IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**BRIEF OF AMICUS CURIAE**
Appellee,	)	SEANTYEL HARDY AND
	)	ANGELICA NGUYEN,
v.	)	CORNELL LAW SCHOOL, IN
	)	SUPPORT OF APPELLANT
Captain (O-3),	)	
TYLER G. EPPES, USAF,	)	Crim. App. No. 38881
Appellant.	)	USCA DKT. NO. 17-0364/AF

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

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INDEX

INDEX ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

STATEMENT OF THE PARTIES' CONSENT 1

ISSUES PRESENTED 1

FACTUAL AND PROCEDURAL BACKGROUND 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. The Search of the Appellant's Personal Bags on 5 February 2013 Violated Appellant's Fourth Amendment Right Against Unreasonable Searches and No Exception to the Exclusionary Rule Applies. 5

A. The Search of Appellant's Personal Bags Was Not Reasonable. 6

B. The Good Faith Exception to the Exclusionary Rule Does Not Apply. 15

C. The Inevitable Discovery/Independent Source Doctrine Does Not Apply. 18

II. The Search of Appellant's Apartment Pursuant to the 7 December 2012 Warrant Violated Appellant's Fourth Amendment Right Against Unreasonable Searches. 20

A. The Affidavit Submitted for the Search Warrant was not a Substantial Basis to Support Probable Cause. 21

B. The Good Faith Exception to the Exclusionary Rule Does Not Apply..... 24

CONCLUSION..... 25

CERTIFICATE OF COMPLIANCE WITH RULE 24(d) 27

CERTIFICATE OF FILING..... 28

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Groh v. Ramirez, 540 U.S. 551 (2004) 8
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)..... 8
Chimel v. California, 395 U.S. 752 (1969)..... 13
United States v. Chadwick, 433 U.S. 1 (1977)..... 14
Davis v. United States, 564 U.S. 229 (2011) 15, 16, 17, 18
Herring v. United States, 555 U.S. 135 (2009)..... 15, 17, 25
Arizona v. Evans, 514 U.S. 1 (1995)..... 15, 17
Illinois v. Krull, 480 U.S. 340 (1987) 15, 17
United States v. Leon, 468 U.S. 897 (1984)..... 15, 16, 17
Massachusetts v. Sheppard, 468 U.S. 981 (1984) 16, 17

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Wicks, 73 M.J. 93 (C.A.A.F. 2014) ..... *passim*
United States v. Fogg, 52 M.J. 144 (C.A.A.F. 2010) 6, 9
United States v. Kinane, 1 M.J. 309 (C.M.A. 1979)..... 13
United States v. Carter, 54 M.J. 414 (C.A.A.F. 2001) ..... *passim*
United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996)..... 16
United States v. Wallace, 66 M.J. 5 (C.A.A.F.2008)..... 19
United States v. Hoffmann, 75 M.J. 120 (C.A.A.F. 2016)..... 20, 21, 23, 24
United States v. Gurczynski, 76 M.J. 381 (C.A.A.F. 2017)..... 21

OTHER COURTS

States v. Sedaghaty, 728 F.3d 885 (9th Cir. 2013) 6, 9
Doe v. Groody, 361 F.3d 232 (3d Cir. 2004)..... 6, 7, 8, 10
United States v. Kaye, 432 F.2d 647 (D.C. Cir.1970)..... 7, 10
United States v. Angelos, 433 F.3d 738 (10th Cir. 2006) 6, 9, 16, 17, 18
Moore v. United States, 461 F.2d 1236 (D.C. Cir. 1972) 7
United States v. Graham, 638 F.2d 1111 (7th Cir. 1981)..... 11, 12, 13
United States v. Johnson, 475 F.2d 977 (D.C. Cir. 1973) 11, 12
United States v. Branch, 545 F.2d 177 (D.C. Cir. 1976)..... 11
United States v. Berry, 560 F.2d 861 (7th Cir. 1977)..... 14

OTHER AUTHORITIES

United States Constitution ..... *passim*
Mil. R. Evid. 315(h)(4) 6
Mil. R. Evid. 311(b)(3) 16, 17, 24
Mil. R. Evid. 315(f)(2) 21

STATEMENT OF INTEREST

Seantyel Hardy and Angelica Nguyen, third-year Cornell Law School students, file this brief of *Amicus Curiae* in support of Appellant and for the purpose of participating in this Court's Project Outreach under the supervision of Professor John H. Blume, a member of the bar of this Court.

STATEMENT OF THE PARTIES' CONSENT

Both the Government and Appellant have consented to the filing of this brief.

ISSUES PRESENTED

I.

WHETHER THE SEARCH OF APPELLANT'S PERSONAL BAGS EXCEEDED THE SCOPE OF THE WARRANT'S AUTHORIZATION WHEN THE AGENT REQUESTED AUTHORITY TO SEARCH APPELLANT'S PERSON, PERSONAL BAGS, AND AUTOMOBILE, BUT THE MILITARY MAGISTRATE ONLY AUTHORIZED THE SEARCH OF APPELLANT'S PERSON AND AUTOMOBILE?

II.

WHETHER AGENTS VIOLATED APPELLANT'S RIGHT TO FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT BY SEARCHING ON THE BASIS OF THE 7 DECEMBER 2012 WARRANT UNSUPPORTED BY PROBABLE CAUSE?

FACTUAL AND PROCEDURAL BACKGROUND

The issues in this case revolve around two searches, which are described in detail in the party briefs, but are briefly discussed below.

The 5 February 2013 Search

On 5 February 2013, agents submitted an affidavit to a military magistrate requesting the authority to search "(1) EPPES' person, (2) EPPES' personal bags and (3) EPPES' personally owned vehicle." JA at 736. The military magistrate granted a warrant authorizing the search of the "person of Tyler G. Eppes, Capt, USAF" and the "premises known as Vehicle: 2005 Acura TL, Black, Florida license C455FP" for "[d]ocuments and/or items of evidence as may be used in the commission of fraud against the United States Government or against federally insured financial institutions; watches and jewlery [sic] matching the description of items claimed lost or stolen in insurance claims against USAA and commercial airline companies." *Id.* at 734.

Later that same day, agents executed the warrant at Appellant's military office located on Joint Base Andrews. *Id.* at 703. In executing the warrant, agents searched not only Appellant's person and vehicle, but also two of Appellant's personal bags, which were sitting on the floor by Appellant's desk at the time of the search. *Id.* From Appellant's bags, the agents recovered numerous incriminating documents. *Id.* at 703, 853.

Following a suppression hearing, the military judge issued an opinion denying Appellant's motion to suppress the evidence obtained from Appellant's bags. *Id.* at 986, 1012. The judge determined that, because the search warrant authorized a

search of Appellant's person, the search of Appellant's "immediate vicinity" was reasonable. *Id.* at 1012.[1]

On appeal, the United States Air Force Court of Criminal Appeals affirmed. *Id.* at 026. However, the court did not adopt the military judge's specific theory of admissibility, instead finding that denial of the motion to suppress was proper because the agents acted in good faith in executing the search warrant. *Id.* at 017-18.

The 7 December 2012 Search

The second search at issue occurred on 7 December 2012. The Superior Court of the District of Columbia granted a search warrant to United States Air Force Office of Special Investigations agents ("AFOSI") for Eppes' apartment located at 301 Tingey Street, Southeast, Apartment 423, Washington, D.C. *Id.* at 709. Special Agent Russell Armstrong's affidavit was the basis of the court's probable cause finding and was attached to the warrant. *Id.* The warrant stated the apartment, with no limitations, as the place to be searched, and "evidence as more fully described in the affidavit" as the property to be seized. *Id.* Finally, the warrant stated, "evidence of the commission of a crime" as the grounds for seizure. *Id.* Agents executed the

[1] After the suppression hearing, Appellant entered his pleas on the condition that the guilty pleas would not waive "any appellate review or relief he may be entitled to" based on the judge's denial of the motion to suppress. *Id.* at 532.

warrant that same day, accessing Eppes' two-bedroom, two-bathroom apartment and recovering a number of items. *Id.* at 702.

At the same suppression hearing referenced above, the military judge also denied Appellant's motion to suppress evidence obtained during this search. *Id.* at 1010. The judge reasoned that the warrant authorizing the search was "reasonably specific in its particularity and breadth" because it incorporated the affidavit. *Id.* Additionally, the judge concluded that the agents acted in good faith reliance upon the search warrant. *Id.* The judge did not address the defense's argument (*Id.* at 686) that there was no statement of probable cause to support the assertion that evidence of criminal activity conducted in Texas would be found in Appellant's Washington, D.C. apartment. *Id.* at 1010.

The United States Air Force Court of Criminal Appeals affirmed. *Id.* at 026. The court reasoned the warrant was not overbroad since it incorporated the affidavit, and the language in the affidavit was not too amorphous. *Id.* at 010. Likewise, the court did not address Eppes' argument in its motion to suppress regarding the lack of probable cause to link the Texas activity to the Washington, D.C. apartment. *Id.*

SUMMARY OF THE ARGUMENT

The search of Appellant's personal bags was not reasonable because the search exceeded the scope of the warrant issued, which only permitted the search of

Appellant's person and vehicle. Further, no exception to the exclusionary rule applies.[2]

Additionally, agents violated Appellant's Fourth Amendment rights when searching his Washington, D.C. apartment and digital devices with a warrant unsupported by probable cause because its only focus was alleged criminal activity in Texas. The good faith exception to the exclusionary rule does not apply.[3]

ARGUMENT

I. The Search of the Appellant's Personal Bags on 5 February 2013 Violated Appellant's Fourth Amendment Right Against Unreasonable Searches and No Exception to the Exclusionary Rule Applies.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. To comply with the Fourth Amendment, a search—under most circumstances—must be authorized by a warrant that describes with particularity, the place to be searched and the things to be seized. *Id.*; *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014). A search is presumptively unreasonable when it occurs outside of the authority granted by a valid warrant and no warrant exception applies.

[2] The only exclusionary rule exceptions raised by either the Government or the courts below with respect to the 5 February 2013 search are the good faith exception, the inevitable discovery exception, and the independent source exception. As such, these are the only exceptions discussed in connection with that search.

[3] The only exclusionary rule exception raised by either the Government or the courts below with respect to the 7 December 2012 search is the good faith exception. Likewise, this is the only exception discussed in connection with that search.

Wicks, 73 M.J. at 99. If a search is unreasonable, evidence obtained as a result of the search must be suppressed unless an exception to the exclusionary rule applies. *Id.* at 103; *see* Mil. R. Evid. 315(h)(4) (adopting the exclusionary rules required by the United States Constitution).

A. The Search of Appellant's Personal Bags Was Not Reasonable.

1. Broad Language Within an Affidavit Cannot Extend the Scope of a Narrow Warrant.

Though police officers need not interpret a warrant in an unduly narrow fashion, they must exercise common sense in assessing the warrant's scope. *United States v. Fogg*, 52 M.J. 144, 148 (C.A.A.F. 2010). In *Fogg*, the warrant authorized the seizure of certain items including "photos," but in exercising the warrant, the officers also seized videotapes. *Id.* There, the court sensibly interpreted the word "photos" as including videotapes, citing various evidence rules, a secondary source, and case law that defined "photos" to include "videotapes." *Id.* at 148-49.

When the scope of the area to be searched or items to be seized, as set out in the warrant, is narrower than the scope sought in the supporting affidavit, a number of circuits have sensibly concluded that the warrant controls. *States v. Sedaghaty*, 728 F.3d 885, 913 (9th Cir. 2013) ("The affidavit as a whole cannot trump a limited warrant."); *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006) (holding that a search congruent with the affidavit but beyond the explicit terms of the warrant exceeded the scope of the warrant); *Doe v. Groody*, 361 F.3d 232, 241 (3d Cir. 2004)

("The warrant provides the license to search, not the affidavit."); *United States v. Kaye*, 432 F.2d 647, 649 (D.C. Cir. 1970) ("It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched."); *see also Moore v. United States*, 461 F.2d 1236, 1238-39 (D.C. Cir. 1972) (refusing to permit officers to speculate as to "why or on what basis [warrant] language [is] narrowed," instead requiring them to assume that when a judge issues a warrant narrower in scope than the affidavit, the judge intended to limit the search).

In *Kaye*, for example, the officers requested a "search warrant for entire premises 3618 14th Street, N.W., Washington, D.C., *a two-story brick building.*" 432 F.2d at 649 n.1 (emphasis added). The first floor of this building was the suspect's business, with an official address of 3618 14th St. NW; the second floor was the suspect's apartment, with an official address of 3168 ½ 14th St. NW. *Id.* at 648. The magistrate issued a warrant authorizing a search of "the premises known as 3618 14th St. N.W.," omitting any language regarding the existence of two floors in the building. *Id.* at 649 n.1. The court held that the search of the second-floor apartment was beyond scope of the warrant because the omitted language rendered the warrant narrower than the affidavit. *Id.* at 650.

Similarly, in *Doe*, officers submitted an affidavit requesting authority to search "all occupants" inside a particular dwelling for evidence of drug crimes. 361 F.3d at 236. In response, the magistrate issued a warrant on a boilerplate form

authorizing only the search of "John Doe" and omitting reference to any other occupants. *Id.* In executing the warrant, the officers searched not only John Doe, but also his wife and daughter who were present in the dwelling. *Id.* at 236-37. The officers asked the court to read the warrant in a "common sense" fashion in light of the affidavit that requested authority to search "all occupants." *Id.* at 239. The court rejected this argument and found that the officers exceeded the scope of the warrant when they searched persons included in the affidavit but not the warrant. *Id.* at 243.

Though an affidavit may help to *particularize* an overbroad warrant when the warrant specifically incorporates the affidavit (which the warrant at issue did not), *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004), an affidavit cannot *broaden* the search authority of a more limited warrant. Allowing the affidavit to do so would undermine the purpose of the warrant requirement. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 331 (1978) (noting that the purpose of the warrant requirement is to safeguard Fourth Amendment rights by interposing a neutral magistrate between the citizen and the "zealous law enforcement officer"). To grant search authority based on an affidavit, even when the scope of the affidavit is broader than the scope of the warrant ultimately issued, would render the neutral magistrate requirement a useless and ineffective safeguard against unreasonable searches.

In this case, the military judge issued a search warrant that particularly described the area to be searched as the "person of Tyler G. Eppes, Capt, USAF"

and the "premises known as Vehicle: 2005 Acura TL, Black, Florida license C455FP," making no reference to Appellant's personal bags. JA at 734. The officers nonetheless searched Appellant's bags, thereby exceeding the authority granted to them under the warrant. *Wicks*, 73 M.J. at 99.

The Government's interpretation of the plain language of the warrant is too broad and proves too much. Specifically, the Government argues that since the affidavit requested authority to search "(1) EPPES' person, (2) EPPES' personal bags and (3) EPPES' personally owned vehicle," this Court should interpret the warrant authority to include not only Appellant's person and vehicle as explicitly listed in the warrant, but also Appellant's personal bags which are not listed in the warrant. An explicit request to search "X, Y, and Z" followed by explicit permission to only search "X and Y" cannot, as a matter of plain language or common sense, be read as permitting a search of "Z." *See Fogg*, 52 M.J. at 148 (requiring officers to exercise common sense in interpreting warrants). Moreover, unlike the abundant evidence in *Fogg*, which suggested that the word "photos" as used in the warrant encompasses "videotapes," there is no evidence suggesting that the word "person" encompasses bags that happen to belong to that person but are not being carried by that person at the time of the search. *See id.* at 148-49.

Furthermore, because the warrant in this case was narrower in scope than the supporting affidavit, the warrant must control. *Sedaghaty*, 728 F.3d at 913; *Angelos*,

433 F.3d at 746; *Doe*, 361 F.3d at 241; *Kaye*, 432 F.2d at 649. Like the warrant in *Kaye*, the warrant in this case omitted language found in the affidavit, which rendered the warrant narrower in scope than the affidavit with respect to the places authorized to be searched. 432 F.2d at 648-49. As such, like the court in *Kaye*, this Court should hold that the language in the warrant determines the scope of a legal search and that the language in the affidavit cannot expand upon that scope. *See id.* at 650.

Moreover, the magistrate in this case, like the magistrate in *Doe*, issued a warrant on a boilerplate form that omitted reference to areas that the affidavit explicitly requested authority to search. 361 F.3d at 236. Additionally, the agents in this case, like the officers in *Doe*, conducted their search according to what was requested in the affidavit rather than what was authorized by the warrant. *See id.* at 236-37. Like the Government in *Doe*, the Government in this case asks this Court to interpret the warrant in a "common sense" fashion by adopting the breadth of search authority requested in the affidavit. *See id.* at 239. This Court should reach the same conclusion as the court in *Doe* and hold that the agents exceeded the scope of the warrant by searching Appellant's bags. *See id.* at 243.

2. Warrant Authority to Search a Person Does Not Extend to Bags Not Appended to that Person's Body Even if Those Bags Are Within the Person's Immediate Vicinity.

Cases defining the term "person" in the context of searches pursuant to a warrant suggest that whether a person's bag is part of his or her "person" depends on whether the bag is appended to the person's body, *not* on whether the bag is within the person's "immediate vicinity." *See, e.g.*, *United States v. Graham*, 638 F.2d 1111 (7th Cir. 1981); *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973). In *Graham*, for instance, police officers had a warrant to search the defendant's person, but searched both the defendant's person and a purse that he was carrying. 638 F.2d at 1112. In the purse, they found drugs and incriminating documents. *Id.* The court held that the search of the purse was within the scope of the warrant because a purse "*while appended to the body*, [is] so closely associated with the person" that it is "within the concept of one's person." *Id.* at 1114 (emphasis added).

Contrastingly, in *Johnson*, officers had a warrant to search an apartment and searched a purse belonging to a visitor who was in the apartment. 475 F.2d at 978. During the search, the visitor was on the couch, while the purse was on a coffee table in front of the couch. *Id.* The court held that the warrant authority to search the apartment extended to the purse because the visitor was not wearing the purse at the time of the search, and, as such, the purse was *not* part of her "person," but rather part of the apartment. *Id.* at 979; *see also United States v. Branch*, 545 F.2d 177, 182

(D.C. Cir. 1976) (holding that a visitor's purse was part of her "person" rather than part of the premises because the visitor was wearing the purse on her shoulder when officers executed a warrant to search the premises).

Here, the warrant authority to search Appellant's "person" does not extend to his personal bags even if those bags were within his "immediate vicinity." Though the Government is correct that the warrant "would not authorize the search of Appellant's personal bags in a location separate and apart from his person," it errs in construing the term "person" to encompass bags that Appellant was not wearing at the time of the search. *See* Brief for Appellee at 15. The Government relies on the Seventh Circuit's decision in *Graham* to support its argument, *see id.* at 14-15, but *Graham* held that a warrant granting authority to search a person extends to that person's bags only "*while appended* to the body." 638 F.2d at 1114 (emphasis added). Here, Appellant's bags were not appended to his person, and thus *Graham* is inapposite. *See* JA at 703. The D.C. Circuit's decision in *Johnson* is more on point—like the visitor's purse in *Johnson,* Appellant's bags, though close-by, were not appended to his body when the agents conducted the search. 475 F.2d at 978-79. Thus, this Court should conclude, as did the *Johnson* court, that the bags were not part of Appellant's "person." *See id.*

The Government insists, however, that Appellant's bags should still be considered part of his "person" *because* they were in his "immediate vicinity." Brief

for Appellee at 14-15. The military judge made a similar determination below. JA at 1012. This argument seems to reflect both a misapplication and a misinterpretation of search incident to arrest doctrine. First, whether an item is in a person's "immediate vicinity" is only relevant to the scope of search authority in the unique context of searches incident to arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969). In that context, it is the lawful *arrest*, not a search warrant, that permits law enforcement to search the "person" and his or her "immediate vicinity" for the purpose of ensuring officer safety and preventing the destruction of evidence. *Id.*; *United States v. Kinane*, 1 M.J. 309, 313 (C.M.A. 1979); *see also Graham*, 638 F.2d at 1112 (noting that the scope of searches incident to arrest, as opposed to searches conducted pursuant to a warrant, is uniquely tailored to serve this underlying purpose). Here, there was no arrest and, therefore, whether (or not) Appellant's bags were within his "immediate vicinity" is not relevant.

Second, search incident to arrest law does not hold that everything in a suspect's "immediate vicinity" is *part of* the suspect's "person"—it merely extends search authority to both areas. *See id.* Moreover, cases that have addressed *delayed* searches incident to arrest,[4] have actually made an important distinction between items found on the "person" and items found in the "immediate vicinity." *See, e.g.*,

[4] Delayed searches incident to arrest are special cases that fall within search incident to arrest jurisprudence. They occur when police officers seize items at the time of an arrest but search the items later, e.g., after going back to the police station.

United States v. Chadwick, 433 U.S. 1, 15-16 n.10 (1977), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Berry*, 560 F.2d 861, 864-65 (7th Cir. 1977), *reh'g granted and opinion vacated on other grounds*, 571 F.2d 2 (7th Cir. 1978) (noting that delayed searches of items seized from the "person" are proper without a warrant, but delayed searches of items seized from the "immediate vicinity" are not). Because the law does not treat "person" as inclusive of "immediate vicinity" in the search incident to arrest context, "person" should not be read to include "immediate vicinity" in our context. To conflate the two here would be to render Fourth Amendment search doctrine inconsistent.

The Government further argues that, because a bag is the most likely place to keep documents, authorizing a search of a person for documents would be nonsensical if it did not include authority to also search the suspect's bags. Brief for Appellee at 14-15. But, again, this argument ignores the plain language of the warrant, which permitted a search of Appellant's person *and* Appellant's vehicle for certain types of "[d]ocuments," "items of evidence," and "watches and jewlery [sic]." JA at 734. In granting this warrant, the military magistrate anticipated that agents would find documentary evidence *either* on Appellant's person *or* in his car. Thus, this Court would not "read common sense out of the plain interpretation of the search authority" by construing the warrant as not authorizing a search of Appellant's bags. *See* Brief for Appellee at 15.

B. The Good Faith Exception to the Exclusionary Rule Does Not Apply.

Once a court determines that a search violates the Fourth Amendment, the exclusionary rule demands that evidence obtained from that search be suppressed unless an exception applies. *Wicks*, 73 M.J. at 103. The good faith exception is applicable when police "act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Davis v. United States*, 564 U.S. 229, 238 (2011). The test is "whether a reasonably well-trained officer would have known that the search was illegal" in light of "all of the circumstances." *Herring v. United States*, 555 U.S. 135, 145 (2009). This standard takes into account the officer's training and experience, but not his or her subjective intent. *Id.* at 145-46. In application, the good faith exception applies to conduct involving only "simple, isolated negligence," but not to conduct amounting to a deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights. *Davis*, 564 U.S. at 238 (2011).

The Supreme Court has applied the good faith exception in a number of situations, such as when police officers rely on an invalid warrant, a statute or binding precedent that is later overruled, or the mistakes of police or judicial personnel. *Davis*, 564 U.S. 229 (overruled binding precedent); *Herring*, 555 U.S. 135 (police employees); *Arizona v. Evans*, 514 U.S. 1, 14-15 (1995) (judicial employees); *Illinois v. Krull*, 480 U.S. 340 (1987) (invalidated statues); *United States v. Leon*, 468 U.S. 897, 922 (1984) (invalid warrants). The rationale underlying

these cases is that courts should not penalize police officers for innocent conduct that is the result of someone else's error. *Davis*, 564 U.S. at 240-41.

Mil. R. Evid. 311(b)(3) embodies the good faith exception as articulated in *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), which specifically address the scenario when officers rely on a subsequently invalidated search warrant. *United States v. Carter*, 54 M.J. 414, 421 (C.A.A.F. 2001). Subject to limitations, *Leon* holds that a court may admit evidence, despite a Fourth Amendment violation, when officers conduct a search in reliance on a defective warrant. 468 U.S. at 914-15. However, the *Leon* exception to the default rule of exclusion does not extend to situations involving the unlawful execution of a *valid* warrant. *Id.* at 918 n.19; *see also United States v. Maxwell*, 45 M.J. 406, 421 (C.A.A.F. 1996). Further, when officers do not rely on *another's* mistake, but instead commit the mistake *themselves* by exceeding the scope of an explicit and valid warrant, the good faith exception does not apply. *Angelos*, 433 F.3d at 744-46 (refusing to apply the good faith exception when officers had a warrant authorizing the search of the defendant's car and safe but nonetheless searched the defendant's entire residence without contacting the issuing magistrate to remedy the warrant's limited scope).

The Government, as did the court below, relies on *Leon*, *Sheppard* and Mil. R. Evid 311(b)(3) as support for its argument that the good faith exception applies.

Brief for Appellee at 16-17; JA at 017-18. However, *Leon* and *Sheppard* (and thus Mil. R. Evid 311(b)(3)) only apply when the police *properly* execute a subsequently invalidated warrant. *Leon*, 468 U.S. at 918 n.19; *Carter*, 54 M.J. at 421 (holding that Mil. R. Evid 311(b)(3) codifies *Leon* and *Sheppard*). They are inapplicable here, where the agents *improperly* executed a lawful warrant. *Leon*, 468 U.S. at 918 n.19. In this case, the agents did not rely on someone else's mistake—rather, the agents themselves made the mistake. *Davis*, 564 U.S. at 240-41 (noting that *Leon, Krull, Evans, Herring,* and *Davis* all seek to protect police conduct that relies on *someone else's* mistake).

Additionally, the good faith exception does not apply here because the agents' conduct amounted to more than "simple, isolated negligence." *Davis*, 564 U.S. at 238. After the agents received the warrant from the military magistrate, they either read the warrant or they did not (and presumably they did). Of course, if the agents neglected to read the warrant altogether, their conduct surely amounts to gross negligence of the type that the exclusionary rule seeks to deter. *Herring*, 555 U.S. at 145l; *Davis*, 564 U.S. at 238. If the agents read the warrant, it should have been obvious to them that the magistrate only authorized the search of Appellant's person and his vehicle since the magistrate made no reference whatsoever to Appellant's bags. Despite this omission, the agents in this case, like the officers in *Angelos*, proceeded with their search without warrant authorization and without attempting to

seek any clarification from the magistrate. 433 F.3d at 744-46. Failing to take such a simple step to clarify the scope of the warrant surely amounts, at a minimum, to gross negligence. *Davis*, 564 U.S. at 238. Therefore, like the court in *Angelos*, this Court should hold that the good faith exception is not applicable. 433 F.3d at 746.

C. The Inevitable Discovery/Independent Source Doctrine Does Not Apply.[5]

Illegally obtained evidence may—under some circumstances—be admitted pursuant to the inevitable discovery doctrine, when, as its name suggests, the prosecution can demonstrate that the evidence would have been inevitably found by law enforcement in the course of their investigation. *Wicks*, 73 M.J. at 103. This exception requires the prosecution to demonstrate, by a preponderance of the evidence, that *at the moment of the illegal search*, agents had obtained or were actively pursuing evidence that would have inevitably led to the lawful discovery of the illegally obtained evidence. *Id.* It is *not enough* that probable cause existed (as

[5] The Independent Source Doctrine is referenced in the Government's Brief (Brief for Appellee at 29-31), but no evidence of an independent source for the illegally obtained evidence was present at the suppression hearing, therefore the doctrine does not apply. This lack of additional, independent evidence is confirmed by the military judge's statement that "[t]he evidence that resulted from those searches and seizures would have impacted the government's ability to meet its burden beyond a reasonable doubt maybe not for all but at least for a substantial number of the charges and specifications in this case," and "I can state that it's this court's opinion that it would have impacted the ability of the government to present its case and meet its burden beyond a reasonable doubt." JA at 532-33.

a matter of law) at the time of the unconstitutional conduct to obtain a warrant for the illegally obtained evidence; rather the prosecution must establish (as a matter of fact) that the police were in the process of obtaining a warrant or conducting an investigation that would have definitely led them to obtain a warrant.[6] *Id.* This Court must determine whether, on the record, without mere speculation and conjecture, the military judge erred in his determination that the Government met its burden. *Id.*

The Government cannot satisfy its burden on these facts. At the time of the agents' illegal actions, the Government was conducting a search of Eppes' person and vehicle. JA at 703. Agents also searched government property, including the desk. *Id.* Appellant was not arrested before, during or after the searches. JA at 705. Thus, it is more likely than not that after the search of government property and Appellant's person (not including the bags since that is the illegal conduct), Appellant would have left the office and any evidence in his bags would have stayed

[6] As this Court has recognized, a mere showing that probable cause existed as a matter of law still requires assumptions that agents would have applied for a warrant to search and a magistrate would have agreed to the breadth of that search. *United States v. Wallace*, 66 M.J. 5, 11 (C.A.A.F. 2008) (Baker, J., concurring in the result). The inevitable discovery doctrine requires more: a showing that "agents would have used that information to show probable cause in an application to search." *Id.* This further requirement is intended to encourage searches of private places based on warrants and not just probable cause. *Id.* ("[O]ne of the fundamental objectives of the Fourth Amendment . . . is to encourage, and in most cases, compel the government to obtain a warrant . . . before conducting a search or seizure.").

in the bags. The Government has not shown that subsequent events would have led officers to conduct *another* legal search that would have included the bags, i.e., that the agents would have been able to successfully procure an additional warrant specifically for the bags after failing to obtain one the first time.[7] Even if the agents later received authorization for another search of the apartment or the car, this requires a questionable assumption that the bags would have been at that place at that time, but bags are commonly moved with their owner. The Government has failed to show by a preponderance of the evidence that agents would have inevitably discovered the same evidence in the bags.

II. The Search of Appellant's Apartment Pursuant to the 7 December 2012 Warrant Violated Appellant's Fourth Amendment Right Against Unreasonable Searches.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. It further provides that "no Warrants shall issue,

[7] One situation in which the Government could have inevitably obtained the same evidence lawfully is if the agents had secured the scene, called for authorization to search the bags, received authorization, and then searched. The United States made a similar argument in *United States v. Hoffmann*, 75 M.J. 120, 125 (C.A.A.F. 2016), that officers could have "lawfully frozen the scene at Appellant's barracks room and pursued a command authorization based on probable cause." The argument failed because this Court reasoned that freezing the scene while waiting for additional search authorization still required probable cause or exigent circumstances. *Id.* Neither were present there, nor in this case where the agents had already attempted and failed to procure authorization for Appellant's personal bags.

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." *Id.* Probable cause for a search warrant exists where there is a reasonable belief and fair probability, based on the circumstances set forth in an affidavit, that evidence of a crime will be found in a particular place. *Hoffmann*, 75 M.J. at 125; Mil. R. Evid. 315(f)(2). This Court does not review a finding of probable cause *de novo* but instead asks whether the magistrate had a substantial basis for finding probable cause. *Id.*

A. The Affidavit Submitted for the Search Warrant was not a Substantial Basis to Support Probable Cause.

Any judge presented with a request for a search warrant, including a military magistrate, is obligated by the Fourth Amendment to be neutral and detached, and not to simply act as a "rubber stamp" for law enforcement. *Carter*, 54 M.J. at 419; *see also United States v. Gurczynski*, 76 M.J. 381, 386-87 (C.A.A.F. 2017) (stating that warrant rules and judicial requirements prevent "dragnet searches for evidence of any crime" and "make general searches . . . impossible"). Thus, bare conclusions of the requesting officer do not suffice to establish probable cause. *Id.*

The Government argues that the military magistrate's probable cause finding is entitled to substantial deference. Brief for Appellee at 34-35. However, this Court outlined in *Carter* a number of exceptions where it would not afford deference to a finding of probable cause. 54 M.J. at 419. One of those exceptions is when the magistrate merely rubber stamped the request. *Id.* Another is when the affidavit did

not provide a substantial basis for issuing the warrant, but the magistrate's finding was a "mere ratification of the bare conclusions of others." *Id.* Both of those exceptions apply here, leaving no room for deference to the military magistrate's finding of probable cause.

The affidavit provided to the military magistrate gave very little factual information or supported allegations. Nor did it provide a substantial basis for a reasonably detached jurist to find that evidence of the specific crimes Appellant was charged with would be found in his apartment.

As probable cause that this evidence would be found in the D.C. apartment, the agent included one section on alleged criminal activity that took place in Texas and one section on a 2008 letter of counseling that Appellant received for falsifying travel orders for his vacation to the United Kingdom. JA at 714-15. In the section regarding the Texas activity, the agent outlined witness testimony from hotel employees in Texas claiming that Appellant used falsified travel orders and intimidation to gain tax exemptions and better treatment for his wedding reception and dinner at the Texas hotel by representing it as official government travel. *Id.* There was no mention of Appellant's D.C. apartment or any statement to lead a reasonably detached jurist to believe evidence of Appellant's alleged activities in the Texas hotel would be found in his D.C. apartment.

Notably, in *Hoffmann*, the court found that the affidavit did not provide a substantial basis for probable cause because the affidavit did not unambiguously link the evidence already obtained to the specific evidence the requesting officers were hoping to find with the search warrant. 75 M.J. at 127. Similarly, here, the general listing of commonplace household records and computer items did not unambiguously link the testimony mentioned in the affidavit regarding alleged criminal activity in a hotel in Texas to any specific evidence the special agent was seeking in the D.C. apartment. The agent did not explain why the contraband might be found there.

Furthermore, the affidavit did not detail with any reasonable degree of particularity what evidence was likely to be found and why it was likely to be found in Appellant's apartment in D.C. Instead it contained vague, overbroad lists throughout, such as a list of every type of written or electronic communication in Appellant's apartment. JA at 712. Of course, a search of *every* printed and electronic document in a person's home would increase the chances of finding some type on contraband. That is what this affidavit requested access to regarding Appellant's D.C. apartment, and that is what the magistrate granted, thus demonstrating that the magistrate did not reason in a neutral and detached manner but instead granted law enforcement license to rummage through Appellant's D.C. apartment hoping to find anything.

B. The Good Faith Exception to the Exclusionary Rule Does Not Apply.

As discussed previously, the good faith exception to the exclusionary rule can, under appropriate circumstances, authorize the admission of illegally obtained evidence when police officers conduct a search in reliance on an invalid warrant. But, the exception, codified in Mil. R. Evid. 311(b)(3), requires a predicate finding that "the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause." *Hoffmann*, 75 M.J. at 128.

In *Hoffmann*, this Court quickly disposed of the Government's good faith exception argument after analyzing the affidavit and determining that there was no substantial basis for finding probable cause due to its failure to specifically link the evidence already obtained to the evidence that the requesting officers were hoping to find with the search warrant. 75 M.J. at 127-28. The affidavit in this case similarly lacked any specific link between the witness testimony and emails from the Texas hotel and any evidence the special agent was requesting to search for in Appellant's Washington, D.C. apartment. Because there was no substantial basis for probable cause, the Court should likewise dispose of this argument as it did in *Hoffmann*.

The Government argues the good faith exception should apply even if this Court finds no substantial basis for probable cause for the 7 December 2012 search warrant. Brief for Appellee at 40-41. However, the third prong of the military good faith exception rule also precludes the application of the exception in this case. Law

enforcement officials cannot reasonably rely on a warrant "[w]here the warrant is 'so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.'" *Carter*, 54 M.J.at 420. As previously noted, this standard takes into account the training and experience of law enforcement officials but not subjective intent. *See Herring*, 555 U.S. at 145.

Here, the 7 December 2012 warrant was clearly facially invalid. It did not state specific things to be seized, provide evidence linking the Texas activity to the D.C. apartment, or set any limitations on places the special agent could search within the apartment. The warrant fully incorporated the affidavit, which requested to search the entire apartment and everything in it despite the paucity of factual support for such a sweeping, general search. JA at 709. Because this warrant was so facially deficient, an objectively reasonable special agent simply could not have relied on it for a lawful search, and the good faith exception cannot apply.

CONCLUSION

For the foregoing reasons, this Court should find that the two searches were conducted in violation of the Fourth Amendment and no exception to the exclusionary rule applies.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6382 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared with Microsoft Word Version 2016 using Times New Roman 14-point typeface.

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CERTIFICATE OF FILING AND SERVICE

I certify that on 25 October 2017, a copy of the foregoing was electronically transmitted to the Court and to counsel of record as follows:

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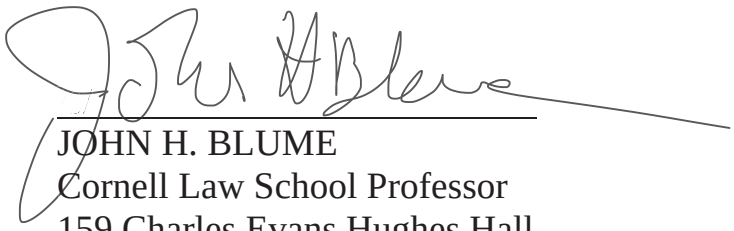

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