IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	REPLY BRIEF ON BEHALF OF APPELLANT
Tyler G. EPPES Captain (O-3), United States Air Force, Appellant	)	AFCCA Dkt. No. 38881 USCAAF Dkt. No. 17-0364/AF

REPLY BRIEF ON BEHALF OF APPELLANT

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

Pursuant to Rule 19 of this Court's Rules of Practice and Procedure, Appellant hereby Replies to the United States' Answer, filed on 11 August 2017.

Argument

I. WHETHER THE SEARCH OF APPELLANT'S PERSONAL BAGS EXCEEDED THE SCOPE OF THE SEARCH AUTHORIZATION WHERE THE AGENT REQUESTED AUTHORITY TO SEARCH APPELLANT'S PERSON, PERSONAL BAGS, AND AUTOMOBILE, BUT THE MILITARY MAGISTRATE AUTHORIZED ONLY THE SEARCH OF APPELLANT'S PERSON AND AUTOMOBILE AND DID NOT AUTHORIZE THE SEARCH OF APPELLANT'S PERSONAL BAGS.

1. The search authorization did not authorize a search of Appellant's bags.

The United States argues that the search authorization "reasonably included the bags Appellant had on his person," and cites a case from the Seventh Circuit

Court of Appeals, *United States v. Graham*, 638 F.2d 1111, 1112 (7th Cir. 1981), for the proposition that a shoulder bag carried by a person at the time he is stopped is within the scope of a warrant to search his person. Gov't Br. at 14. The government concedes that the bags were not worn by Appellant, but argues that they should be considered "part of his person" because they were in the immediate vicinity. *Id.* The government cites to no case, and Appellant's research reveals no case, that extends the authority to search the person to items that are not physically appended to or in the physical possession of the person being searched.

Nor is Appellant convinced, the holding in *Graham* notwithstanding, that the Fourth Amendment necessarily extends to bags in the immediate physical possession of the person to be searched. Most of the federal cases that cite *Graham* cite it for the proposition that a search incident to arrest is an exception to warrantless searches.[1] Other cases cite it for other aspects of its holding, including the discussion of plain-view evidence not specified in the warrant[2]; and that a warrant for a premises search does not extend to search of the person conducted outside the premises, including a purse appended to her person.[3] None of the other

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[1] *See, for example, United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995); *United States v. Bennett*, 908 F.3d 189 (7th Cir. 1990); *United States v. Queen*, 847 F. 2d 346 (7th Cir. 1988); *United States v. McDonald*, 723 F.2d 1288 (7th Cir. 1983); *United States v. Fleming*, 677 F.2d 602 (7th Cir. 1982); *Curd v. City Court*, 141 F.3d 839 (8th Cir. 1998).

[2] *United States v. Jefferson*, 714 F.2d 689 (7th Cir. 1983).

[3] *United States v. Young*, 909 F.2d 442 (9th Cir. 1990).

federal circuits appear to have adopted the holding cited by the government -- that a bag "worn" by a person is an extension of the person and therefore covered by the warrant. And in any event, as noted, the bags in this case were not worn by Appellant, and they were not in his physical possession.

The government argues that to give meaningful effect to a request for authorization to search a person for documentary evidence, "one would naturally search bags, folders, and containers in that person's possession," and to do otherwise "would seem to read common sense out of the plain interpretation of the search authority." Gov't. Br. at 14-15. The first part of this argument certainly explains why the agents requested authorization to search the bags. But the second part of the argument ignores the fact that the authority to search the bags *was not granted*. In other words, the question is not whether it was reasonable to conclude that evidence would be found in the bags; the question is whether the authorization actually included the bags. It didn't.

The government concedes that the search authorization would not authorize the search of Appellant's personal bags in a separate location, but argues that the bags fell within the scope of the search authorization because they were in a "small closet like office where [Appellant] exercised possession of the bags." Gov't. Br. at 15. Again, the government cites no case law for this proposition, and Appellant's research reveals none. This Court has held long ago that military

member retains a reasonable expectation of privacy in the containers he brings into a military facility. *United States v. Carter*, 1 M.J. 318 (C.M.A. 1976).[4] There simply *is no authority* to conduct a warrantless search of a military member's personal bags absent an exception to the warrant requirement.

The government cites *United States v. Fogg*, 52 M.J. 144, 148 (C.A.A.F. 2010) for the proposition officers are not required to interpret a warrant narrowly, and may make common-sense determinations in its execution. First of all, the issue in *Fogg* was not the place to be searched, but the items to be seized. In that case, this Court said that officers "are often required to exercise judgment *as to the items or things to be seized*," and held that videotapes fell within the scope of the warrant, which authorized seizure of "photos." *Fogg*, 52 M.J. at 148 (emphasis added). Even if officers are required to exercise judgement as to the places to be searched, *Fogg* does not stand for the proposition that a warrant may be interpreted broadly to include places to be searched that are not specified in the warrant, particularly where the authority to search that place was requested and the request was not granted.

[4] Indeed, the fact that the bags were found in a "small closet like office" that was assigned for Appellant's use support, rather than diminish, Appellant's expectation of privacy. *Cf. United States v. Battles*, 25 M.J. 58, 60 (C.M.A. 1987)(appellant had no reasonable expectation of privacy in an unsealed and unopened box found a common area of a vessel, and the appellant failed to take reasonable precautions to ensure his privacy interest in the contents of the box).

The government claims that it "appears counterintuitive" to "interpret the authority to search Appellant as forbidding a search of a bag possessed by Appellant most likely to contain the object of the search." Gov't Br. at 15. It certainly wasn't counterintuitive to the agents when they specifically requested separate authority to search Appellant's person and his personal bags. It is obvious from the request that they knew they needed separate and specific authorization with respect to Appellant's person, his personal bags, and his automobile. Thus, not only is it not counterintuitive to interpret warrant as forbidding a search of the bags, the plain language of the warrant itself foreclosed the search of the bags since it did not provide authority that the agents had specifically requested.

2. The Good Faith exception to the exclusionary rule does not apply.

The government argues that the good faith exception to the warrant requirement should apply, and argues that "it is appropriate to determine whether a reasonable agent interpreted that term as authorizing the search in good faith, though in error." Gov't Br. at 18. Both the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 918 n.19 (1984) and this Court in *United States v. Maxwe*ll, 45 M.J. 406, 421 (C.A.A.F. 1996) have stated that the good faith exception applies only in cases of subsequently invalidated or defective warrants. In this case, the agents exceeded the scope of a valid warrant, and the good faith exception therefore does not apply.

The government also argues that the good faith exception applies because "the search authority required the agents to interpret what constituted a person," and in this case "the term 'person' has some level of inherent ambiguity." Gov't Br. at 18-19. The government cites no case, and Appellant's research reveals no case, that stands for the proposition that the term "person" in the context of a search warrant is "ambiguous." The obvious reason is that it is not. And if the term is ambiguous, then the warrant fails for lack of particularity.

The government argues that the AFCCA concluded that it was objectively reasonable for the agents to believe that search of the bags was covered, and states, "this constituted a reasonable interpretation of their authority to search a person." Gov't Br. at 19. First, the military judge found the search reasonable given that the bag was in the immediate vicinity of Appellant's person, but the AFCCA "[did] not subscribe to the military judge's specific theory of admissibility." *United States v. Eppes*, 2017 CCA LEXIS 152, *28 (A.F.Ct.Crim.App., Feb. 21, 2017). In other words, the AFCCA never found the search to "constitute a reasonable interpretation of their authority to search a person."

Instead, the AFCCA based its determination on the fact that the search of Appellant's person and the items in his personal vicinity had been requested in the affidavit. It is worth noting here that the AFCCA stated, "the only factor in dispute is whether, from an objective viewpoint, the AFOSI agents executing the

authorization reasonably and with good faith believed the authorization permitted the search of Appellant's personal bag." *United States v. Eppes*, at *29. Respectfully, that was not "the only factor in dispute." Given that the good faith exception does not apply to a search that exceeds the scope of a facially valid warrant, the good faith belief of the agents is irrelevant. But in any event, where the affidavit requests authority to search in a specific place, and the authority is not granted by the warrant, the "good faith exception" cannot save it, irrespective whatever authority the agents requested in the affidavit.

The government argues that the fact that the officers sought legal advice once they discovered evidence not covered by the warrant is proof that they were acting reasonably. Gov't Br. at 19-20. Of course, by this time the agents had already exceed the scope of their authority to search.

It is difficult to understand how experienced AFOSI agents failed to notice the discrepancy between the authorization they sought and the authorization that was granted. They either didn't read the search authorization, or read it and ignored its limitation. In either case, they acted with "'deliberate,' 'reckless,' or 'grossly negligent' disregard for [Appellant's] Fourth Amendment rights." *See Davis v. United States*, 564 U.S. 229, 238 (2011).

3. The doctrines of inevitable discovery and independent source do not apply.

Warrantless searches are "presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions." *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014)(internal quotations omitted). The government bears the burden of establishing that the exception applies. *Wicks*, 73 M.J. at 99. For the doctrine of inevitable discovery to apply, the government must show by a preponderance of the evidence that when the illegality occurred, government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the lawful discovery of the evidence. *Id.* at 103. "Mere speculation and conjecture" is insufficient, and the doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant." *Id.*

In this case the government argues that Appellant was the subject of an active investigation and the agents were pursuing leads, and the doctrine of inevitable discovery should apply as a result. But the government fails to explain why the agents would have lawfully found this particular evidence in this particular location. As this Court recognized in *Wicks*, it is not enough to show that the agents had probable cause; the agents in this case attempted -- *and failed* -- to obtain a warrant to search the bag. It therefore cannot be said that the bag would

have been inevitably lawfully searched. Nor has the government explained how the agents would have lawfully obtained these exact items and documents without searching the bag.

With respect to the doctrine of independent source, Appellant notes at the outset that neither military judge nor the Air Force Court of Criminal Appeals relied on the independent source doctrine. The reason is obvious -- the government never presented any evidence with respect to independent source. The description of each item seized from Appellant's bag was included in the Report of Investigative Activity dated 5 February 2013. JA at 703. The evidentiary value of many of the documents found in the bag is readily apparent from their descriptions.[5] While the evidence obtained by AFOSI prior to the search of the bag is described in some detail in the record, copies of the documents themselves are not in the record. And although the government bears the burden with respect to the independent source doctrine, it nevertheless asks this court to speculate that the documents seized from Appellant's bag related to insurance fraud are the same documents that were already in possession of the government.

[5] The seized items include such things as a "Marriot room rate discount authorization form"; an "18-page merchandise inventory sheet"; a "10-page United Services Automobile Association (USAA) valuable personal property (VPP) insurance document"; "airline tickets and travel related documents"; "three blank USAA checks"; and "12 pages of USAA VPP documents." JA at 703.

Not to put too fine a point on it, but the burden to show independent source and inevitable discovery has been allocated to the government. *See generally Nix v. Williams*, 467 U.S. 431 (1984). If the government believed that the independent source doctrine applied, it was obligated to come forward with this evidence at the trial. But it did not. Since the documents already in possession of the government are not in the record, and the documents seized during the unlawful search of Appellant's bag are not in the record, the government has not met its burden to prove by a preponderance of the evidence that any of the evidence found in the bag was also obtained through an independent source.

The government also claims that prior to finding travel documents in Appellant's bag, AFOSI was already reviewing all of Appellant's travel claims, and states that AFOSI was "well on its way conducting a thorough review of every claim made by Appellant when they searched his bag," and the travel related documents found in Appellant's bag "did not start an investigation into Appellant's travel fraud and did not contribute to that investigation." Gov't. Br. at 29. Appellant was charged with 21 specifications of making false official statements relating to fraudulent travel claims; at least two specifications of false claims against the United States related to travel claims; and one specification of conduct unbecoming an officer and a gentleman in relation to travel. As discussed previously, how can the government say that the documents "did not contribute" to

the investigation of travel claim fraud when those documents are not in the record? But more to the point, the search for evidence of travel claim fraud was certainly significant enough to the government's investigation that the agents sought a search authorization so they could look for the documents. It is disingenuous for the government to now suggest that the very items the agents were looking for and obtained in violation of Appellant's right against unreasonable search and seizure "did not contribute" to the investigation, particularly where their evidentiary value would have been readily apparent to the agents.

To the extent that the evidence "had no impact on evidence admitted at trial" (a point Appellant does not concede) the government ignores the conclusion of the military judge, who found as a matter of law 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. The government has never challenged that conclusion, and the Air Force Court of Criminal Appeals never held that the military judge abused his discretion or clearly erred in reaching that conclusion.

Nor can this Court look to the Stipulation of Fact to determine which evidence was (or would have been) used against Appellant, as the government contends. This was a conditional guilty plea. The Stipulation of Fact was entered into *after* the military judge ruled on the suppression motion, and it is therefore information that was not available to the military judge at the time he made his decision. The government failed to carry its burden *at the trial* with respect to exceptions to the warrant requirement, and it cannot rescue that failure by invoking evidence that was developed later, and would not have existed but for the conditional guilty plea. By entering a conditional plea of guilty, Appellant did not waive his right for an appellate court to determine whether the government carried its burden at trial, or whether the military judge erred in failing to suppress the evidence.

Agents of the AFOSI exceeded the scope of a valid warrant in conducting the search. The "good faith" exception to the warrant requirement does not apply in such circumstances, and the government has failed to carry its burden to show that the inevitable discovery or independent source doctrines should apply. The findings and the sentence must therefore be set aside.

II. WHETHER APPELLANT'S RIGHT TO FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT WAS VIOLATED WHEN THE THERE WAS NO PROBABLE CAUSE FOR THE 7 DECEMBER 2012 WARRANT.

1. The 7 December 2012 warrant authorizing the search of Appellant's computer and electronic devices was not supported by probable cause.

The government argues that "Appellant's creation of false documents over a period of time established probable cause to search his digital media for evidence of fraud," and claims that "[e]ach of the documents submitted over that period of time would likely be created by Appellant on a computer." Gov't. Br. at 36-37. Similarly, the government argues that paper copies of falsified travel orders were provided to TSgt Cudzila, which "bolstered the nexus to Appellant's computers and digital devices" because "the false documents . . . reasonably must have been created by Appellant on a computer," and "the fact that Appellant provided printed copies makes it more likely that they were printed from a computer." Gov't. Br. at 37-38.

None of the affidavits in support of any of the search authorizations for Appellant's computers or digital devices say that any of these documents "would likely be created by Appellant on a computer." Nor did any of the affidavits suggest that paper copies of documents "must have been created by Appellant on a computer." Nor did any of the agents testify that they told the issuing magistrate any of that.

This is the very sort of thing this Court condemned in *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017). In fact, this is more egregious than *Nieto*, because in *Nieto* the agent at least provided a "generalized profile about how

servicemembers 'normally' store images" (which this Court found to be insufficient to prove a nexus between the alleged crime and the specific item to be seized), while agents in this case made no attempt whatsoever to connect any document to Appellant's computer. There is absolutely no evidentiary support for the government's claim that the documents "would likely be created by Appellant on a computer." That is particularly true in the case of paper documents.

The government also argues, "The Affidavit also made it clear Appellant used email correspondence to make some of these claims and that the Affiant had copies of Appellant's email correspondence furthering the fraudulent claims," and argues, "the fact that those forms were sent via email further strengthens the argument that the forms were created by Appellant with a computer." Gov't. Br. at 37. The government argues that the forms "would have been scanned onto a computer by Appellant to send using email," and it therefore "establishes a reasonable probability that evidence of these frauds would be found on Appellant's computers and digital devices. Gov't. Br. at 37. Of course, the agent never said in his affidavit that any "forms were sent via e-mail." He merely stated that Appellant "allegedly provided four signed Texas state tax exemption forms;" he never said how they were provided. JA at 714. There is simply no factual support in the Affidavit that any of these forms were sent via e-mail, and thus there is no nexus between these forms and Appellant's computer.

And although the agent did discuss e-mail correspondence between Appellant and the Adolphus hotel, he did not provide any nexus between those e-mails and Appellant's computer. As this Court is undoubtedly aware, the e-mails could have been sent from any number of devices, including a smartphone or a tablet; they could also have been sent from any physical computer or device world-wide, including workplace computers, or publicly accessible computers found in libraries or internet cafés. Although some of the electronic mail messages were apparently sent from Appellant's personal g-mail account (a fact that was never expressed to the magistrate) the affidavit makes no attempt to link the e-mails with any of Appellant's devices.

The government urges this Court to examine the e-mails Appellant sent to the Adolphus hotel, and notes, "some of those emails sent included attachments." Gov't. Br. at 38. The question in this case is whether the magistrate had probable cause to issue the warrant. Neither the e-mails nor the attachments were provided to the magistrate at the time the search warrant was requested, and the agent never told the magistrate that the e-mails included attachments. In this regard, it doesn't matter whether *the agent* had probable cause to seek a search warrant, but whether *the magistrate* had probable cause to issue one.

The government goes on to argue that "The fact that the email addresses all related to Appellant create a link to his digital devices," and "The additional fact

that Appellant repeatedly used his personal account to send emails with attachments strengthens the nexus to Appellant's computers and digital devices in his home." Again, the most the magistrate knew of these emails was that Appellant had apparently communicated with the Adolphus hotel via e-mail, the government was in possession of some of that correspondence, and in the agent's view, some of the emails related to fraudulent activity. But the agent never attempted to draw any nexus between the e-mails and any of Appellant's devices. Moreover, the magistrate was *never informed* that the emails were sent from Appellant's personal account, or that the e-mails contained attachments.

The government attempts to distinguish this case from *Nieto* by claiming that "our case established Appellant created false documents in a digital format, printed some of them and mailed others." Gov't. Br. at 39. The government also claims that "we had evidence that Appellant created fraudulent documents from his digital devices, printed fraudulent documents from his digital devices, and transmitted fraudulent documents and information using his digital devices with email accounts associated with Appellant." *Id.* As discussed, there was no evidence presented to the magistrate that Appellant used any of his devices to "create," "print," or "transmit" any fraudulent documents.

The government apparently expects this Court to make the very leap that it specifically disapproved of in *Nieto*: That because documents and e-mails were

involved they must have been generated, not only by a computer, but by *Appellant's* computer. In *Nieto*, this Court stated, "In order to identify a substantial basis for concluding that probable cause existed to believe that Appellant's laptop was linked to the crime, we conclude that -- at a minimum -- there needed to be some additional showing [linking images] to his laptop." *Nieto*, 76 M.J. at 107. The same is true here. Before the magistrate could identify a substantial basis for concluding that probable cause existed to believe that Appellant's computer was linked to the crime, there needed to be an additional showing linking the emails or other fraudulent documents to his computer. The agent made no such showing, and the magistrate therefore had no substantial basis to find probable cause to search Appellant's computer or other electronic devices.

2. The good faith exception should not apply.

The government argues that this Court should interpret the "substantial basis" requirement to mean that so long as the law enforcement officer has a substantial basis for believing that probable cause exists, the good faith exception applies even in the absence of probable cause. Appellant acknowledges that this Court, in *United States v. Carter*, 54 M.J. 414, 422 (C.A.A.F. 2001), concluded that "'substantial basis' as an element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization," and noted that the second prong of Mil. R.

Evid. 311(b)(3) is satisfied "if the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause." And in *United States v. Hoffman*, 75 M.J. 120, 128 (C.A.A.F. 2016), this Court held the good faith exception does not apply where the individual issuing the search authorization does not have a substantial basis for determining the existence of probable cause. This Court in *Nieto* noted that it need not resolve the tension between these cases because in that case the government failed to meet its burden of establishing that the good faith doctrine applied.

Appellant believes that *Hoffman* is the correct statement of the law. The good faith exception to the warrant requirement is contained in Mil. R. Evid. 311(b)(3). The Rule has three prongs, *all of which* must be satisfied before the good faith exception applies:

> (A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
> (B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
> (C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

The difference between *Carter* and *Hoffman* is that *Carter* says, in essence, that subparagraph (B) can be satisfied through the application of subparagraph (C). *Hoffman* recognizes that subparagraph (B) requires that the issuing magistrate have

probable cause. This is consistent with the plain language of Mil. R. Evid. 311(b)(3)'s presentation of the three prongs in the conjunctive, rather than the disjunctive. But in any event, just as in *Nieto*, the issuing magistrate did not have a substantial basis for determining probable cause. And for the same reason, the agents seeking and executing the warrant did not reasonably rely on the issuance of the warrant because they lacked probable cause in seeking it.

Because the magistrate did not have probable cause to issue the 7 December 2012 warrant, and the good faith exception to the warrant requirement does not apply, the findings and sentence must be set aside.

WHEREFORE Appellant so prays.

Respectfully submitted,

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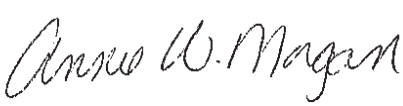

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 4,512 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was mailed to the Court and delivered to opposing counsel on 21 August 2017.

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