, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **AARON M. BUFORD,** United States Air Force, *Appellant.*	))))))))))	OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUSPEND THIS COURT'S RULES AND FILE AN OPPOSITION TO THE GOVERNMENT'S REQUEST FOR *EN BANC* RECONSIDERATION OUT OF TIME Before Panel No. 2 Misc. Dkt. No. 2013-26

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.1 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby opposes the government's motion for reconsideration, out of time. In addition, Appellant moves for leave, in accordance with Rule 25, to suspend Rule 17(a)(3) in regards to filing a reply to the government's request for reconsideration *en banc*.

As shown below, the government has failed to meet the requirements for this Court to reconsider its order. It appears the government is requesting reconsideration based on Rule 19.2(b)(1), more specifically, that a factual matter was overlooked. This Court correctly applied the facts and the law in its 4 April 2014 order, therefore the government's request should be denied.

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

As this Court correctly pointed out, "probable cause necessary to warrant a search cannot be based on illegally obtained information or evidence." *United States v. Buford*, Misc. Dkt. No. 2013-26, slip. op. at 7 (A.F. Ct. Crim. App. 4 April 2014) (unpub. op.) (citing *United States v. Turck*, 49 C.M.R. 49 (A.F.C.M.R. 1974)). All the government's evidence was illegally obtained. The government wants, once again, to have this Court believe Appellee's wife was an independent source - but those are not the facts. Gov. Br. at 7.

The Court of Military Appeals said, "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 this Court 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. *Buford*, slip op. 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. R. 265. 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). While Appellee believes reconsideration is not appropriate in this case, if this Court chooses to grant Appellant's request and does not agree that there was not probable cause, then this Court should do the same thing as the Court of Appeals for the Armed Forces (CAAF) 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.

B. 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 is conflating two different issues. First, they want this Court to find probable cause where none existed. Gov. Br. at 4. Second, they want this Court to use the illegally-obtained evidence that supposedly created the probable cause, to rectify the illegal search that Air Force Office of Special Investigations (AFOSI) conducted. Gov. Br. at 10. As stated above, their first argument

fails. Likewise, their second argument fails. 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 CAAF 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.

C. 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 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. *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. 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. A1C Marlow testified that Appellee's wife went to Security Forces at his urging. 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. R. 80. 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. R. 52. Accordingly, there can be no inevitable discovery.

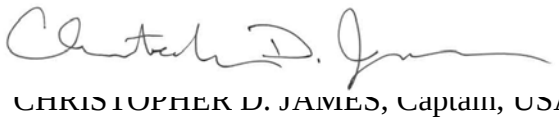
The government attempts to avoid this result using backwards logic. They assert that, because this Court found Appellee's wife consented to the search of her laptop and Appellee's thumb drive, then AFOSI would have inevitably discovered the other evidence. Gov. Br. 14. That is not inevitable discovery. That is known as the exclusionary rule. That evidence is excluded based upon the government's choice to violate Appellant's Fourth Amendment rights.

D. Reconsideration *en banc* is not necessary in this case.

The government asserts that reconsideration *en banc* is "necessary to secure and maintain uniformity of decision." Gov. Br. at 3. Their reasoning is this Court's reliance on *Turck*, and that this Court ignores *United States v. Gallo*, 53 M.J. 556 (A.F. Ct. Crim. App. 2000) and *United States v. Camanga*, 38 M.J. 249 (C.M.R. 1993) in its order. As shown above, that is not the case. Rather, the government would like this Court to believe there was legally obtained information before the magistrate for him to determine if there was probable cause. However, there was no such information. While Appellee would assert this Court should deny the government's motion outright, at the very least this Court should deny the government's request for reconsideration *en banc*, since there is already uniformity in this Court's decisions.

WHEREFORE, this Court should deny the government's motion for reconsideration and reconsideration *en banc*.

Respectfully submitted,



CHRISTOPHER D. JAMES, Captain, USAF
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 28 April 2014.

Respectfully submitted,

CHRISTOPHER D. JAMES, Captain, USAF
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4770

2 May 2014

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant,* v. Senior Airman (E-4) AARON M. BUFORD, USAF, *Appellee.*	)))))))))	GOVERNMENT'S OPPOSITION TO APPELLEE'S OPPOSITION MOTION OUT OF TIME TO GOVERNMENT'S MOTION FOR RECONSIDERATION AND RECONSIDERATION *EN BANC* Misc. Dkt. No. 2013-26 Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 17(a) and 23.1(c) of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellee's[1] Motion for Leave to File Out of Time Appellee's Opposition to Government's Motion for Reconsideration and Reconsideration *En Banc*. Simply put, Appellee's written opposition is expressly prohibited by this Court's Rule 17(a): "No response to a suggestion for consideration or reconsideration by the Court as a whole may be filed unless the Court shall so order." This Court did not order Appellee to submit a response to the United States' motion. Therefore, Appellee's motion is prohibited by rule and should be disregarded in its entirety by the Court.

Furthermore, under Rule 23.1(c), Appellee's motion is untimely. This Court issued its order in this case on 4 April

[1] In the caption to Appellee's motion, Appellee refers to the United States as "Appellee," but, to be clear, as the appealing party in this Article 62, UCMJ appeal, the United States is the Appellant.

2014. The United States timely responded and requested both reconsideration and reconsideration *en banc* on 18 April 2014. Appellee submitted his opposition motion on 28 April 2014. Rule 23.1(c) makes clear that responses "to all other motions must be filed within 7 calendar days after receipt by the responding party." Thus, in addition to Rule 17(a), Appellee has violated Rule 23.1(c).

Although Appellee's motion is not couched as a request for an enlargement of time, any enlargement of time should be denied under Rule 23.1(c) because Appellee outright failed to provide "good cause with particularity." Moreover, under Article 62 and R.C.M. 908, government appeals are to receive priority consideration, which further undermines Appellee's untimely and unexplained delay. But, with regard to the substance of Appellee's opposition motion argument, the United States rests on its 18 April 2014 motion for reconsideration and reconsideration *en banc*.

WHEREFORE, the United States respectfully requests that this Court disregard Appellee's prohibited opposition motion.

THOMAS J. ALFORD, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 May 2014.

THOMAS J. ALFORD, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800