11 August 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 17-0364/AF
Captain (O-3), TYLER G. EPPES, USAF, *Appellant.*	)	Crim. App. No. 38881

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUES PRESENTED

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.

II.

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

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

On 16 November 2012, a staff member from the Adolphus Hotel, Dallas, Texas contacted the Office of the Air Force Inspector General and made inquiries in preparation for a meeting with Appellant. (J.A. at 699.) AFOSI determined that Appellant misused his position as the Personal Security Advisor to the Chief of Staff of the Air Force (CSAF) to influence the service at the hotel and that Appellant and civilian members of his wedding party stayed at the hotel in a tax free status using official Air Force Travel Orders. (J.A. at 699.)

Search of Appellant's residence 7 December 2012

On 7 December 2012, AFOSI conducted a search of Appellant's apartment pursuant to a search warrant granted by the Superior Court of the District of Washington on 7 December 2012. (J.A. at 702.) At the search of his residence pictures were taken before the search. (J.A. at 702.) Travel documents and receipts were taken into evidence. (J.A. at 702.) Additionally books and electronic

media with classified markings were seized. (J.A. at 702.) Electronic devices were also seized. (J.A. at 702.) The evidence recovery log and a supplemental filing outlined the items seized. (J.A. at 804-806.) The search warrant issued on 7 December 2012 by the District of Columbia authorized the search of Appellant's residence to locate property more fully described in the Affidavit. (J.A. at 709, 892-893.)

7 December 2012 search warrant Affidavit

The Affidavit described probable cause to believe that Appellant engaged in false statements, and fraud (?) against the United States and other military specific crimes. (J.A. at 712.) The Affidavit requested authority to search for evidence of fraud to include documents, orders, notes, financial records, receipts, computer hardware, and digital media. (J.A. at 712.) The Affidavit outlined how from 15 May 2012 to November 2012 Appellant submitted false documents which represented that his wedding was an official US Government function to hotel staff in order to gain tax exemptions. (J.A. at 714.) It also described how on November 18, 2012, Appellant provided forms asserting four attendees were on official business in Dallas. (J.A. at 714.) The week of 19 November 2012, hotel staff provided AFOSI with email correspondence, to include email addresses between Appellant and the hotel along with false tax forms submitted by Appellant. (J.A. at 714, 820, 989.) The Affidavit stated the Affiant had been provided the email

correspondence between Appellant and hotel staff. (J.A. at 714.) The Affidavit also described how on 9 November 2012, Appellant gave TSgt Jesse Cudzila a manila envelope containing falsified travel orders. (J.A. at 714, 892, 987-988.) The Affidavit also described invitational travel orders for members of Appellant's fiancée's family for an official event, allegedly a Chief of Staff of the Air Force interest item. The event did not occur. (J.A. at 715, 820-821.) In addition to the request to seek evidence of fraud, the Affidavit explained Appellant was ordered into a non-law enforcement status and that law enforcement equipment and identification should be seized. (J.A. at 715.) The Affidavit also described how Appellant admitted to falsifying travel orders and misleading a protocol officer to make reservations under false pretenses in 2008. (J.A. at 715.)

Email correspondence with hotel staff

The Affidavit described emails sent from email addresses associated with Appellant. In an email dated 10 June 2012, from tyler.eppes@gmail.com Appellant argued for tax exempt status for his wedding, representing himself as official agent of the United States government acting in an official program appointed, managed and funded by the United States. (J.A. at 677) The email sent from Appellant's personal email had 3 attachments. (J.A. at 677) On 19 June 2012, in another email from Appellant's gmail account, Appellant asserted he "would be acting in an official capacity and traveling on official orders with my

support staff whom would be operating under the same conditions." (J.A. at 676.) In another email dated 22 June 2012, Appellant told hotel staff he was sending his secret service guys to the hotel to do a workup and assessment. (J.A. at 675.) Appellant also used a pentagon.af.mil email address and an ogn.af.mil address. (J.A. at 674-680.)

Investigation is broadened based upon a review of the evidence

In mid-December 2012, the Chief of AFOSI's Crime Integration Desk broadened the scope of the investigation to review all of Appellant's Air Force claims and activities. (J.A. at 767.) On 19 December 2012, Special Agent James Long requested all of the claims Appellant submitted in DTS. (J.A. at 897.) On 4 January 2013, SA James Long requested all of the manually submitted travel vouchers from the Air Force financial services center. (J.A. at 897.) On 7 January 2013, AFOSI requested the Air Force Audit Agency's assistance in a systematic review of Appellant's travel claims. (J.A. at 767, 897, 996.) Based upon a review of Appellant's travel records, AFOSI determined 51 vouchers contained fraudulent information. (J.A. at 897-898.)

AFOSI reviewed a previous investigation based upon witness interviews, reviewed Appellant's email communication with Capt Coffman, and electronic transfers from Capt Coffman. (J.A. at 899.) Email correspondence between Appellant and Capt Coffman was uncovered during a review of the electronic

evidence seized in the 7 December 2012 search and subsequent interviews of Capt Coffman. (J.A. at 603-634, 540-559.)

SA Long also expanded the investigation into drug offenses based upon evidence found during the 7 December search. On 7 December 2012, during the search of Appellant's residence "agents observed in plain view, evidence of prescription drug fraud that included several flattened, empty boxes of prescription medication and blank prescription forms already signed by a medical provider at Cannon AFB, NM. Agents seized this evidence of potential prescription fraud." (J.A. at 991.) In late December 2012, SA Long tasked SA Shannon Stineberg to conduct a medical records review. (J.A. at 996.) SA Stineberg used the evidence of drug fraud recovered on 7 and 8 December to establish probable cause for electronic searches of Appellant's computer for wrongful use and possession of controlled substances. (J.A. at 723.) The search authorization was signed on 9 December 2012. (J.A. at 718.) On 29 January 2013, at 1200 a search of Appellant's computer uncovered emails containing prescriptions. (J.A. at 929.) Electronic searches of seized computers revealed emails between Capt Ash and Appellant regarding Valium, Xanax and prescription forms. (J.A. 749-750.) AFOSI interviewed Capt Ash who told them details about how Capt Ash sent Appellant both prescription forms and prescription drugs pursuant to their conspiracy. (J.A. at 901.) Prosecution Exhibit 8 consists of sixteen emails

between Appellant and Capt Ash that constituted the evidence of the conspiracy in Charge I. (J.A. at 658- 672.)

Agent Long also expanded the investigation to include insurance fraud. In late December 2012, SA Long tasked SA Shannon Stineberg to conduct financial records checks. (JA at 996.) Appellant's 2012 USAA claims were flagged as fraudulent. SA Stineberg contacted USAA and received the claim information. (J.A. at 996.) On 9 January 2013 the DoD IG subpoenaed Appellant's financial records from USAA. (J.A. at 996.) On 22 January 2013, SA Stineberg compared photographs of the watches Appellant had reported stolen with photographs taken at a later date on Appellant's computer and photos taken at the 7 December search of Appellant's residence. (J.A. at 997.) The watches matched and indicated the watches had not been stolen. On 29 January 2013 at 1115 a review of Appellant's computer revealed questionable appraisal documents. (J.A. at 929.) On January 30, 2013, agents reviewed documents submitted by Appellant to USAA regarding the allegedly stolen items including an appraisal for a crescent moon broach. Agents contacted the owner of the company who was also the appraiser and confirmed the document was false. (J.A. at 740.)

5 February Search at Chapel 1

On 5 February 2013, law enforcement conducted a search of Appellant in his office on Chapel 1 based upon a search authority granted by a military magistrate

on Joint Base Andrews (JBA), MD. (J.A. at 703, 734, 905.) The military magistrate authorized the search of Appellant's person and his vehicle. The search authority specified the seizure of the following property: "documents and/or evidence as may be used in the commission of fraud against the United States Government or against federally insured financial institutions; and watches and jewelry matching the description of items claimed lost or stolen in insurance claims against USAA and commercial airline companies." (J.A. at 734.) During the 5 February 2013 search, agents stopped the search and contacted the 11th Wing Deputy Staff Judge Advocate to ensure the fraudulent travel documents that they found were covered by the search authority. (J.A. at 703.) Agents seized a Marriot discount authorization form, an 18 page merchandise inventory sheet, a 10 page United Services Automobile Association insurance document, 11 Airline tickets and travel-related documents, three blank USAA checks, 12 pages of USAA VPP documents, three blank Chief of Staff of the United States Air Force (CSAF) Letter documents, one Cole Hahn receipt, one Citi direct statement, one ATM card with "Africa Russia" written on it, and Foundry lofts envelope with four documents inside. (J.A. at 703.) Located in the second right hand drawer were five leave request authorizations, a 16 page permanent duty travel arrival worksheet and voucher, and other documents. (J.A. at 703.) Items listed as recovered from Appellant's bag included merchandise inventory sheets, USAA documents, VPP

documents, airline tickets, airline receipts. (J.A. at 853.) Evidence recovered from Appellant's other bag included documents, Chief of Staff USAF envelopes, and a medication label for Amphetamine salts.

5 February 2013 Affidavit

The Affidavit outlined how Appellant filed two insurance claims for watches and jewelry Appellant had reported stolen. (J.A. at 737.) The Affidavit explained how watches photographed during the 7 December 2012 search appeared to be previously claimed as stolen; during a search of his person on 8 December agents noted a high value watch. (J.A. at 738.) SA Willie Cooper submitted an Affidavit wherein he stated that on 4 February 2013 he received a comparison of photographs submitted with the insurance claim and items (??) reported stolen. (J.A. at 739.) On 30 January 2013, Agents reviewed the documents Appellant submitted to USAA regarding the allegedly stolen items, including an appraisal for a crescent moon broach. Agents contacted the owner of the company (who is also the appraiser) and confirmed the document was false. (J.A. at 740.) On 30 January 2013, Agents met with Appellant and noted that he was wearing a watch which matched the description of a watch he claimed to have been stolen in June 2012. (J.A. at 740.) In view of those facts, the Affidavit noted that it was probable Appellant still maintained the stolen watches on his person and in his personal belongings. (J.A. at 740.) The affiant requested "search authority be issued for a

search of [Appellant's] person, his personal belongings that may be located within a reasonable vicinity of [Appellant's] person or as may be found at his work location located in Chapel 1 and his vehicle." (J.A. at 740.)

5 February search of Appellant's residence

On 5 February 2013, AFOSI conducted a separate search of Appellant's residence pursuant to a warrant issued by the Superior Court of the District of Columbia. (J.A. at 827.) During that search they recovered a Nikon DS35 Camera, a watch winder, and additional travel documents. (J.A. at 838, 840.)

SUMMARY OF THE ARGUMENT

The military judge's decision not to suppress the 5 February search of Appellant's bags was not an abuse of discretion. The granted authority to search the person should be interpreted to include bags in the possession of that person. If the search of bags in Appellant's possession was beyond the scope of the authorization, the Agent executing the search acted in good faith when conducting the search. Additionally, the doctrines of independent source and inevitable discovery apply in this case, and mandate against exclusion.

The military judge's decision not to suppress the 7 December 2012 search was proper and did not constitute an abuse of discretion. A neutral and detached magistrate approved the request for the warrant to search Appellant's residence based upon probable cause. The Affidavit demonstrated six months of Appellant's

communication in furtherance of a fraud using his personal email addresses. The Affiant had copies of email correspondence and falsified documents that had been found in Appellant's desk, provided to a coworker in person, and emailed. The magistrate had a substantial basis to find probable cause that the six months of emails in furtherance of a fraud, coupled with the fraudulent documents created by Appellant related to his wedding, would be found in his residence. This information gave the magistrate more than enough information to find there was a reasonable probability of discovering evidence of fraud in Appellant's home and on his computers. Even if this court were to hold otherwise, the good faith exception applies as the agents reasonably relied on the warrant.

ARGUMENT

I.

THE SEARCH OF APPELLANT'S PERSONAL BAGS WAS WITHIN THE SCOPE OF THE SEARCH AUTHORIZATION. EVEN IF THE SEARCH OF APPELLANT'S PERSONAL BAGS EXCEEDED THE SCOPE OF THE AUTHORIZATION, BOTH THE GOOD FAITH EXCEPTION TO EXCLUSIONARY RULE AND THE INEVITABLE DISCOVERY DOCTRINE APPLY, AND THERE WAS NO PREJUDICE.

Standard of Review

This Court reviews a military judge's denial of a motion to suppress for an abuse of discretion. United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010). An abuse of discretion occurs when the court determines the military judge's findings of fact are clearly erroneous or that the judge misapprehended the law. Id. In doing so, this Court views the evidence in the light most favorable to the prevailing party below. United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016). This Court reviews the military judge's findings of fact for clear error, and his conclusions of law de novo. Id.

Law and Analysis

The Fourth Amendment[1] provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Evidence directly obtained through a violation of the Fourth Amendment as well as evidence that is the "fruit" of such a violation may be subject to exclusion at trial. Wong Sun v. United States, 371 U.S. 471, 488 (1963). The touchstone of the Fourth Amendment is "reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991) A search that is conducted pursuant to a warrant is presumptively reasonable. United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014).

[1] U.S. Const. amend. IV.

In the Affidavit's concluding paragraph, SA Willie Cooper "respectfully requested search authority be issued for a search of [Appellant's] person, his personal belongings that may be found within a reasonable vicinity of [Appellant's] person or as may be found at his work location in Chapel 1 and his vehicle." (J.A. at 851.) Earlier in the Affidavit the request for search authority was framed differently; it was framed as a request "for search authority for (1) [Appellant's] person, (2) [Appellant's] personal bags and (3) [Appellant's] personally owned vehicle described as black in color 2005 Acura TL . . . and affects for documents and or items of evidence as may be used in the commission of fraud against the United States or against federally insured financial institutions." (J.A. at 847) The Affidavit's concluding request for authority to search Appellant's person and personal belongings without specifically mentioning his personal bags belies Appellant's point that the absence of that specific language should be interpreted as an express limitation on searching Appellant's bags. This is particularly true here where Appellant's bags were in Appellant's possession at the time and place they had authority to search his person.

1. <u>The authority to search Appellant's person authorized a search of the bags in his possession</u>

The military judge correctly ruled that the 5 February 2013 search of Appellant and the search of items in the immediate vicinity was reasonable. (J.A. at 1012.) The search authority reasonably included the bags Appellant had on his

person. The Seventh Circuit Court of Appeals addressed a similar issue when they upheld the search of a defendant's shoulder bag when law enforcement executed a warrant for his person. United States v. Graham, 638 F.2d 1111, 1112 (7th Cir. 1981).

> It is our opinion that a shoulder purse carried by a person at the time he is stopped lies within the scope of a warrant authorizing the search of his person. The human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried. To remedy this anatomical deficiency clothing contains pockets. In addition, many individuals carry purses or shoulder bags to hold objects they wish to have with them. Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person.
> United States v. Graham, 638 F.2d 1111, 1112 (7th Cir. 1981).

In the instant case, though the bags were not worn by Appellant, they were within his immediate vicinity and should therefore be considered a part of his person. The warrant authorized the search of Appellant's person for "documents 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 jewelry matching the description of items claimed lost or stolen in insurance claims against USAA and commercial airline companies." (J.A. at 845.) To give meaningful effect to a search of a person for documentary evidence, one would naturally search bags, folders, and containers in that person's possession. To do otherwise

would seem to read common sense out of the plain interpretation of the search authority.

Appellant's best argument for suppression is that a section of the Affidavit specifically asked for this authority, and the Search Authority does not specifically address personal bags. We agree the search authority would not authorize the search of Appellant's personal bags in a location separate and apart from his person. Here in the small closet like office where he exercised possession of the bags, the search of those bags was within the scope of the search of Appellant's person. We also disagree that a difference in Affidavit and granted authority should be interpreted as an express limitation on the scope of the warrant. In executing a warrant, officers are required to exercise judgement and are not required to interpret a warrant narrowly, rather they can make common sense determinations in executing a search authority. United States v. Fogg, 52 M.J. 144, 148 (C.A.A.F. 2010). In Fogg the seizure of videotapes was within the scope of the search warrant that authorized photos. Id. In this case a common sense reading of the authority to search a person for documents would include the authority to search for those documents in bags the person has in his possession. 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 appears counterintuitive.

Here the search of Appellant's bag was within the scope of the authorization to search his person.

2. The Good Faith exception to the exclusionary rule applies

In this case, the military judge correctly determined that during the 5 February 2013 searches of Appellant and his vehicle, the agents conducted their searches in reasonable good faith reliance on the search authorization. (J.A. at 1012.) The military judge specifically remarked, "when agents discovered apparent evidence of a crime outside the scope of the warrant, they stopped and sought legal advice." (J.A. at 1012.) In their opinion, the Air Force Court found the evidence derived from the search admissible under the good faith exception given the facts of this case. (J.A. 17-18)

Mil. R. Evid. 311(b)(3) provides that:

> Evidence that was obtained as a result of an unlawful search or seizure may be used if:
>
> (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.

Mil. R. Evid. 311(b)(3), which is the military's "good faith exception" to the exclusionary rule, incorporated the Supreme Court's decisions in United States v. Leon, 468 U.S. 897 (1984) and Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984).[2] United States v. Carter, 54 M.J. 414, 421 (C.A.A.F. 2001). This Court has indicated that Mil. R. Evid. 311(b)(3) is not intended to be a more stringent rule for the military than Leon and Sheppard, and therefore, the Rule should be construed "in a manner consistent with those decisions." Carter, 54 M.J. at 421.

In Leon, the Supreme Court determined that there were four circumstances under which the good faith exception does not apply: (1) a false or reckless affidavit; (2) a "rubber stamp" judicial review; (3) an affidavit so deficient in probable cause that a reasonable officer could not rely on it; and (4) a warrant so facially deficient – i.e., in failing to particularize the place to be search or the things to be seized – that the executing officers cannot reasonably presume it to be valid. Leon, 486 U.S. at 914-15.

In this case the Air Force Court of Criminal Appeals (AFCCA) focused on "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." (J.A. at 18.) They concluded a

[2] Sheppard holds that the good faith exception can be applied to warrants that violate the particularity requirement of the Fourth Amendment.

reasonable agent would have believed that the authorization allowed the search of Appellant's bag as requested in the Affidavit. (J.A. at 18.) In their analysis, they also discuss the fact that the language granting a search of Appellant's person could reasonably be interpreted as also authorizing the search of Appellant's personal belongings. (J.A. at 18.) As previously discussed, the case of United States v. Graham hinged on whether a warrant that authorized a search of a person included a bag worn by that person. That Court found it did by interpreting the scope of a grant to search a person. In this case we believe interpreting the scope of an authority to search a person should include those bags in his possession. If this interpretation is incorrect, and it is beyond the scope of the authorization, it is appropriate to determine whether a reasonable agent interpreted that term as authorizing the search in good faith, though in error.

The search of Appellant's person on 5 February 2013 is distinguishable from what occurred in the Tenth Circuit case cited by Appellant precisely because the search authority required the agents to interpret what constituted the person. (App. Br. at 14.) In United States v. Angelos, 433 F.3d 738 (10th Cir. 2006), the warrant authorized a search of a safe in the basement and a car. In that case, the court stated "the warrant on its face contained no constitutional or clerical defects, and there was no ambiguity in the terms used in the warrant." United States v. Angelos, 433 F.3d 738, 745 (10th Cir. 2006). Neither the term "car" nor "safe"

leave room for interpretation. The Tenth Circuit went on to conclude these terms were without ambiguity and "none of the terms in the warrant can be read with practicality to encompass the entire premises." Id at 746. In the case at hand, the term "person" has some level of inherent ambiguity. The Angelos opinion went on to quote Leon stating how that opinion references officers "properly executing a warrant and searching only those places and for those objects that it was reasonable to believe were covered in the warrant." Id at 746. (emphasis added) As noted in AFCCA's opinion, it was objectively reasonable for AFOSI agents executing the search warrant to believe the search of the bags was covered; this constituted a reasonable interpretation of their authority to search a person. This is an ambiguity which did not exist in the Tenth Circuit case. AFCCA found that because the accompanying Affidavit requested the ability to search Appellant's personal bags, it was more reasonable for agents to interpret the authority to search Appellant as including the authority to search items of his personal property in his possession when he was searched. (J.A. at 18.)

As a final indicator of AFOSI's good faith in executing the search authorization, this Court should consider that upon finding evidence of travel fraud agent thought might fall outside of the scope of the warrant, they immediately stopped and sought legal advice. (J.A. at 1000.) The military judge specifically highlighted this point: "when agents discovered apparent evidence of a crime

outside the scope of the warrant, they stopped and sought legal advice." (J.A. at 1012.) This demonstrates that SA Cooper knew he was not allowed to exceed the scope of the search authorization, and was using care not to do so. United States v. Riccardi, 405 F.3d 852, 864 (10th Cir. 2005) (by consulting the prosecutor about the scope of the warrant, the officers "showed their good faith in compliance with constitutional requirements.")

Ultimately, the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 918-19. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 129 S.Ct. 695, 702 (2009). "When police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." Davis v. United States, 564 U.S. 229, 238 (2011). On the other hand, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." Id.

This was not a deliberate, reckless, or grossly negligent disregard for Appellant's Fourth Amendment rights. The error in interpreting the scope of the

search of the person, if it is found to be error, is not so gross an error as would trigger the exclusionary rule. Even if agents incorrectly interpreted the search authorization for the person to extend to personal belongings, the costs of applying the exclusionary rule heavily outweigh any deterrent effect that suppression of the evidence would achieve. These agents demonstrated care in trying to comply with the terms of the search authority. Nothing about the conduct of the search was reckless or grossly negligent; as such, exclusion is not warranted.

3. Assuming arguendo the search of the bags violated the scope of the search authority inevitable discovery applies, and there was no prejudice to Appellant.

As noted by the military judge, "a preponderance of the evidence demonstrates that AFOSI possessed and were actively pursuing evidence and leads independent of the searches and seizures at issue." (J.A. at 1014) The judge, in analyzing the defense challenges to all of the searches found at a minimum AFOSI would have inevitably discovered "at least, the fraudulent travel vouchers from DTS and DFAS, Capt Eppes' GTC records, the AFOSI investigation file for the Burkina Faso theft, the unfunded purchase requests from Capt Eppes' previous detachment, financial database information (ISO, FINCEN, etc.), the USAA claim flagged in ISO, the fraudulent vehicle claim, and Capt Eppes Bank records." (J.A. at 1014.) The military judge made this determination in the context of the defense challenges to all of the searches. Looking at the evidence law enforcement had discovered and was actively pursuing prior to the 5 February 2013 search, it

becomes clear that the items found in Appellant's bag were already known to AFOSI, were actively being pursued and / or had no impact on evidence admitted at trial.

Evidence obtained from Appellant's bags on 5 February 2013 was admissible under the exceptions of independent source and inevitable discovery. For inevitable discovery to apply, the Government must demonstrate by a preponderance of the evidence that "when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence" in a lawful manner. United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014) Speculation and conjecture are insufficient in applying the inevitable discovery doctrine. Id. at 103. Based upon the timing of the search, we can establish without speculation that AFOSI possessed the relevant evidence. Any evidence against Appellant that was not already possessed by AFOSI was actively being pursued by AFOSI and would have been found irrespective of the material recovered from Appellant's bag in the 5 February 2013 search. Moreover, nothing found in the search of the bag was offered as evidence at trial aside from evidence already in AFOSI's possession.

Inevitable discovery is only applicable when the routine procedures of a law enforcement agency would inevitably find the same evidence. Wicks, 73 at 103. This case more than meets the requirements of inevitable discovery, as most

evidence of import had already been found, and the remainder was not used against Appellant directly or indirectly.

In order to assess the inevitable discovery doctrine with respect to this search, we must start by accounting for what was recovered from Appellant's bags on 5 February 2013. Items listed as recovered from Appellant's bag included merchandise inventory sheets, USAA documents, VPP documents, airline tickets, airline receipts. (J.A. at 853.) Evidence recovered from Appellant's other bag included documents, Chief of Staff USAF envelopes, and a medication label for Amphetamine salts. (J.A. at 853.) Appellant describes the items seized as "one white Office of the Chief of Staff of the United States Air Force (USAF) envelope, one medication label reading [Appellant,] AMPHETAMINE SALTS 30 MG TAB. (App. Br at 6, 7; J.A. at 703.) Appellant's brief continues to outline the items recovered from Appellant's bag as:

> One Marriot room rate discount authorization form with the date covered, an 18-page merchandise inventory sheet, a 10-page United Services Automobile Association (USAA) valuable personal property (VPP) insurance document, 11 Airline tickets and travel related documents, three blank USAA checks, 12 pages of USAA VPP documents, three blank Chief of Staff of the United States Air Force documents, one Cole Haan receipt, one citi direct statement, one ATM Card with "Africa Russia" written on it and one foundry lofts envelope with four documents inside.
>
> (App Br at 7; J.A. at 703.)

Addressing each category of evidence recovered elucidates how the items in the bag had no impact on the evidentiary landscape for Appellant.

a. The medication label for Amphetamine Salts was not offered and did not contribute to any charges

The evidence Appellant engaged in a conspiracy to possess controlled substances was unrelated to the label for Amphetamine salts.[3] On 7 December 2012, during the search of Appellant's residence "agents observed in plain view, evidence of prescription drug fraud that included several flattened, empty boxes of prescription medication and blank prescription forms already signed by a medical provider at Cannon AFB, NM. Agents seized this evidence of potential prescription fraud." (J.A. at 991.) In late December 2012, SA Long tasked SA Shannon Stineberg to conduct a medical records review. (J.A. at 996.) SA Stineberg used the evidence of drug fraud recovered on 7 and 8 December to establish probable cause for electronic searches of Appellant's computer for wrongful use and possession of controlled substances. (J.A. at 723.) The search authorization was signed 9 December 2012. (J.A. at 718.) On 29 January 2013, at 1200 a search of Appellant's computer uncovered emails containing prescriptions. (J.A. at 929.) Electronic searches of seized computers revealed emails between Capt Ash and Appellant regarding Valium, Xanax and prescription forms. (J.A.

[3] Charge I alleged Appellant conspired to possess an intoxicating substance and ship some amount of a controlled substance with Damian Ash. This charge, unrelated to Amphetamines, is the only charge related to controlled substances.

749-750.) AFOSI interviewed Capt Ash who told them details about how he sent Appellant both prescription forms and prescription drugs pursuant to their conspiracy. (J.A. at 901.) Prosecution Exhibit 8 consists of sixteen emails between Appellant and Capt Ash that constituted the evidence of the conspiracy in Charge I. (J.A. at 658- 672.) Charge I that Appellant conspired with Capt Ash to possess a controlled substance. (J.A. at 42.) Appellant was not charged with possession of Amphetamines and Amphetamines were not referenced in the stipulation of fact. Charge I is more fully described in the stipulation of fact and addressed prescription medications for Valium and Xanax and referred to the emails between Capt Ash and Appellant. (J.A. at 593.)

Well before the 5 February 2013 search occurred, AFOSI possessed evidence of Appellant's drug offenses and was actively pursuing additional evidence. Under these facts, there is overwhelming evidence the government possessed the evidence of the drug charge prior to the 5 February 2013 search and was actively pursuing evidence of drug offenses and leads through review of digital evidence and interviews. As such, inevitable discovery would have protected the evidence of the drug conspiracy even if the Amphetamine labels played some role in that charge. United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014). In this case, the labels do not appear to have played any role.

Rather, all of the evidence supporting Charge I was derived from an independent source.

b. AFOSI requested received and reviewed Appellant's USAA insurance policies and claims prior to the 5 February 2013 search

In late December 2012, SA Long tasked SA Shannon Stineberg to conduct a financial records checks. (JA at 996.) Appellant's 2012 USAA claims were flagged as fraudulent. SA Stineberg contacted USAA and received the claim information. (J.A. at 996.) On 9 January 2013, the DoD IG subpoenaed Appellant's financial records from USAA. (J.A. at 996.) On 22 January 2013, SA Stineberg compared photographs of the watches Appellant reported stolen with photographs taken at a later date on Appellant's computer and photos taken at the 7 December search of Appellant's residence. (J.A. at 997.) The watches matched and indicated the watches had not been stolen. On 29 January 2013 at 1115, a review of Appellant's computer revealed questionable appraisal documents. (J.A. at 929.) On 30 January 2013, agents reviewed documents submitted by Appellant to USAA regarding the allegedly stolen items including an appraisal for a crescent moon broach. Agents contacted the owner of the company who is also the appraiser and confirmed the document was false. (J.A. at 740.) Prior to conducting the 5 February 2013 search, AFOSI had reviewed Appellant's claims against his USAA homeowners and VPP policies and concluded these were not stolen but likely falsely claimed as stolen. (J.A. at 737, 738, 739, 740.)

Agents already had the evidence related to the fraud against USAA prior to the search of Appellant's bags on 5 February 2013. Under these facts, overwhelming evidence establishes that when the search of the bags occurred AFOSI already possessed the documents from USAA obtained through financial records checks, DoD IG subpoenas and other lawful means. Charge III, Specification 2 alleged Appellant stole from USAA. Since the insurance documents found in Appellant's bag were already evidence lawfully obtained by AFOSI and actively being pursued, inevitable discovery applies and the documents should not be suppressed. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014) Moreover, finding the documents in his bag did not generate new leads, change the evidentiary landscape or prejudice Appellant in any way.

c. Prior to finding travel documents in Appellant's bag on 5 February 2013, AFOSI was actively reviewing all travel claims made by Appellant

AFOSI obtained evidence of travel fraud from the outset of the investigation. On 29 November 2012, SA Parrish recovered a false travel document attributed to Appellant at work and reported it to his commander. (J.A. at 989.) The referenced trip was not a government function, had Appellant traveling with family, and was clearly false. (J.A. at 990.) Prior to the initial search on 7 December 2012, TSgt Cudzila provided AFOSI with the falsified travel orders Appellant that gave him in a manila envelope on 9 November 2012. (J.A. at 714, 892, 987-989, 991.) During a search of Appellant's residence on 7

December 2012 pursuant to a warrant, law enforcement took travel documents and receipts into evidence. (J.A. at 702.) Several of the seized hotel receipts had been altered. (J.A. at 995.) Additionally, a stamp used by Appellant to create a false travel document in 2008 was found in Appellant's residence on the 7 December 2012 search. (J.A. at 995.)

In mid-December 2012, the Chief of AFOSI's Crime Integration Desk broadened the scope of the investigation to review all Appellant's Air Force claims and activities. (J.A. at 767.) On 19 December 2012, SA Long requested all of the claims Appellant submitted in DTS. (J.A. at 897, 995.) On 4 January 2013, SA Long requested all of the manually submitted travel vouchers from the Air Force Financial Services Center. (J.A. at 897.) On 7 January 2013, AFOSI requested the Air Force Audit Agency's assistance in a systematic review of Appellant's travel claims. (J.A. at 767, 897, 996.) AFOSI compared each voucher to GTC records, and subpoenaed business record from airlines, hotels, and other businesses. (J.A. at 897, 898.) Based upon a review of Appellant's travel records, AFOSI determined 51 vouchers contained fraudulent information. (J.A. at 897-898.)

AFOSI had evidence of travel fraud and was conducting a systematic review of each and every travel claim submitted by Appellant prior to the 5 February search of his bag. The fraud uncovered in the systematic review constituted the evidence supporting the 21 specifications of false official statements in Charge II,

and Charge IV, Specification 1 for making a false claim on divers occasions. (J.A. at 42-47.) AFOSI had evidence of the travel fraud and was well on its way conducting a thorough review of every claim made by Appellant when they searched his bag. The 11 airline tickets and travel-related documents and the Marriott room rate document did not start an investigation into Appellant's travel fraud and did not contribute to that investigation. There is clear evidence that when the 5 February 2013 search occurred, agents possessed evidence of travel fraud related to every DTS claim made by Appellant and were systematically comparing it with other evidence seized or subpoenaed. Therefore the travel documents seized are protected under the doctrine of inevitable discovery as all of the information supporting the travel fraud was already in the possession of AFOSI or was being actively pursued. United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014). AFOSI obtained evidence of travel fraud from independent sources and initiated a voucher by voucher review of every claim made by Appellant prior to the search of the bag, eliminating the possibility of prejudice to Appellant.

d. The remainder of the evidence recovered from the bag during the 5 February 2013 search did not contribute to any charge or investigative steps, thus there was no prejudice to Appellant

The remainder of the charges in this case were proven by independent evidence and were unrelated to the evidence seized in the bag. The evidence supporting Charge V, Specifications 1, 2, and 3 was provided by staff in the

Adolphus hotel prior to the search of Appellant's bag; further, the contents therein are irrelevant to the charge. The evidence supporting Charge V, Specification 4 came from email evidence uncovered during a review of Appellant's electronic evidence which was then compared to Appellant's DTS claim. (J.A. at 600-602.) The evidence supporting the structuring in Charge V, Specification 5 came from email correspondence between Appellant and Capt Coffman uncovered during a review of the electronic evidence and subsequent interviews of Capt Coffman. (J.A. at 603-634, 540-559.) Evidence supporting the additional charge for theft of two cameras (military property) came from a separate search of Appellant's residence pursuant to a warrant as well as email traffic between Appellant and an individual to whom he sold a camera. (J.A. at 834, 835, 838,839; J.A. 636-641.) The remaining items seized from Appellant's bags on 5 February 2013, (three blank Chief of Staff of the United States Air Force documents, one Cole Haan receipt, one citi direct statement, one ATM Card with "Africa Russia" written on it and one foundry lofts envelope with four documents inside), did not support any of the charges. All of the evidence supporting these charges was derived from independent evidence and the seizure of these items caused no prejudice to Appellant.

Assuming arguendo, the search of Appellant's bags on 5 February 2013 exceeded the scope of the warrant, Appellant is still not entitled to relief.. The

USAA documents and travel-related documents were already in the possession of AFOSI prior to the search. AFOSI was systematically reviewing leads generated from these documents including every claim filed by Appellant. Therefore, to the extent these items possessed any value at the time they were seized they are covered by the doctrine of inevitable discovery. More importantly these items appeared to add nothing to the evidence in the case. The evidence supporting any related charges was derived from independent sources. Similarly, the charge related to conspiracy to possess controlled substances was unrelated to the Amphetamine salts seized from the bags on 5 February 2013. The remaining items recovered from Appellant's bags do not appear to have produced any evidence to support any charges in this case. The government has demonstrated that for all of the evidence seized which might have related to any charge, AFOSI already possessed the evidence from other sources and was actively pursuing leads derived from that evidence. Therefore under the doctrines of independent source and inevitable discovery suppression is not required.

II.

THE 7 DECEMBER 2012 WARRANT WAS SUPPORTED BY PROBABLE CAUSE AND DID NOT VIOLATE APPELLANT'S RIGHT TO FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT.

Standard of Review

This Court reviews a military judge's denial of a motion to suppress for an abuse of discretion. United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010). An abuse of discretion occurs when the Court determines the military judge's findings of fact are clearly erroneous or that he misapprehended the law. Id. In doing so, this Court views the evidence in the light most favorable to the prevailing party below. United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016). This Court reviews the military judge's findings of fact for clear error, and his conclusions of law de novo. Id. This Court examines whether there was a substantial basis for concluding probable cause existed. A substantial basis exists when based on the totality of the circumstances, a common-sense judgement would lead to the conclusion that there is a fair probability that the evidence of a crime will be found in the identified location. United States v. Nieto, 76 M.J. 10, 105 (C.A.A.F. 2017) (internal citations omitted).

Law and Analysis

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Evidence directly obtained through a violation of the Fourth Amendment as well as evidence that is the "fruit" of such a violation may be subject to exclusion at trial. Wong Sun v.

United States, 371 U.S. 471, 488 (1963). The touchstone of the Fourth Amendment is "reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991)

Great deference should be given to a magistrate's probable cause determination because of the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. Nieto, 76 M.J. at 105 (internal citations omitted). A search that is conducted pursuant to a warrant is presumptively reasonable. United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014). If a magistrate has a substantial basis to find probable cause a military judge [does] not abuse his discretion in denying a motion to suppress. Nieto, 76 M.J. at 105 (citing United States v. Leedy, 65 M.J. 208 at 213 (C.A.A.F. 2007).

This Court outlined the framework for reviewing probable cause determinations in Clayton.

> The analysis focused on four key principles. First, determinations of probable cause made by a neutral and detached magistrate are entitled to substantial deference. Second, resolution of doubtful or marginal cases should be largely determined by the preference for warrants, and "'[c]lose calls will be resolved in favor of sustaining the magistrate's decision.'" *Id*. Third, "courts should not invalidate [warrants] by interpreting [affidavits] in a hypertechnical, rather than a commonsense, manner." Fourth, the evidence must be considered in the light most favorable to the prevailing party.

Clayton, 68 M.J. at 423-424. (internal citations omitted.)

This Court went on to discuss the importance of context in probable cause determinations which "may involve the timing of the determination and the nexus between the alleged criminal activity and the place searched."

In order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized. Nieto, 76 M.J. at 105. A probable cause determination is a practical common-sense decision whether given all the circumstances set forth in the Affidavit there is a fair probability that contraband or evidence of a crime will be found in a particular place. United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009) (Citing Illinois v. Gates, 462 U.S. 213, 238 (1983)).

a. The four principle framework for reviewing probable cause demonstrates the military judge's decision not to suppress was not an abuse of discretion

Applying the four part framework set forth in Clayton supports a finding of probable cause in this case. The military judge found that "the Superior Court of the District of Columbia judge was neutral and detached" in his findings of fact. (J.A. at 991.) Applying the first principle, the determination the magistrate made that probable cause existed for the search on 7 December 2012 is entitled to substantial deference. Clayton, 68 M.J. at 423. The finding of fact continues stating, "the judge was satisfied there was probable cause to believe evidence 'as more fully described in the Affidavit,' which was 'evidence of a crime,' was being concealed at [Appellant's] residence." (J.A. at 991.) These determinations are

entitled to substantial deference. The second principle, that close calls should be resolved in favor of sustaining the magistrate's decision, support this Court finding probable cause in this case. Id. The third principle, that courts should not invalidate warrants by interpreting Affidavits in a hypertechnical rather that a commonsense manner, also weighs in favor of finding probable cause in this case. Id. The Affidavit outlined six months of fraudulent communication and falsified documents transmitted by email using Appellant's personal email accounts, given to individuals in printed form personally by Appellant and placed in his work place. Applying a common sense interpretation of the Affidavit demonstrates the six months of fraud clearly supports a finding of probable cause that the evidence of fraud would be located in Appellant's residence. Id. Finally, the fourth principle stands for the proposition that this court should consider the evidence in the light most favorable to the prevailing party. Id at 424. This factor also weighs in favor of finding sufficient probable cause in this case.

b. The contextual circumstances, to include timing and nexus also show ample probable cause that evidence of fraud would be found in Appellant's home and on his digital devices

The timing of the request to search Appellant's residence for evidence of six months of fraud surrounding his recent wedding supported probable cause. The magistrate had a substantial basis for finding probable cause to search Appellant's residence for evidence of fraud. Evidence in the Affidavit showed that the groom,

in this case Appellant, had been personally coordinating his wedding plans with the hotel for six months. During those six months, Appellant repeatedly submitted false documents to the hotel. Appellant also provided false documents to a coworker, TSgt Cudzila, and additional false documents were found in Appellant's desk at work. Appellant had been planning his wedding for six months, providing falsified orders to the hotel for that period of time, giving falsified travel orders to a coworker for the wedding, and had some falsified travel documents in a drawer at work. A common sense view of these circumstances shows more than a fair probability that documents, papers, and material related to the planning of the wedding would be located in Appellant's home. Given the consistent fraudulent nature of requests for tax exemptions, assertions about the official nature of the wedding, and falsified orders set forth in the Affidavit, the magistrate had a substantial basis to find probable cause for the search of Appellant's residence for evidence of fraud.

The creation of falsified documents and emails in the Affidavit also provided a strong nexus to Appellant's computers and digital media. Appellant's creation of false documents over a period of time established probable cause to search his digital media for evidence of fraud. The Affidavit included information that from 15 May 2012 to 18 November 2012, Appellant submitted false documents which represented his wedding was an official US Government function to gain tax

exemptions. (J.A. at 714.) Each of the documents submitted over that period of time would likely be created by Appellant on a computer. The Affidavit also outlines how on 18 November 2012, Appellant submitted tax exemption forms, certifying four individuals were on official business. (J.A. at 801.) These tax exemption forms would likely be created by Appellant on a computer. The Affidavit also made it clear Appellant used email correspondence to make some of these claims and that the Affiant had obtained copies of Appellant's email correspondence furthering the fraudulent claims. (J.A. at 801.) The information that Appellant sent emails in furtherance of the fraud provided a nexus to Appellant's computers and digital media which necessarily would have been used to transmit these emails. Additionally, the fact that those forms were sent via email further strengthens the argument that the forms were created by Appellant with a computer. If not, they would have been scanned onto a computer by Appellant to send using email. In either case, it establishes a reasonable probability that evidence of these frauds would be found on Appellant's computers and digital devices.

The Affidavit also outlined how on 9 November 2012, Appellant provided TSgt Cudzila with an envelope containing falsified travel orders. (J.A. at 801, 802.) These travel orders for six members of Appellant's family to attend an alleged Chief of Staff of the Air Force event (which did not occur) bolstered the

nexus to Appellant's computers and digital devices for several reasons. (J.A. at 802.) First, the false documents for an event that did not exist reasonably must have been created by Appellant on a computer. Second, the fact that six members of Appellant's family are the subject of those false travel orders further links the orders to Appellant. Third, the fact that Appellant provided printed copies makes it more likely they were printed from a computer. The Affidavit also described how Appellant previously falsified official travel orders in 2008. (J.A. at 802.)

The use of email to transmit the fraudulent activity provided a further nexus to Appellant's computers and digital media. The hotel provided AFOSI with the email correspondence Appellant used to make these false assertions. The record shows those emails were sent from at least two email addresses associated with Appellant. Appellant used his gmail account tyler.eppes@gmail.com to send emails making these false assertions. Some of those emails sent included attachments. (J.A. at 675, 676, 677.) Appellant also used his pentagon email account on one occasion. (J.A. at 674.) The transmission of emails over a period of months described as spanning between 15 May 2012 and 18 November 2012 makes it likely that evidence of these emails would be contained on Appellant's digital media. The fact that the email addresses all related to Appellant create a link to his digital devices. 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. The fact that the email correspondence was relatively recent also made it more likely there would still be digital evidence of the criminal activity on Appellant's computers when the search authority was requested.

In Nieto, this Court dealt with a situation where the alleged crime involved a cell phone and there was nothing to show the laptop was used. Our case differs from Nieto in that the Affidavit in our case established Appellant created false documents in a digital format, printed some of them and emailed others. In Nieto, this Court stated at a minimum "there needs to be some additional showing, such as the fact that Appellant actually downloaded images from his cell phone to his laptop, stored images on his laptop or transmitted images from his laptop." Nieto 76 M.J. at 107. Here 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 digital devices with email accounts associated with Appellant. In short, the Affidavit in this case provided the substantial basis for the magistrate to conclude there was a reasonable probability of finding evidence of fraud on Appellant's digital devices in his home. All of the things this court identified as missing in Nieto are present in Appellant's case.

c. The Good Faith exception to the exclusionary rule applies

Even in cases where this Court determines that probable cause was insufficient, the good faith exception to the warrant requirement may weigh against applying the exclusionary rule.

> The good faith exception is contained in Mil. R. Evid. 311(b)(3), which provides as follows:
>
> Evidence that was obtained as a result of an unlawful search or seizure may be used if:
>
> (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.

United States v. Carter, 54 M.J. 414, 420 (C.A.A.F. 2001).

In Carter, this court went on to explain how substantial basis should be analyzed with regard to good faith. “"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. In this context, 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." Carter, 54 M.J. at 422. As pointed out in Nieto, this approach to analyzing substantial basis differs from the one described in United States v. Hoffman, 75 M.J. 120, 128 (C.A.A.F. 2016) which appears to keep the focus on whether the individual issuing the authorization had a substantial basis for finding probable cause. This more stringent approach appears to contradict the explanation provided in Judge Erdmann's concurrence in Leedy. There, Judge Erdmann explained the purpose (?) of the exclusionary rule was to prevent police misconduct and not to punish the errors of judges or magistrates; this is one reason a substantial basis for good faith purposes is reviewed through the eyes of a reasonable law enforcement officer. Leedy, 65 M.J. at 220.

If this Court were to determine the magistrate did not have a substantial basis to find probable cause, the good faith exception should apply. In making this argument the Government contends that tension over how substantial basis should be reviewed for good faith purposes should be resolved in favor of Carter and Leedy. In other words, even if this Court determined that the information before the magistrate fell short of a substantial basis for probable cause, looking through eyes of a reasonable law enforcement official, this Court can and should find a substantial basis for probable cause existed.

In Leedy, Judge Erdmann (check the spelling of his name in entire document) found the evidence presented fell short of demonstrating a fair probability that child pornography would have been found on the appellant's computer. Leedy, 65 M.J. at 219. However, he determined "the deficiencies are not so egregious that the law enforcement officer executing the search warrant should be faulted for relying on the magistrate's probable cause determination" and upheld the search on the basis of the law enforcement officer's good faith belief. Id at 20.

In this case, there was clearly a substantial basis for probable cause as viewed through the eyes of a reasonable law enforcement officer. Here the Affidavit established that Appellant engaged in communication over a period of six months including using his personal email account furthering the fraud. Affiant had the email correspondence establishing falsity. The Affidavit established false claims about the official status of attendees and falsified documents including travel orders and tax exemption requests. The Affiant had interviewed witnesses that provided him with information about ongoing fraudulent representations. The affiant received copies of falsified documents from individuals and obtained email correspondence between Appellant and the witness in which Appellant made fraudulent representations and forwarded documents in furtherance of the fraud. These emails were sent from email addresses associated with Appellant regarding

his wedding over a six month period. Given the extent of the information provided in the Affidavit as viewed by a reasonable law enforcement official, there was a substantial basis under the good faith doctrine. Therefore even if this court finds there was not probable cause supporting the search from the view of the magistrate, the search should be upheld under the good faith doctrine.

Ultimately, the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 918-19. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 129 S.Ct. 695, 702 (2009). "When police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." Davis v. United States, 564 U.S. 229, 238 (2011). On the other hand, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." Id.

There was no deliberate, reckless, or grossly negligent disregard for Appellant's Fourth Amendment rights. The agents executing the 7 December 2012 warrant reasonably relied upon the authority granted by the magistrate. A

reasonable law enforcement agent reviewing the substantial evidence of fraud described in the Affidavit would have believed there was a substantial basis for probable cause and that there was a reasonable probability of finding evidence of a fraud in Appellant's home and on his computers. Email correspondence, falsified documents and six months of fraudulent representations made by Appellant using his personal email all help establish a reasonable agent would have found this substantial basis to exist. There was nothing reckless or wanton about the execution of this warrant. As such the good faith exception applied in this case and the military judge's decision not to suppress evidence obtained during the 7 December 2012 search was not an abuse of discretion.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian appellate defense counsel, and to the Appellate Defense Division on 11 August 2017.

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/s/_____

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