IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KALEB S. GARCIA,
Senior Airman (E-4), USAF
Appellant.

Crim. App. No. 2019-07

USCA Dkt. No. 20-_____/AF

SUPPLEMENT TO THE PETITION FOR A GRANT OF REVIEW

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Issue Presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT THE MILITARY JUDGE ABUSED HER DISCRETION IN SUPPRESSING EVIDENCE OBTAINED AS A RESULT OF A SEARCH AND SEIZURE OF APPELLANT'S DNA.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (CCA) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2012). Senior Airman (SrA) Garcia filed a timely petition for a grant of review, bringing this case within this Court's statutory jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

SrA Garcia is charged with two specifications of sexual assault of Airman First Class (A1C) ML, and an additional specification of sexual assault of A1C JL, all in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). Record of Trial (ROT), Vol. 1, Charge Sheet. SrA Garcia was arraigned on these charges at a general court-martial at Minot Air Force Base (AFB), North Dakota on June 14, 2019, and deferred motions and pleas. Record (R.) at 15.

The first motions hearing was held from August 19-20, 2019, and the second motions hearing was held from November 1-7, 2019. R. at 17-243, 244-496. At the hearings, the parties presented evidence and argument related to several

motions. *Id*. On August 26, 2019, following the first motions hearing, the military judge granted the defense's motion to suppress evidence obtained from the search and seizure of SrA Garcia's DNA pursuant to a February 2019 search authorization. Appellate Exhibit (App. Ex.) XXIV. The military judge determined that Air Force Office of Special Investigations (AFOSI) Special Agent (SA) RB, who sought the search authorization, made multiple material false statements to the search authority. *Id*. at 10. The military judge concluded that, with the false information set aside, the remaining information was insufficient to establish probable cause for the search and seizure of SrA Garcia's DNA. *Id*. The government did not appeal the military judge's ruling.

On August 29, 2019, the government moved the military judge to reconsider her ruling on the defense's motion to suppress.[1] App. Ex. XXXIV. Then, on October 4, 2019, the government sought a second search authorization for SrA Garcia's DNA. App. Ex. LVII at 28-34. On October 8, 2019, the search authority (a military judge), granted authorization for the search and seizure of buccal swabs from SrA Garcia. *Id*. at 23.

On October 28, 2019, the defense moved the military judge to suppress SrA Garcia's DNA obtained from the October 2019 search. App. Ex. LVII. After

[1] After a second motions hearing, the military judge denied this motion on November 3, 2019. App. Ex. XLIV.

a second motions hearing, the military judge granted the defense's motion on November 6, 2019. App. Ex. LIX. The military judge determined that SA RD, the AFOSI agent who sought the second search authorization, made multiple intentional and reckless omissions in his affidavit submitted to the search authority and that a corrected affidavit extinguished probable cause. *Id*. at 12-13. Additionally, the military judge concluded SrA Garcia's DNA was not obtained from an independent source and was derivative of the initially tainted evidence. *Id*. at 13-14. The government appealed the military judge's ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862. On April 10, 2020, the CCA reversed the military judge's decision. Appendix A.

Statement of Facts

Background

On February 1, 2019, A1C JL started drinking alcohol at her residence. App. Ex. LVII at 24. Later, her friend A1C CS picked her up and they went to Dakota Lounge, a bar, in Minot, North Dakota. *Id*. There, they met up and had drinks with SrA Garcia and SrA CG. *Id*. A1C CS left the bar around 2230 hours. *Id*. A1C JL then left with SrA Garcia and SrA CG and went to The Spot, another bar, where she had three more drinks. *Id*. At the Spot, A1C JL was texting her ex-boyfriend and current roommate, SrA ZB. App. Ex. XXXIX at 21. After A1C JL, SrA Garcia, and SrA CG left the bar, they stopped to purchase beer, and then went

to SrA Garcia's apartment. App. Ex. LVII at 24.

At SrA Garcia's apartment, A1C JL, continued drinking and played beer pong with SrA Garcia and SrA CG. *Id*. at 24, 26-27. A1C JL claimed that she was "pretty drunk," that things got "blurry," and that she blacked out at some point. *Id*. at 24. SrA CG explained that after they played a few games of beer pong, they sat down on the couch to watch a movie. *Id*. at 27. At some point after playing beer pong, SrA CG claimed SrA Garcia asked to have a threesome. *Id.* Even though SrA CG declined, SrA Garcia kept nodding his head toward him, A1C JL, and the spare bedroom. *Id*. SrA CG understood SrA Garcia's gestures to mean he wanted to have a threesome. *Id*. In response, SrA CG shook his head no. *Id*.

Next, they played "Truth or Dare" in the spare bedroom. App. Ex. XXXIX at 30, 39. A1C JL went along with several dares, including taking off her bra, kissing SrA CG, and spending three minutes alone with SrA CG in the spare bedroom. *Id*. at 30. A1C JL spent the entire three minutes kissing SrA CG. *Id*. Then, as part of another dare, A1C JL spent three minutes alone with SrA Garcia. *Id*. The two did not have any sexual contact, rather A1C JL talked to SrA Garcia about how she defended him in her statement against the sexual assault allegations by A1C ML. *Id*. at 30-31.

After SrA CG came back in the room and A1C JL and SrA Garcia finished their conversation, SrA Garcia went to his room. *Id*. at 31. In his first interview

with AFOSI, SrA CG explained that he stayed with A1C JL and the two started kissing. *Id*. This led to consensual sexual intercourse, which SrA CG described in detail during the interview. *Id*. After they had sex, A1C JL went to the bathroom, but ran back to the room and told SrA CG that someone was in there. *Id*. SrA CG went to the bathroom and saw SrA Garcia in there with the lights off. *Id*. After SrA Garcia left the bathroom, A1C JL used the bathroom and then got back into the bed with SrA CG. *Id*.

SrA CG heard SrA Garcia cleaning up and went to help him. App. Ex. LVII at 27. SrA Garcia suggested that they watch a movie. *Id*. While SrA CG picked out a movie, SrA Garcia went to the spare bedroom to get A1C JL. *Id*. In his initial interview with AFOSI, SrA CG stated SrA Garcia was gone for 1-2 minutes before coming back out of the spare bedroom with A1C JL. App. Ex. XXXIX at 31. However, in a second AFOSI interview, SrA CG claimed SrA Garcia was gone for 10-20 minutes. App. Ex. LVII at 27. When A1C JL and SrA Garcia emerged from the spare bedroom, they were both fully clothed. App. Exs. XXXIX at 31; LVII at 27. While watching the movie, SrA CG and A1C JL fell asleep cuddling on the couch. App. Ex. XXXIX at 31.

A1C JL remembered playing beer pong and thought she may have spilled beer on herself, but her next memory was sitting in the spare bedroom with SrA Garcia and SrA CG talking about SrA Garcia's sexual assault case. App. Ex.

XXXIX at 35. The next event A1C JL recalled was waking up to SrA Garcia on top of her and trying to have sex. App. Ex. LVII at 25. In a follow-up interview, A1C JL further explained that SrA Garcia was touching her stomach and his face was in her neck. *Id*. at 26. Additionally, SrA Garcia's body was slightly to the side of her. *Id*. A1C JL did not remember whether there was vaginal intercourse, but she felt like she had sex. *Id*.; App. Ex. XXII at 10. A1C JL claimed that she knew it was SrA Garcia because she asked, "Who is that," and he answered, "It's Garcia." App. Ex. LVII at 25. Then, A1C JL fell back asleep. *Id*. Around 0300 or 0400 hours SrA Garcia woke A1C JL up and told her to take a shower. *Id*.; XXII at 10. A1C JL thought this was suspicious and believed he was trying to cover up having sex with her. App. Ex. LVII at 26-27.

AFOSI Investigation

Although she had no memory of vaginal intercourse, on February 3, 2019, A1C JL reported to her first sergeant that she believed SrA Garcia sexually assaulted her. *Id*.; App. Ex. LIX at 2. A1C JL did not remember having sex with SrA CG. App. Ex. LIX at 2; App. Ex. XXXIX at 36. That same day, A1C JL participated in an AFOSI interview by SA RD and SA RB that lasted approximately 20 minutes. App. Ex. LIX at 2. In the interview, A1C JL claimed that she blacked out after playing beer pong at SrA Garcia's house. App. Ex. LVII at 24. When she woke up halfway through the night, A1C JL stated that

SrA Garcia "was trying to have sex with me." *Id*. at 25. Next, A1C JL explained that she fell back asleep and then SrA Garcia "woke [her] up at 0300 or 0400 am telling [her] to go take a shower." *Id*. A1C JL was "pretty sure [SrA Garcia] had sex with [her]." *Id*. A1C JL told investigators that she "was gonna go get a rape kit" the next day but did not end up doing so because she did not know how the process worked. *Id*.

SA RB asked A1C JL to provide more detail about her assertion that SrA Garcia tried to have sex with her. *Id*. In response, A1C JL explained that when she woke up, SrA Garcia was "pretty much on top of [her]." *Id*. A1C JL also relayed, "I didn't even know if I had clothes on or anything like I have no idea because I was so drunk at the time, like I was unconscious so." *Id*. When SA RD asked how A1C JL knew it was SrA Garcia, A1C JL said she could tell it was him by his face and she asked, "Who is that?" and he replied, "It's Garcia." *Id*.

Approximately halfway through her interview, A1C JL mentioned that she knew there was another sexual assault allegation against SrA Garcia. App. Ex. XXII, Encl. 1 at 08:39. She explained that she testified at an Article 32, UCMJ hearing for SrA Garcia "in the last rape situation he had." *Id*.

At the end of the interview, A1C JL asked, "What happens if I get pregnant with him?" App. Ex. LVII at 25. Before ending the interview, SA RD asked A1C JL, "Do you remember him, I'm sorry just one—being inside of you? I mean

did you remember that at all? Or just that he was on top of you?" *Id*. A1C JL replied, "Just that he was on top of me and like I didn't have any clothes on. Like from, like I can't remember really anything. I just remember waking up to him." *Id*. at 26.

After her AFOSI interview, SA RD accompanied A1C JL to Trinity Hospital in Minot, ND, to accomplish a Sexual Assault Forensic Examination (SAFE). *Id*.; App. Ex. LIX at 2. While waiting for the results from the SAFE, A1C JL, with the assistance of SA RD, initiated a pretext conversation with SrA Garcia about the night in question. App. Exs. LVII at 26; LIX at 3. SrA Garcia denied having sex with A1C JL, but told her that she had sex with SrA CG. App. Exs. LVII at 26; LIX at 3. SrA Garcia also told A1C JL that he only told her she needed to take a shower because she spilled beer on herself. App. Ex. LVII at 26.

In her report, the Sexual Assault Nurse Examiner (SANE) included A1C JL's statement that "her clothing was on when she woke up at 0300" and that she did not remember what happened, but "it felt like [she] had sex." App. Ex. XXII at 10. SA RD read the report the next day and gave a copy to SA RB because she was the lead agent. App. Ex. LIX at 5.

Following A1C JL's interview, SA RB coordinated with Captain (Capt) KS, the Chief of Military Justice at the base legal office, and sought search authorization to search and seize SrA Garcia's DNA. *Id*. at 3. SA RB falsely told

the search authority, Colonel CG, that when A1C JL woke up and SrA Garcia was on top of her, they both did not have clothes on, and SrA Garcia was vaginally penetrating A1C JL. *Id*. at 3, 5. After the phone call, SA RB drove to Col CG's house to have him sign the search authorization form. *Id*. at 5. She did not present the affidavit at the time because of a pending snow storm. *Id*.

On February 4, 2019, SA RB and SA RD interviewed SrA Garcia who denied any sexual contact with A1C JL, but stated A1C JL and SrA CG had sex. *Id*. Pursuant to the granted search authorization, the agents took SrA Garcia to a medical facility to conduct a SAFE. *Id*. Penile swabs, pubic combings, buccal swabs, and fingernail clippings were sent to the United States Army Criminal Investigation Laboratory (USACIL) for DNA testing. *Id*.

After executing the search authorization, but before presenting the written affidavit to Col CG, SA RB learned that information included in her verbal request for search authorization was incorrect. *Id*. at 6. However, Capt KB advised SA RB to keep the information the same in her written affidavit because she believed the affidavit should mirror the verbal request. *Id*. Subsequently, on February 5, 2019, SA RB provided the written affidavit containing the false information to Col CG. *Id*. SA RB did not tell Col CG the information was inaccurate, nor did she seek a new search authorization based on a corrected affidavit. *Id*.

SA RD and SA interviewed SrA CG on February 4, 2019. *Id*. After waiving his rights, SrA CG admitted that he had sex with A1C JL on the night in question. *Id*. at 5. SrA CG described how they kissed, he massaged her clitoris, he digitally penetrated her, and the two engaged in vaginal sex in multiple positions. *Id*. In the interview, SrA CG placed SrA Garcia alone in the room with A1C JL for three minutes during their game of "Truth or Dare." App. Ex. XXXIX at 30. During those three minutes, A1C JL and SrA Garcia talked about his pending sexual case involving ML. *Id*. at 31. Additionally, SrA CG explained SrA Garcia was gone for 1-2 minutes when he went to the spare bedroom to get A1C JL so they could watch a movie. *Id*. at 32. However, in his second interview on February 7, 2019, SrA CG claimed SrA Garcia was gone for 10-20 minutes. App. Ex. LVII at 27. Also, for the first time, SrA CG explained how SrA Garcia asked to have a threesome and kept nodding his head toward him, A1C JL, and the spare bedroom. *Id*. at 27. SrA CG consented to search and seizure of his DNA via buccal swabs. App. Ex. LIX at 6.

In A1C JL's follow-up interview on February 5, 2019, she provided further detail about what she remembered from the night in question. Specifically, she added that when she woke up to SrA Garcia, he was touching her stomach and his face in her neck. App. Ex. LVII at 26. Additionally, SrA Garcia's body was slightly to the side of her. *Id*. Regarding her state of dress, A1C JL stated she was

wearing a shirt, but was unsure if she was wearing underwear or pants. *Id*. A1C JL recalled standing in the bathroom naked with SrA Garcia. *Id*. Then, SrA Garcia turned the shower on and told her to get in. *Id*. She refused because she feared he was trying to get rid of evidence of sexual contact with her. *Id*. at 26-27. A1C JL also confirmed she had no memory of any sexual contact with SrA CG. App. Exs. XXXIX at 36; LIX at 2.

On March 15, 2019, Mr. MT, a forensic biologist at USACIL, completed his report detailing his DNA analysis on A1C JL's SAFE kit, SrA Garcia's SAFE kit, and SrA CG's buccal swabs. App. Ex. LIX at 7. The report identified the presence of DNA from SrA CG and SrA Garcia on A1C JL's vaginal swabs. *Id*.

Suppression of DNA Evidence from February 2019 Search

On August 26, 2019, the military judge granted the defense's motion to suppress evidence obtained from the February 4, 2019 search and seizure of SrA Garcia's DNA. App. Ex. XXIV. The military judge determined that SA RB made intentional and reckless false statements to the search authority. App. Ex. XXIV at 8-9. Specifically, SA RB falsely stated that A1C JL alleged that when she woke up to SrA Garcia, neither of them were wearing clothes and SrA Garcia was vaginally penetrating her. *Id*. at 8. Further, with the false statements set aside, the remaining information was insufficient to establish probable cause. *Id*. at 10. On November 3, 2019, the military judge denied the government's request to

reconsider her ruling. App. Ex. XLIV.

October 2019 Search and Seizure of SrA Garcia's DNA

On October 4, 2019, over a month after the military judge suppressed SrA Garcia's DNA, SA RD sought a new search authorization. R. at 407; App. Ex. LVII at 23. In the suppression hearing, RD testified that he only sought search authorization because trial counsel requested him to. R. 415-16. Absent trial counsel's request, SA RD would not have sought search authorization because the investigation was closed. *Id*. It was SA RD's understanding that trial counsel's request was prompted by the military judge's decision to suppress DNA evidence resulting from the February 2019 search and seizure. *Id*. At the time he sought search authorization, SA RD was aware of the DNA testing results and knew that SrA Garcia's DNA matched the DNA evidence found on A1C JL's vaginal swabs. R. at 419.

In preparing his affidavit, SA RD reviewed the previous affidavit prepared by SA RB and reviewed A1C JL's recorded AFOSI interview. R. at 407. SA RD also sent the affidavit to trial counsel and incorporated revisions sent back to him. R. at 416. The affidavit includes a summarized transcript of portions of A1C JL's 20-minute interview on February 3, 2019. App. Ex. LVII at 24-26. However, SA RD bolded and underlined these statements by A1C JL: "**And I'm pretty sure he had sex with me**," "**I was gonna go get a rape kit**," and "**what happens if I**

get pregnant with him?" *Id*. at 25. Lastly, SA RD bolded and underlined the part of SA RB's question asking "**Okay um was it just vaginal intercourse . . . ?**" App. Ex. LVII at 25.

SA RD's affidavit omits A1C JL's statements during the interview about potential sexual contact with SrA CG. Specifically, when SA RB asked A1C JL if there was a possibility that SrA CG touched her, A1C JL said she did not think so but she did not know because she was asleep. App. Ex. XXII, Encl. 1 at 08:01. A1C JL explained she woke up on the couch next to SrA CG after SrA Garcia tried to get her to shower. *Id*. at 08:15.

The affidavit includes a summary of A1C JL's second interview with AFOSI on February 5, 2019, including statements about her state of dress. App. Ex. LVII at 26. While SA RD included information about A1C JL's SAFE in his affidavit, he omitted A1C JL's statements to SANE about her state of dress. R. at 417-18; App. Exs. LVII at 26, LIX at 2. Specifically, A1C JL told the SANE that "her clothing was on when she woke up at 0300" and that she did not remember what happened, but "it felt like [she] had sex." App. Ex. XXII at 10; R. at 417-18.

SA RD included SrA Garcia's statements denying he had sex with A1C JL, both in text messages to A1C JL and in his AFOSI interview. App. Ex. LVII at 26.

SA RD omitted SrA CG's statements from his AFOSI interview on February 4, 2019. Consequently, the affidavit fails to disclose that, not only did SrA CG

admit to having sex with A1C JL on the night in question after a rights advisement, but he also provided a detailed description of their sexual encounter. App. Exs. LVII at 27, XXXIX at 29. Relying on SrA CG's second interview, the affidavit only briefly mentions that SrA CG and A1C JL had sex.

> After having sex with [A1C JL] in the spare bedroom, [SrA CG] recalled hearing [SrA Garcia] cleaning the living room and went to help him. [SrA Garcia] told [SrA CG] to put a movie on while he went to get [A1C JL]. SrA Garcia and [A1C JL] were in the spare bedroom alone for approximately 10-20 minutes, and they both came out to the living room clothed. Eventually, [A1C JL] walked into the living room first. [SrA CG] did not recall any discussion or sounds coming from the room or any sounds coming from the shower or bathroom.

App. Ex. LVII at 27. Then, after describing SrA Garcia's request to have a threesome, the affidavit reads, "This exchange occurred earlier in the night before [SrA CG] and [A1C JL] had sex, and before [SrA Garcia] went into the spare bedroom alone with [A1C JL] for approximately 10-20 minutes." *Id*.

Additionally, the affidavit omitted SrA CG's initial statement placing SrA Garcia alone in the spare bedroom with A1C JL for only 1-2 minutes when SrA Garcia went to get her to watch a movie. App. Ex. XXXIX at 32. Instead, the affidavit included SrA CG second statement, from his February 7, 2019 interview, that A1C JL and SrA Garcia were alone in the spare bedroom for 10-20 minutes. App. Ex. LVII at 27.

SA RD did not include in his affidavit the fact that his partner, SA RB, in

seeking the same evidence, previously provided an affidavit to the search authority that contained false information. App. Ex. XXIV at 8-9. SA RD testified that he knew the military judge previously suppressed SrA Garcia's DNA because of the inaccurate information in the affidavit. R. at 422.

SA RD's affidavit did not include information from A1C JL's second interview that she lived with her ex-boyfriend. App. Ex. XXXIX at 33. However, SA RD included MT's affidavit which summarized his finding that DNA from SrA CG and "unknown male" were found on A1C JL's vaginal swabs. App. Ex. LVII at 29. Both SA RD and MT knew that the "unknown male" was SrA Garcia. R. at 419; 451-52. MT later testified in the suppression hearing that he referred to SrA Garcia as an "unknown male" in his affidavit because the first submission of oral swabs was considered invalid. R. at 448. For that reason, MT claimed he could not attribute the DNA profile to SrA Garcia. *Id*. According to MT, SrA Garcia changed to an "unknown male" once the initial swabs were no longer considered valid, even though the second set of swabs had not yet been submitted to USACIL. R. at 465.

On October 8, 2019, based on the RD's and MT's affidavits, a military judge granted authorization for the search and seizure of SrA Garcia's DNA via buccal swabs. App. Ex. LVII at 23. These second set of buccal swabs were sent to USACIL for testing and MT was informed the first set were no longer valid. R. at

443. MT testified that he did not rely on SrA Garcia's initial buccal and penile swabs when he conducted his second analysis. R. at 444. However, in his second report, MT referenced his first report to capture the previous testing he did in the case. R. at 444-45, App. Ex. LVI. MT also compared DNA from SrA Garcia's new buccal swabs to SrA Garcia's penile swab from the first search. R. at 446. MT explained that he was unaware the penile swab from the first search had been suppressed. R. at 446, 454. MT was unsure if USACIL would have assigned a different analyst to perform the second analysis if it would have been known on the front-end that evidence was suppressed. R. at 458. MT was also unaware of what USACIL's protocol is where there is suppression of DNA evidence, nor was he familiar with other cases involving this issue. R. at 463-64.

Suppression of DNA Evidence from October 2019 Search

On 6 November 2019, the military judge granted the defense's motion to suppress the October 2019 search and seizure of SrA Garcia's DNA. App. Ex. LIX. In her ruling, she found that SA RD "intentionally and recklessly" omitted information in his affidavit by failing to include: (1) a complete picture of A1C JL's state of dress; (2) SrA CG's February 4, 2019 admission that he had sex with A1C JL on the night in question; and (3) information that A1C JL was involved in an intimate relationship with her ex-boyfriend at the time. *Id*. at 13.

In concluding the government failed to provide "the full picture of evidence

and information," the military judge also noted that SA RD bolded and underlined part of SA RB's question, "**Okay um was it just vaginal intercourse**" in order to emphasize the agent's conclusion that penetration occurred, "without any factual predicate laid by A1C JL." *Id*. at 12. Regarding MT's affidavit, the military judge concluded that MT's statement that an "unknown male" was a contributor to DNA found on A1C JL's vaginal swab was false. *Id*. Also, the affidavit did not disclose that MT previously analyzed SrA Garcia's DNA samples. *Id*.

After finding SA RD intentionally and recklessly omitted information from the affidavit, the military judge determined that the hypothetical inclusion of the omitted facts extinguished probable cause. *Id*. at 13. Moreover, because there was a reckless affidavit, the good faith exception did not apply. *Id*. Ultimately, the military judge concluded the exclusionary rule was appropriate and would result in "appreciable deterrence of future unlawful search and seizures" and outweighed the costs of exclusion. *Id*.

Lastly, the military judge determined the evidence from the second search did not originate from an independent source. App. Ex. LIX at 14. "There is no indication AFOSI was pursuing any leads through a means untainted by the illegality and it is speculative to believe the explanation for the third source of DNA would have been [SrA Garcia], rather than [A1C JL's ex-boyfriend], with whom A1C JL was having an intimate relationship at the time of the charged

offense." *Id*. Further, the military judge concluded that the government only sought new search authorization based on the knowledge that SrA Garcia's DNA was present on A1C JL's vaginal swabs. *Id*. The evidence was "tainted" by the initial illegal search. *Id*. at 13.

The government appealed the military judge's ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862, and the CCA reversed her decision. Appendix A.

The CCA's Opinion

Without determining if the military judge's finding that SA RD recklessly or deliberately left information out of his affidavit was clearly erroneous, the CCA concluded the military judge abused her discretion in finding that "inclusion of the omitted information in a corrected affidavit would have extinguished probable cause." Appendix A at 26. The CCA found that the military judge "applied an erroneously heightened legal standard for probable cause" and emphasized that "an affidavit is not required to include every piece of information gathered in the course of an investigation." *Id*. at 27 (quoting *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008)) (internal quotation marks omitted). The CCA focused on the military judge's rationale that SA RD failed to "provide a complete picture" to the search authority, and noted that "[t]he proper test under the circumstances is not whether investigators provided the full and complete picture, but whether the omitted information was material." *Id*. (citing *United States v. Mason*, 9 M.J. 416,

422 (C.A.A.F. 2004)) (internal quotations omitted).

The CCA individually examined four omissions identified by the military judge: (1) A1C JL's statement to the SANE that her clothing was on; (2) SrA CG's statement that SrA Garcia and A1C JL were clothed when they exited the spare bedroom after being alone together for approximately 10-20 minutes; (3) SrA CG's admission during his February 4, 2019 interview to having sex with A1C JL on the night in question; and (4) SA RD's omission that A1C JL lived with her ex-boyfriend at the time of the alleged incident. *Id*. at 28-29. First, the CCA found that information that A1C JL was clothed when SrA Garcia woke her up to take a shower did not discount A1C JL's statements about her uncertainty as to whether she was clothed earlier during the alleged sexual assault. *Id*. Finding A1C JL's statements to the SANE to be inconsequential to the probable cause determination, the CCA concluded that inclusion of this omitted information would not have extinguished probable cause. *Id*. at 29.

Regarding SrA CG's statement about A1C JL and SrA Garcia's state of dress when they exited the spare bedroom, the CCA reasoned that A1C JL's state of dress when she left the spare bedroom "ha[d] little to no bearing on whether she was vaginally penetrated without her consent." *Id*.

Next, the CCA found SA RD's omission that SrA CG admitted to having sex with A1C JL in two separate AFOSI interviews, and not just his second

interview referenced in SA RD's affidavit, did not diminish probable cause. *Id*. Specifically, the CCA found the information was cumulative and unnecessary, noting, "[A]n affiant is not required to include every piece of information gathered in the course of an investigation. *Id*. (citing *Tate*, 524 F.3d at 455).

Lastly, the CCA noted it was "little more than conjecture to find that the ex-boyfriend could be the second of two male contributors of DNA found in A1C JL's body " and determined "the military judge's finding [was] not fairly supported by the record." *Id*. at 29-30.

Ultimately, the CCA concluded that 'the hypothetical inclusion of the [above listed] omitted information would not have prevented a finding of probable cause if it had been presented to the search authorizing official." *Id*. at 30 (citing *Mason*, 59 M.J. at 422).

Turning next to whether the search was derived from the first illegal search, the CCA found the military judge "abused her discretion in finding the seizure of [SrA Garcia]'s DNA in October 2019 was not independent of knowledge the Government acquired from the first seizure in February that she suppressed." *Id*. The CCA reasoned that "there [was] no evidence in the record that government attorneys or investigators sought to exploit SA [R]B's misinformation or their knowledge that [SrA Garcia]'s DNA was present on A1C JL's vaginal swabs because of it." *Id*. at 32.

Based on the above findings, the CCA "[did] not reach the applicability of the good faith exception to the exclusionary rule or the inevitable discovery doctrine, which the military judge found were unsupported by the evidence." *Id*. at 25.

Additional relevant facts are contained in the argument section below.

Reasons to Grant Review

This Court should grant review of this issue because the CCA misapplied the law in concluding that the military judge applied a heightened legal standard for probable cause. To support its finding, the CCA pointed to the military judge's finding that the agent failed to provide "a complete picture" to the search authority. Appendix A at 27. However, the military judge's analysis, which focused on how SA RD cherry-picked facts and selectively omitted facts to create a misleading picture of what happened is consistent with applicable law. The CCA failed to consider how, collectively, the multiple omissions created a misleading narrative that deprived the search authority of the ability to make an independent probable cause determination. *See United States v. Perkins*, 850 F.3d 1109, 1117-18 (9th Cir. 2017); *United States v. Stevenson*, 2009 CCA LEXIS 445, at *19-21 (N-M. Ct. Crim. App. 10 Dec. 2009) (unpub. op.). Instead, the CCA erred by only considering how each omission on its own affected probable cause, thereby applying a lessened legal standard for probable cause.

Argument

THE CCA ERRED IN FINDING THE MILITARY JUDGE ABUSED HER DISCRETION IN SUPPRESSING EVIDENCE OBTAINED AS A RESULT OF A SEARCH AND SEIZURE OF APPELLANT'S DNA.

Standard of Review

In an Article 62, UCMJ, appeal, "this [C]ourt reviews the military judge's decision and reviews the evidence in the light most favorable to the party which prevailed at trial[.]" *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019) (citing *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)). A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (citation omitted).

The military judge's factfinding is reviewed under the clearly-erroneous standard and her conclusions of law are reviewed *de novo*. *United States v. Gurczynski*, 76 M.J. 381, 385 (C.A.A.F. 2017) (citation omitted). Where there is a mixed question of fact and law, "a military judge abuses [her] discretion if [her] findings of fact are clearly erroneous or [her] conclusions of law are incorrect." *Id*. This standard requires "more than a mere difference of opinion." *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015) (internal quotation marks omitted) (citation omitted). "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire of the evidence is left with

the definite and firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

When an issue is raised through a government appeal, this Court cannot make findings of fact, and can only act with respect to matters of law. *United States. v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (internal quotation marks omitted) (citations omitted).

Law

The Fourth Amendment expressly imposes two requirements for a search to be lawful. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established. U.S. CONST. AMEND. IV, *Payton v. New York*, 445 U.S. 573, 584 (1980).

The defense bears the burden of proving by a preponderance of the evidence that a law enforcement agent included a false statement made knowingly and intentionally, or with reckless disregard for the truth, in a search affidavit. *Franks v. Delaware*, 438 U.S. 154 (1978); Military Rule of Evidence (Mil. R. Evid.) 311(d)(4)(B). If the defense meets its burden, the burden shifts to the government to prove by a preponderance of the evidence that, with the false information set

aside, the remaining information is sufficient to establish probable cause. *Id*. "Logically, this same rationale extends to material omissions." *Mason*, 59 M.J. at 422. A military judge's determination that a law enforcement agent made false statements or omissions with reckless disregard for the truth are findings of fact reviewed under the clearly-erroneous standard. *United States v. Allen*, 53 M.J. 402, 408 (C.A.A.F. 2000).

With false statements set aside or the hypothetical inclusion of omissions, probable cause exists if, under the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001). Probable cause is not a "technical" standard, but rather is based on "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *United States v. Leedy*, 65 M.J. 208, 213 (2007) (citations omitted). "Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence." *Id*. It relies on a "common sense decision" based on the totality of the circumstances. *United States v. Cowgill*, 68 M.J. 388, 393 (C.A.A.F. 2010) (quoting *Leedy*, 65 M.J. at 213) (internal quotation marks and citations omitted).

In *Perkins*, the Ninth Circuit noted that an affiant can mislead a magistrate by failing to provide the full story, thereby manipulating the inferences a

magistrate will draw. *Perkins*, 850 F.3d at 1117-18 (citing *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985)). In *Perkins*, the agent seeking a search warrant "selectively included information bolstering probable cause, while omitting information that did not." *Id*. at 1117. The Ninth Circuit held that, "[b]y providing an incomplete and misleading recitation of the facts *and withholding the images*, [the agent] effectively usurped the magistrate's duty to conduct an independent evaluation of probable cause." *Id*. at 1118 (emphasis in original). The Court reversed the district court, concluding that the agent at least recklessly omitted material facts from the search warrant application and a corrected application would not support probable cause. *Id*. at 1119.

In *Stevenson*, the agent's affidavit omitted facts related to the intruder's state of dress, and instead, made conclusory statements that the appellant was nude during the rape. *Stevenson*, 2009 CCA LEXIS 445, at *19-21. This, coupled with appellant's identification in a peeping Tom incident and standing outside naked, lead the reader to the inevitable conclusion that the intruder and appellant were one in the same. *Id*. The Navy-Marine Corps CCA found that the omissions were at least reckless. *Id*. at *22.

The exclusionary rule prohibits introduction of evidence seized during an illegal search, and derivative evidence obtained directly or indirectly from an illegal search. *United States v. Murray*, 487 U.S. 533, 536-37 (1988) (citations

omitted). However, evidence resulting from an illegal search may still be admissible if it "can be derived from an independent source." *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (internal quotation marks and citations omitted).

Under the "independence source doctrine," evidence obtained from an unlawful search that is later obtained from a lawful search may be admissible if the lawful seizure is "genuinely independent of [the] earlier tainted [search]." *Murray*, 487 U.S. at 544; *see also Stevenson*, 2009 CCA LEXIS 445, at *26; *United States v. Holloway*, No. ACM 32868, 2000 CCA LEXIS 45, at *14 (A.F. Ct. Crim. App. 22 Feb. 2000) (unpub. op.). The independence source doctrine does not apply if a law enforcement agent's decision to seek search authorization is prompted by information learned from the illegal search. *Murray*, 487 U.S. at 542; *Stevenson*, 2009 CCA LEXIS 445, at *27.

The exclusionary rule protects against "illegally obtained information to support a search warrant." *United States v. Moreno*, 23 M.J. 622, 625 (citing *Wong Sung v. United States*, 371 U.S. 471, 488 (1963)). Evidence acquired by exploitation of an illegal search, rather than "by means sufficiently distinguishable to be purged of the primary taint" is properly rendered inadmissible by the exclusionary rule. *Wong Sung*, 371 U.S. at 488. In *United States v. Conklin*, this Court found the exclusionary rule appropriate where law enforcement agents

sought consent to search based on information obtained from the illegal search, stating:

> [T]here was a causal connection between the illegal search and the act of obtaining consent. The illegal search is the only factor that led directly to the request for consent from Appellant and the subsequent search of his computer. The exploitation of the information obtained from the illegal search was flagrant even if the search itself was not. Since Appellant's consent was 'obtained through exploitation of the illegal [search], it can not be said to be sufficiently attenuated from the taint of that [search].'

63 M.J. 333, 340 (C.A.A.F. 2006).

Absent an exception, the exclusionary rule only applies where "it result[s] in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence must outweigh the costs." *Wicks*, 73 M.J. 93, 104 (C.A.A.F. 2014) (citing *United States v. Herring*, 555 U.S. 135, 141 (2009)) (internal quotation marks omitted).

Analysis

1. The military judge's finding that SA RD intentionally and recklessly omitted material information from his affidavit is supported by the record and is not clearly erroneous.

The CCA did not decide whether SA RD recklessly or deliberately omitted information from his affidavit. Nonetheless, the record supports the military judge's factfinding on this issue. SA RD misled the search authority and gave the impression that SrA Garcia unequivocally had sex with JL and was the only person

who could be the third source of DNA. In his affidavit discussing JL's interview, SA RD not only included conclusory statements that penetration occurred, he emphasized them by bolding and underlining them ("**And I'm pretty sure he had sex with me**", "**I was gonna go get a rape kit**," "**[W]hat happens if I get pregnant with him?**" and the agent's question "**Okay um was it just vaginal intercourse ?**"). App. Ex. LVII at 25. The choice to emphasize these details, including a conclusory statement from SA RB rather than JL, obscured the fact that JL was definitively unable to verify that SrA Garcia vaginally penetrated her. *See* App. Ex. LVII at 26.

Furthermore, SA RD drafted the affidavit in a manner to eliminate the plausible explanation that JL mistakenly believed SrA Garcia had sex with her because: (1) she felt like she had sex; and (2) she did not remember having sex with SrA CG. The affidavit provides no context to SrA CG's admission that he had sex with JL on the night in question and omits the fact that JL does not remember having sex with him.

Regarding A1C JL's state of dress, SA RD acknowledged that he probably did not provide the whole picture to the search authority by omitting JL's statement to the SANE that her clothes were on when she woke up to SrA Garcia around 0300 hours. R. at 427.

Lastly, by failing to include information that A1C JL was living with her ex-

boyfriend at the time of the alleged incident, the agent eliminated the plausible explanation that SrA ZB could have been the third source of DNA. These multiple, material omissions show SA RD selectively chose facts to include in the affidavit and provided an inaccurate and misleading picture to the search authority. Thus, RD's actions were intentional, or at least reckless.

2. The CCA erred in concluding that the military judge abused her discretion in finding that a hypothetical inclusion of the omitted information in the affidavit would have extinguished probable cause.

In erroneously concluding that the military judge applied a heightened legal standard for probable cause, the CCA pointed to the military judge's finding that the agent failed to provide "a complete picture" to the search authority. Appendix A at 27. The CCA emphasized that an agent is not required to include "every piece of information gathered in the course of an investigation" or "amass every piece of conceivable evidence" before seeking search authorization. *Id*. (citing *Tate*, 524 F.3d at 455; *United States v. Montieth*, 662 F.3d 660, 665 (4th Cir. 2011)) (internal quotation marks omitted).

However, the military judge's consideration of whether SA RD provided a complete picture to the search authority is consistent with applicable case law. In this case, the agent cherry-picked facts and selectively omitted facts to create a misleading picture of what happened. App. Ex. LIX at 12. The military judge focused on the fact that the search authority was left with an inaccurate and

misleading picture of what happened because of multiple intentional and reckless omissions. *Id*. at 12-13. This does not equate to requiring investigators to include every piece of evidence in an affidavit. *See Perkins*, 850 F.3d at 1117-18 (finding the agent's selective omission of facts provided an "incomplete and misleading" picture to the magistrate).

In this case the interplay of the omissions and selective inclusion of facts served to provide an incomplete and misleading narrative of what happened to the search authority. However, the CCA only considered each omission individually in evaluating materiality. Appendix A at 28-30. The CCA failed to properly consider whether the numerous omissions *collectively* would have extinguished probable cause if included in the affidavit. *See Perkins*, 850 F.3d at 1117-18; *Stevenson*, 2009 CCA LEXIS 445, at *19-21.

The omitted facts, collectively, denied the search authority of the full picture of what happened and obscured the fact that JL did not remember any penetration. Instead, the affidavit colored the facts in a manner that misled the search authority to believe penetration occurred. With the omitted information, the conclusion that penetration occurred would have been too speculative to justify the issuance of a search warrant. The common-sense conclusion, based on the totality of the circumstances, would be that JL mistakenly believed SrA Garcia had sex with her, and that it was actually SrA CG who had sex with her.

The CCA incorrectly dismissed the materiality of the omission of SrA CG's statements during his first AFOSI as simply cumulative. Appendix A at 29. However, SA RD's inclusion of SrA CG's statements from his second interview, and not his first interview, created a misleading narrative. While the affidavit indicates that SrA CG had sex with JL, it omits the fact that JL did not remember having sex with SrA CG. Instead, the affidavit focuses on SrA CG's statements providing opportunity for SrA Garcia to commit a sexual assault and SrA Garcia's alleged sexual interest in JL. Specifically, the affidavit details SrA Garcia's request for a threesome and places him alone in the spare bedroom with JL for 10-20 minutes.

SrA CG's statements would have been significantly undercut by inclusion of his first AFOSI interview. In that interview, after waiving his rights, he detailed his sexual encounter with JL. He made no mention of SrA Garcia wanting to have a threesome and told investigators that SrA Garcia was only alone in the spare bedroom with JL for 1-2 minutes, not 10-20 minutes. Thus, inclusion of SrA CG's initial admission to having sex with JL was material, and by omitting this information, SA RD manipulated the inferences the search authority would draw. *See Perkins*, 850 F.3d at 1117-18.

If considering the omitted context of SrA CG's sexual contact with JL (kissing for three minutes during a Truth and Dare game and having sex in

multiple positions), and the omitted fact that JL had no memory of any of it, a reasonable and prudent person would question whether JL accurately perceived that it was SrA Garcia on top of her, and not SrA CG. Even if JL legitimately recalled waking up with SrA Garcia on top of her, she had no memory of him penetrating her. R. at 417-18, App. Exs. LVII at 24-26, LIX at 2. She only "felt like she had sex." App. Ex. XXII at 10. It would be no more than "bare suspicion" to believe that actual penetration occurred and SrA Garcia's DNA would be found in JL's vagina. *See Leedy*, 65 M.J. at 213 (stating "[p]robable cause requires more than bare suspicion").

Given JL's lack of memory, it was necessary for SA RD to provide accurate information to the search authority about JL's state of dress during the alleged incident and immediately afterward. The CCA determined that the military judge erred in interpreting JL's statement to the SANE regarding her state of dress. Appendix A at 28. Specifically, the CCA concluded that JL's statement that her clothes were on referred to when SrA Garcia woke her up to take a shower at 0300, not when she woke up earlier when he was on top of her. *Id*. Even assuming *arguendo* the CCA's interpretation is accurate, JL's state of dress shortly after the alleged incident suggest her clothing was never removed. Likewise, SrA CG's statement that JL and SrA Garcia both exited the spare bedroom clothed further indicates no sexual activity occurred when they were alone together.

SA RD omitted JL's only affirmative statement that her clothes were on around the time of the alleged incident. R. at 417-18. Although it is true that SA RD's affidavit referenced some of JL's inconsistent statements pertaining to her state of dress, his affidavit nevertheless left the impression that, at the very least, JL may not have been wearing any underwear or pants during the alleged incident. App. Ex. LVII at 25-26. The fact that JL later recalled being clothed when she woke up to SrA Garcia around 0300 hours would have corrected this mischaracterization. Had SA RD's included this important information, the search authority would have understood that not only did JL never recall SrA Garcia vaginally penetrating her, he potentially never had an opportunity to do so since she was clothed at the time and that her suspicions against him were based, in part, on the actions of another individual.

Lastly, SA RD provided information that JL's vaginal swabs revealed the presence of DNA from SrA CG and an "unknown male." App. Ex. LVII at 29. Once again, however, SA RD provided a misleading picture to the search authority. He did not inform the search authority that JL disclosed during her interview that she was living with her ex-boyfriend at the time of the incident. App. Exs. XXXIX at 21, 33; LIX at 12. This information would have provided the search authority with a plausible explanation for the third source of DNA and would have further diminished suspicion that SrA Garcia was the source of this

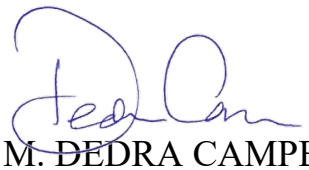
DNA.

3. The CCA erred in concluding that the military judge abused her discretion in finding that SrA Garcia's DNA was not obtained independently by a lawful search untainted by the first search.

The independent source doctrine does not apply where the government's decision to seek search authorization is influenced by information acquired during the first illegal search. *Murray*, 487 U.S. at 542; *Stevenson*, 2009 CCA LEXIS 445, at *27. The military judge considered whether evidence of a third source of DNA on JL's vaginal swabs constituted an independent source. App. Ex. LIX at 14. In explaining that it did not, the military judge reasoned that it was not an independent source because the plausible explanation for the third-source of DNA was JL's ex-boyfriend, not SrA Garcia. *Id*. Consequently, it was not this information that prompted law enforcement to get a search warrant for SrA Garcia's DNA. Rather, it was because the government already *knew* SrA Garcia was a DNA contributor, information acquired as a result of the illegal search. SA RD confirmed that he only sought new search authorization upon trial counsel's request, which to his understanding, was prompted by the suppression of DNA evidence. R. at 415-16.

WHEREFORE, SrA Garcia requests this Honorable Court grant review of the issue.

Respectfully submitted,



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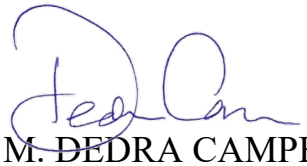
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on June 3, 2020.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 8,548 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.

Respectfully Submitted,

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APPENDIX A

.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Misc. Dkt. No. 2019-07

UNITED STATES
Appellant

v.

Kaleb S. GARCIA
Senior Airman (E-4), U.S. Air Force, *Appellee*

Appeal by the United States Pursuant to Article 62, UCMJ

Decided 10 April 2020[1]

Military Judge: Bradley A. Morris (arraignment); Elizabeth M. Hernandez (motions).

GCM convened at: Minot Air Force Base, North Dakota.

For Appellant: Captain Kelsey B. Shust, USAF (argued); Colonel Shaun S. Speranza, USAF; Mary Ellen Payne, Esquire.

For Appellee: Captain M. Dedra Campbell, USAF (argued); Mark C. Bruegger, Esquire.

Before J. JOHNSON, POSCH, and KEY, *Appellate Military Judges.*

Judge POSCH delivered the opinion of the court, in which Chief Judge J. JOHNSON and Judge KEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

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[1] We heard oral argument in this case on 26 February 2020.

POSCH, Judge:

The Government brings this interlocutory appeal under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862,[2] challenging the military judge's ruling to suppress evidence obtained as a result of a search and seizure of Appellee's DNA from buccal cells on the inside of Appellee's cheeks. The Government maintains that Appellee's DNA was taken pursuant to a search authorization supported by probable cause that was untainted by either the conduct of military personnel or a prior suppression of Appellee's DNA that was obtained by those personnel. We agree and find the military judge abused her discretion in suppressing the evidence.

I. PROCEDURAL HISTORY

Appellee is charged with sexual assault of Airman First Class (A1C) JL by penetrating her vulva with his penis without her consent in violation of Article 120(b)(2)(A), UCMJ, 10 U.S.C. § 920(b)(2)(A).[3] Appellee was arraigned on 14 June 2019, at which time the military judge granted Appellee's request to defer motions and pleas. Hearings in the case were held at Minot Air Force Base (AFB), North Dakota (ND), on 19–20 August 2019, and 1–7 November 2019 in which the parties presented evidence and argument related to several motions.

On 26 August 2019, following the first motions hearing, the military judge suppressed buccal and penile swabs obtained from Appellee pursuant to a February 2019 search authorization. The military judge determined the Air Force Office of Special Investigations (AFOSI) agent, Special Agent (SA) B, who sought the search authorization made materially false statements that Appellee's commander relied on to find probable cause. The military judge concluded SA B "acted knowingly and intentionally and with reckless disregard for the truth," and absent SA B's falsehoods, probable cause would not have supported the search. On 3 November 2019, the military judge denied the Government's motion to reconsider her ruling. The Government did not appeal the suppression of the February 2019 search and seizure.

Meanwhile, on 4 October 2019, the Government sought a second search authorization for Appellee's DNA, which is the subject of this appeal. This time the Government requested a military judge, separate from the presiding judge

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[2] All references in this decision to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] This is an additional charge. Appellee also stands charged with two specifications of sexual assault of another female Airman alleged to have occurred before the incident in question involving A1C JL.

at Appellee's trial, to act as the authorizing official for the search. The Government provided two affidavits in support of its request: an affidavit from SA RD (an experienced agent who worked the case with SA B), and an affidavit from Mr. MT, a forensic biologist at the United States Army Criminal Investigation Laboratory (USACIL) who tested vaginal swabs collected from A1C JL's sexual assault forensic examination (SAFE) and previously conducted DNA analysis of Appellee's February 2019 buccal and penile swabs that the trial judge had suppressed.

On 8 October 2019, a different authorizing official found probable cause and allowed the search and seizure of a second set of buccal swabs from Appellee's person, which SA RD obtained the next day. Forensic analysis of the swabs by Mr. MT revealed Appellee's DNA was one of two contributing male DNA profiles represented on A1C JL's vaginal swabs.

On 28 October 2019, Appellee moved to suppress evidence obtained as a result of the October 2019 search and seizure. On 5 November 2019, a suppression hearing was held during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, and the parties presented evidence and argument on the legality of the October 2019 search and seizure. On 6 November 2019, the military judge issued her written ruling and again suppressed Appellee's DNA. The trial counsel notified the military judge of its appeal within 72 hours of her ruling. Article 62(a)(2), UCMJ, 10 U.S.C. § 862(a)(2).

Appellee's court-martial has been stayed, *see* Rule for Courts-Martial 908(b)(4), pending the Government's appeal of the military judge's 6 November 2019 ruling granting Appellee's motion to suppress.

II. BACKGROUND

A. Investigation of Appellee

The relevant charge in this appeal stems from an incident involving Appellee and A1C JL that occurred at Appellee's off-base apartment in Minot, ND, in the early morning hours of Saturday, 2 February 2019. On Sunday, 3 February 2019, A1C JL called her first sergeant to report that she was possibly sexually assaulted by Appellee at his off-base residence over the weekend. The first sergeant relayed this information to special agents of the AFOSI who initiated an investigation.

1. Initial Interview of A1C JL

The same day AFOSI received the first sergeant's report, SA B and SA RD conducted a video-recorded initial interview with A1C JL, which lasted about 20 minutes. SA B testified that the interview was short because its purpose was to determine if there was credible information "to go forward and get [A1C

JL] a sexual assault kit . . . because that evidence is fleeting." SA B also explained the purpose of the initial interview was to determine if there was "probable cause to get search warrants for other things like the residence where [a sexual assault] might have occurred or sexual assault kits on the alleged offenders."

A1C JL told the AFOSI agents that after a night of heavy drinking with Appellee and other friends, she and a male Airman, Senior Airman (SrA) CG, returned with Appellee to Appellee's apartment. The three continued drinking and were talking in Appellee's spare bedroom until she "blacked out completely." A1C JL then described waking up twice during the night under circumstances that involved altercations with Appellee, and him alone.

In the first incident, A1C JL described waking up to Appellee "trying to have sex with [her]." She told the agents he was "pretty much on top of [her]" and she "*didn't even know if [she] had clothes on* or anything[.]" (Emphasis added). She said she "ha[d] no idea because [she] was so drunk at the time, like [she] was unconscious." A1C JL told the agents she was certain it was Appellee because when she asked, "What the f[**]k's going on?" a male voice she recognized responded, "It's Garcia." She also recognized Appellee's face. A1C JL told the agents she was "pretty sure [she] fell back asleep."

A1C JL described a second incident in which she woke up at 0300 or 0400 hours, Appellee was trying to get her to take a shower, and "[he] got really mad" when she refused. She told the agents she was "pretty sure he had sex with [her]," and explained she left the bedroom after the shower incident and fell asleep on the couch in the living room. One of the agents asked her, "Do you think there was any way [SrA CG] could have touched you or was it just [Appellee]?" She replied, "I want to say no, but I don't know because . . . I was asleep."

She told the AFOSI agents she wanted a "rape kit" but did not know how to get one and was concerned any evidence was lost because she had taken a shower when she returned home from Appellee's residence. A1C JL agreed to participate in a SAFE by a sexual assault nurse examiner (SANE). Before leaving for the examination she asked the agents, "What happens if I get pregnant with him?" and volunteered she "bought Plan B at the store earlier today" but had not taken it yet.

As the interview was ending, A1C JL told the agents that she did not know if Appellee ejaculated. She then stated she was not wearing clothes when she awoke to Appellee trying to have sex with her, which was at odds with her earlier statement that she could not recall if she was clothed at the time: an agent asked, "Do you remember him being inside of you?" She answered, "just that he was on top of me . . . *like I didn't have any clothes on*, like from, I can't

remember, really, anything, I just remember waking up to him . . . .” (Emphasis added).

2. A1C JL’s SAFE at Trinity Hospital

After the interview, A1C JL went to Trinity Hospital in Minot, ND, and a SAFE was accomplished. While waiting at the hospital, A1C JL exchanged text messages with Appellee about the night in question in a pretext conversation that SA RD helped facilitate. Appellee told her it was SrA CG who had sex with her that night and not him. Appellee explained that he was in the spare bedroom looking for shorts, and the reason he wanted her to take a shower was because she spilled beer all over herself.

As part of the forensic examination, the SANE collected several biological samples, including vaginal swabs. The SANE included a typed narrative in her report of A1C JL’s first-person account of the incident in question. The narrative in the SANE report—captured in the nurse’s words—is more disjointed and non-linear compared to A1C JL’s initial interview with the AFOSI agents that the agents video-recorded:

> Patient states, “‘. . . [W]e stopped at [t]he . . . liquor store and then we went to [Appellee]’s house. I had about [two] more drinks there and then I don’t remember much of anything. We talked on the couch about [Appellee’s] current sexual assault situation[4] and we played some beer pong and that’s really all I remember. Then *he woke me up at 3 in the morning and he was trying to get me to take a shower*. I kept saying ‘Why?’ but he wouldn’t say anything. He was on top of me and I said ‘Who is this?’ He said ‘Garcia’ and that’s how I knew it was him. I didn’t take a shower at that time then I went out to the couch and passed back out.’” Patient states that *her clothing was on when she woke up at 0300*. At this time, the patient does not recall any details of the events that occurred. Patient states that “it felt like I had sex.”

(Emphasis added) (footnote added).

The military judge and Appellee rely on the narrative for the proposition that A1C JL was clothed when she felt like she had sex. For reasons not apparent from the record, the SANE was not called to testify at either suppression hearing.

3. First Authorization to Search and Seize Appellee’s DNA

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[4] A1C JL knew a female Airman had accused Appellee of sexual assault. She and SrA CG were discussing the case with Appellee before she fell asleep in the spare bedroom.

While SA RD was with A1C JL at Trinity Hospital and before AFOSI received the SAFE report including the SANE's typed narrative, SA B contacted the chief of military justice (CMJ) at the base legal office for advice on seeking search authorization for Appellee's DNA. SA B relayed the facts garnered from the AFOSI interview with A1C JL, and was advised to seek verbal authorization from Appellee's commander to search and seize Appellee's DNA.

Also on 3 February 2019, at 1909 hours, SA B provided the following information to the commander in a recorded three-party phone call that included the CMJ:

> [A1C JL] believes she passed out with her clothes on in [Appellee]'s spare bedroom and her next memory is she woke up to [Appellee] on top of her *and she wasn't wearing any clothes and neither was he* and she knows it was [Appellee] because she said "who is this" and he said "it's Kaleb Garcia" and she looked at his face and knows what his face looks like and *he was vaginally penetrating her* and she passed back out and then she woke up around three or four in the morning and [Appellee] instructed her, he said, "hey you need to go take a shower" and she refused and then moved from the spare bedroom to the couch.

(Emphasis added).

Based on the information provided by SA B, Appellee's commander gave verbal authorization to conduct "[a] complete [SAFE] of [Appellee] to include penile swabbings, pubic combings, buccal swabs, and fingernail clippings." Half an hour later SA B drove to the commander's residence where he memorialized his earlier verbal authorization by signing an Air Force (AF) Form 1176, *Authority to Search and Seize*.

At some point after executing the verbal search authorization on 4 February 2019, but before presenting a written affidavit to the commander on 5 February 2019, SA B testified she realized the information she verbally relayed to Appellee's commander was incorrect. A1C JL's memory whether she was clothed was more uncertain than SA B had relayed when she sought verbal authorization, and A1C JL had not described whether Appellee was clothed. Additionally, SA B relayed to Appellee's commander during the phone call her assurance that Appellee penetrated A1C JL vaginally, which was unwarranted based on the information A1C JL gave in her initial interview with the AFOSI agents.

SA B brought the erroneous information to the attention of the CMJ. The CMJ testified she advised SA B to keep the information in her affidavit the same as she had briefed to the commander, without any changes. The CMJ's

rationale for doing so was because she believed the affidavit should mirror the facts that the AFOSI agent previously provided.[5]

In accordance with the CMJ's advice, even after learning her affidavit contained incorrect information before she signed it, SA B failed to correct it or attempt to re-accomplish the authorization with information that accurately relayed what A1C JL told the AFOSI agents. On 5 February 2019, Appellee's commander administered an oath to SA B who signed the affidavit attesting to the veracity of the incorrect information.

4. Appellee's Interview and Execution of the Search Authorization

The AFOSI agents interviewed Appellee on 4 February 2019. He denied having any sexual contact with A1C JL, but relayed that SrA CG and A1C JL had sexual contact with each other throughout the evening. Appellee assumed A1C JL and SrA CG had sexual intercourse in his spare bedroom. Appellee asserted he was never alone with A1C JL other than three minutes in the spare bedroom when he went looking for SrA CG's shorts because SrA CG was wearing Appellee's pants. Also on 4 February 2019, the AFOSI agents took Appellee to the hospital to undergo the SAFE authorized by his commander.

5. Interviews with SrA CG

That same day, the AFOSI agents interviewed SrA CG, who admitted to engaging in sexual intercourse with A1C JL during the evening in question. He described A1C JL as an active participant and told the AFOSI agents he could not remember if he ejaculated inside of her because he was intoxicated. SrA CG consented to a seizure of his DNA, and SA RD obtained two buccal swabs and sent them to the USACIL for forensic analysis.

On 7 February 2019, the AFOSI agents interviewed SrA CG a second time. He told the agents that after returning to Appellee's apartment the three played a few games and watched a movie. When A1C JL went to use the restroom, Appellee indicated to SrA CG that he wanted to have a threesome and SrA CG declined, giving the reason that Appellee was married. Later in the evening, SrA CG had sexual intercourse with A1C JL in Appellee's spare bedroom. Afterwards, he fell asleep in the bed with A1C JL and believed A1C JL fell asleep as well.

SrA CG told the AFOSI agents he heard Appellee cleaning the living room and went to help him, leaving A1C JL in the spare bedroom. After the cleaning was finished, SrA CG looked for a movie to watch while Appellee went to tell A1C JL what they were doing. He told the AFOSI agents Appellee was gone

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[5] The CMJ participated as trial counsel at the arraignment on 14 June 2019, but not during subsequent Article 39(a), UCMJ, sessions of court.

approximately 10 to 20 minutes and then returned, with A1C JL, to the living room from the spare bedroom. They both returned from the bedroom clothed.

6. Second Interview with A1C JL

On 5 February 2019, SA B and SA RD conducted a second interview of A1C JL. She described she was home on Friday night drinking alcohol and making plans for the evening. She told the AFOSI agents at the time she was living again with her ex-boyfriend because her new apartment flooded and had bed bugs.

A1C JL described going out drinking with friends and returning with Appellee and SrA CG to Appellee's apartment. The three played beer pong and then talked with Appellee about his pending sexual assault case in the spare bedroom. She fell asleep and later awoke to Appellee trying to have sex with her. Appellee's face was in her neck, he was touching her stomach, and his body was slightly to her side, but she was unsure if he was vaginally penetrating her or not. She was wearing her shirt, but was unsure if she had on underwear or pants.

A1C JL told the AFOSI agents her next memory was standing in the bathroom naked with Appellee who turned on the shower and told her to get in. She told the AFOSI agents she refused because she believed Appellee was trying to wash away evidence that he had sexual contact with her. After she refused, she put her clothes back on and slept near SrA CG on a couch in the living room.

7. DNA Analysis

The evidence obtained by AFOSI was sent to the USACIL for forensic analysis. On 15 March 2019, Mr. MT, a forensic biologist at the USACIL, completed a DNA analysis on A1C JL's and Appellee's SAFE kits and SrA CG's buccal swabs. Appellee's DNA profile was matched to one of two male DNA profiles obtained from semen residue found on A1C JL's vaginal swabs. Mr. MT identified the second DNA profile as belonging to SrA CG.

B. First Suppression Ruling

In a written ruling on 26 August 2019, the military judge granted the Defense's motion to suppress evidence obtained from the 4 February 2019 search and seizure of Appellee's DNA. The military judge determined that SA B gave false information to Appellee's commander on 3 February 2019 when she sought verbal authorization. The military judge found SA B told the commander that "[A1C JL] woke up to [Appellee] on top of her and she wasn't wearing any clothes and neither was [Appellee]," and that Appellee "was vaginally penetrating her." The agent's statements are recorded and not in dispute.

The military judge found SA B knew her statements were "intentionally false" because "A1C JL told SA [B] earlier that day she could not remember if either of them were wearing clothes and she did not know if vaginal penetration occurred." The military judge found that during A1C JL's initial 20 minute interview she "consistently maintained that she was unsure whether penetration occurred" and yet "believes the [Appellee] had sex with her." In fact, A1C JL told both AFOSI agents she was "pretty sure [Appellee] had sex with [her]." A1C JL's statement to the agents is recorded and also not in dispute. However, this fact was omitted in the military judge's written rulings granting the Defense motion and denying the Government's motion for reconsideration.

The military judge ruled the Defense met its burden to show that SA B "acted knowingly and intentionally and with reckless disregard for the truth." Further, the military judge found the Government failed to meet its burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer was sufficient to establish probable cause.

C. Second Authorization to Search and Seize Appellee's DNA

After the first hearing that resulted in the suppression of Appellee's DNA, in October 2019, Captain (Capt) JS[6] of the Minot AFB legal office advised SA RD to accomplish an affidavit to support a second search authorization. Capt JS did so after the base legal office sought guidance on what to do next from higher headquarters following the suppression ruling. At the second suppression hearing, SA RD testified that it was not his independent decision to seek a second authorization because the AFOSI investigation was closed. He prepared his affidavit after examining the report of investigation along with recorded witness interviews and notes he took during interviews. Capt JS reviewed and edited SA RD's draft, added a summarized transcript of the agents' initial recorded interview with A1C JL, and then on 4 October 2019 notarized SA RD's signature. Before doing so, SA RD reviewed and considered each revision made by the legal office before adopting it as his own.

SA RD then sought authorization to collect buccal swabs from Appellee to compare his DNA against DNA from two contributing males that had been

[6] Capt JS participated as assistant trial counsel at arraignment, and as trial counsel under the supervision of a circuit trial counsel during all subsequent Article 39(a), UCMJ, sessions of the court-martial.

determined by forensic analysis of A1C JL's vaginal swabs. This time, the Government requested a military judge with no involvement in the matter to authorize a search and seizure of Appellee's DNA.

The Government provided the authorizing official with two affidavits in support of its request:[7] the affidavit SA RD accomplished on 4 October 2019 with the assistance of Capt JS, and a 30 September 2019 affidavit from Mr. MT, the forensic biologist from the USACIL who had tested vaginal swabs collected from A1C JL's SAFE kit, the buccal swabs obtained from SrA CG, and Appellee's DNA that had been suppressed.

1. SA RD's 4 October 2019 Affidavit

In his affidavit in support of the second search authorization, SA RD summarized the information obtained in the AFOSI investigation and arranged it mainly in chronological order. SA RD included a summarized transcript of portions of A1C JL's recorded interview on 3 February 2019:[8]

> . . . [A1C] JL: That's where everything kinda gets blur[r]y, and I blacked out completely, like unconscious pretty much. And I ended up waking up half way through the night and Garcia was trying to have sex with me. And kinda fell—I'm pretty sure I fell back asleep, and he woke me up at 0300 or 0400 am telling me to go take a shower. **And I'm pretty sure he had sex with me**. Um and I refused to take a shower and he got really mad. Then I went and slept on the couch and I woke up in the morning and they were kinda just acting fine and everything like that so. And then **I was gonna go get a rape kit** but then I didn't know if I had to go through like TRICARE or anything like that so I didn't do it [inaudible] because I didn't know how that all worked.
>
> . . . SA [B]: Well so that's actually the next step that we'll do after this is that we'll take care of it, we'll go down to Trinity and get a kit done.

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[7] The CMJ emailed the Government's request to the authorizing official. As evident from an attachment to Appellee's 28 October 2019 motion to suppress, both affidavits were included in the email. However, the AF Form 1176, *Authority to Search and Seize*, signed by the authorizing official, states "This authorization incorporates the attached affidavit of [SA RD], dated 4 October 2019," and does not reference any other document. The military judge concluded the authorizing official reviewed both affidavits as part of his probable cause determination.

[8] This conversation is from SA RD's affidavit. The bold and underlined portions of the following quote appear in the original text, along with [inaudible] and [JL responds no]. All other alterations were made by this court.

> . . . SA [B]: So just give me a little more detail on when you blacked out to when you woke up to Garcia trying to have sex with you. Can you just give me a little more detail?
>
> . . . [A1C] JL: Um well I like, I guess I, because we were all like talking in the spare bedroom after we got done playing pong. And I guess I just fell asleep because I was so drunk. And then I woke up with him pretty much on top of me. I didn't even know if I had clothes on or anything like I have no idea because I was so drunk at the time, like I was unconscious so.
>
> . . . SA [RD]: How did ya—I mean when you said you woke up you knew it was him, how did you know it was him? I mean what stood out to you to say you know it's Garcia? Anything in particular? His face—I mean I'm sure you recognize—
>
> . . . [A1C] JL: His face, [inaudible] ya it was definitely him. And he said . . . I was like "who is that" and he was like "it's Garcia." So I knew it was him.
>
> . . . SA [B]: Do you think—um do you have any other injuries or anything like that? [JL responds no]. **Okay um was it just vaginal intercourse**, was there any like anal intercourse or anything like that?
>
> . . . [A1C] JL: Not that I—I don't think so.
>
> . . . SA [B]: Ya do you have any other questions for us . . .
>
> . . . [A1C] JL: Um the last thing is, is like **what happens if I get pregnant with him?**
>
> . . . SA [RD]: Do you remember him, I'm sorry just one—being inside of you? I mean did you remember that at all? Or just that he was on top of you?
>
> . . . [A1C] JL: Just that he was on top of me and like I didn't have any clothes on. Like from, like I can't remember really anything. I just remember waking up to him.

The affidavit then relayed that a SANE at Trinity Hospital conducted a SAFE. As part of the medical exam, the SANE collected, among other things, four vaginal swabs from A1C JL. The affidavit informed that the SAFE kit was sent to the USACIL for DNA analysis so that "[a]ny DNA found on [A1C JL's] vaginal swabs can be compared to DNA collected from [Appellee's] buccal swabs" that were the subject of the Government's request for authorization. Although SA RD had reviewed the SANE's report, he did not include any information from the report, such as that A1C JL told the nurse "her clothing

was on when she woke up at 0300" when Appellee tried to make her take a shower. He likewise omitted that A1C JL told the nurse she "does not recall any details of the events that occurred."

SA RD averred that also on 3 February 2019, while waiting for the SAFE, A1C JL texted Appellee and asked him if they had sex on Friday night, 1–2 February 2019. Appellee replied that they did not have sex, but that she had sex with SrA CG. A1C JL then asked Appellee why he was in the room on top of her if they did not have sex. Appellee replied that he was in the room looking for "Soffe" brand shorts. She then asked him why he told her she needed to take a shower. He replied that she had spilled beer all over herself, so he wanted her to clean up. SA RD averred that Appellee continued to deny any sexual contact with A1C JL and restated that SrA CG was the only person who had sex with her on Friday night. SA RD further averred that he and SA B conducted an interview with Appellee who told the agents he "never touched [A1C JL] sexually between 1–2 Feb 19 and that he has never had sex" with her. Appellee "stated that he was never alone with [A1C JL] aside from three minutes in the spare bedroom. When asked if there was any reason forensic examiners would find [Appellee]'s DNA inside of [A1C JL], [Appellee] responded, 'Shouldn't, no.'"

SA RD averred that on 5 February 2019, he and SA B conducted a second interview of A1C JL. A1C JL told the AFOSI agents that she was "pretty drunk" at Appellee's apartment and "lost memory" after "shot gunning" a beer. The affidavit further relayed that

> [A1C JL] remembered having a conversation with [Appellee] and [SrA CG] in the spare bedroom about [Appellee]'s pending court case.[9] [She] could not remember how she got into the spare bedroom. [She] remembered falling asleep and then woke up to [Appellee] "trying to have sex with her[."] [She] stated her memory was waking up to [his] face in her neck and touching her stomach. [She] stated [his] body was slightly to the side of her. [She] was wearing her shirt, but was unsure if she had on any underwear or pants. [She] was unsure if [he] was vaginally penetrating her or not. When [she] woke up to [Appellee], [she] asked, "Who is this?" and [Appellee] responded, "It's Garcia. Don't you remember?" [She] responded, "What the f**k," and passed out

[9] Near the end of his affidavit, SA RD explained the Minot AFB AFOSI detachment "previously ran an investigation on [Appellee] for allegedly sexually assaulting another victim in his home, which was initiated on 27 Aug 18," and that "[o]n 7 Jan 19, [Appellee] was formally charged with violating [UCMJ] Article 120, Sexual Assault related to the previous allegation."

> again. [She] was certain it was [Appellee], not [SrA CG], because [Appellee]'s voice was much deeper than [SrA CG]'s voice. [Her] next memory was standing in the bathroom naked with [Appellee]. [Appellee] turned the shower on and told her to get in. [She] refused because she was scared [he] was trying to get rid of evidence that he had any sexual contact with [her]. After [she] refused, [she] put her clothes back on, which she believed were all in the bathroom, and slept on the couch next to [SrA CG].

(Footnoted added).

SA RD averred that on 7 February 2019, he and SA B interviewed SrA CG who relayed the following information: While playing pool at a bar on Friday night, A1C JL "missed hitting the scratch ball with the pool stick multiple times because she was so intoxicated." After going to Appellee's apartment, the three sat on the couch talking. A1C JL continued to drink alcohol at the apartment, and they all played a few games of beer pong before they watched a movie. SA RD relayed in his affidavit that SrA CG "ha[d] sex with [A1C JL] in the spare bedroom," after which "[SrA CG] recalled hearing [Appellee] cleaning the living room and went to help him. [Appellee] told [SrA CG] to put a movie on while he went to get [A1C JL]." The affidavit stated SrA CG told the AFOSI agents that

> [Appellee] and [A1C JL] were in the spare bedroom alone for approximately 10–20 minutes, then they both came out to the living room clothed. Eventually, [A1C JL] walked into the living room first. [SrA CG] did not recall any discussion or sounds coming from the room or any sounds coming from the shower or bathroom. He did not recall which room they came from. [SrA CG] did not remember [Appellee] asking [A1C JL] to take a shower.

SA RD further averred that after additional questioning, SrA CG disclosed to the AFOSI agents that "[Appellee] was talking about 'something could happen' that night, or words to that effect, meaning he wanted to have sex with [A1C JL]." As described in SA RD's affidavit, SrA CG explained to the agents that

> [a]t some point while in the living room after playing beer pong, [Appellee] asked [SrA CG] to have a threesome (having sex with three people) with [A1C JL]. [SrA CG] said no because [Appellee] was married. Even though [SrA CG] said no, [Appellee] kept nodding his head towards him and [A1C JL], and then nodding his head towards the spare bedroom. [SrA CG] opined that [Appellee]'s gestures meant he wanted them all to go to the spare

> bedroom to have sex, so [SrA CG] shook his head no in response. This exchange occurred earlier in the night before [SrA CG] and [A1C JL] had sex, and before [Appellee] went into the spare bedroom alone with [A1C JL] for approximately 10–20 minutes.

SA RD concluded his affidavit stating "[b]ased on the information provided by [A1C JL] and the interview of [SrA CG] on 7 Feb 19, and my training and experience, I believe there is probable cause to obtain buccal swabs from [Appellee] for DNA analysis and comparison with the SAFE kit obtained from [A1C JL] during the course of this investigation." Finally, SA RD stated that on 2 October 2019, he had "briefed the above facts and circumstances to Capt [JS], 5th Bomb Wing, Staff Judge Advocate (SJA) office . . . who agreed there was sufficient probable cause to collect DNA from [Appellee]."

2. Mr. MT's 30 September 2019 Affidavit

Mr. MT's 30 September 2019 affidavit, which the Government also provided to the authorizing official, stated he identified the presence of DNA "originating from three individuals" on the vaginal swabs he analyzed from A1C JL's SAFE kit. Among the three DNA profiles, Mr. MT identified two as male contributors. Mr. MT reported one profile belonged to SrA CG, and the other as an "unknown male." However, at the time Mr. MT conducted the second analysis he knew that the second profile matched Appellee's DNA profile that he analyzed from the first seizure of Appellee's DNA that the military judge had suppressed.

3. Authorization and Analysis of Appellee's Buccal Swabs

With the information from both affidavits, on 8 October 2019 the authorizing official found probable cause existed and approved search and seizure of Appellee's DNA. The next day, SA RD executed the search authorization and obtained two buccal swabs from Appellee and sent them to the USACIL where they were forensically analyzed.

Mr. MT again participated in the processing and analysis of Appellee's DNA. The results were reflected in a second report, dated 25 October 2019. Mr. MT examined vaginal swabs from A1C JL and identified the presence of male DNA from Appellee and SrA CG. Although the information had been suppressed, as part of his duties Mr. MT compared the information against Appellee's DNA profile obtained from the first swabs that had been suppressed, which were maintained in the USACIL database. He included the results of that comparison in his 25 October 2019 report that referenced the findings in his 15 March 2019 report.

D. Defense Motion to Suppress and the Second Suppression Hearing

At trial, Appellee again moved to suppress admission of his DNA obtained from his buccal cells pursuant to a search authorization that he once more claimed was not founded on probable cause. The Defense argued in its written motion that SA RD recklessly omitted two crucial pieces of information from his affidavit. First, that A1C JL told the SANE that her clothing was on when she awoke to Appellee and that she did not recall details of the events that occurred, just that "it felt like [she] had sex." Second, that SA B provided a false affidavit to the commander for the same evidence SA RD was seeking to search and seize, and she did so in reckless disregard for the truth.

The Defense also argued that Mr. MT's affidavit was false because it stated A1C JL's vaginal swabs were determined to have DNA from an "unknown male individual" whom Mr. MT in fact knew to be Appellee because he was the same analyst who examined Appellee's DNA that was submitted to the USACIL pursuant to the first, invalidated search authorization. The Defense further argued as a basis for suppression that Mr. MT's affidavit failed to disclose his prior involvement in testing Appellee's DNA. The Defense claimed that the recklessly omitted information and false information rendered the second search authorization ineffectual because it lacked probable cause.

1. SA RD's Testimony

At the second suppression hearing, SA RD testified he knew evidence from the first DNA analysis was suppressed on grounds that SA B included inaccurate information in her affidavit. He explained he was not involved in completing her affidavit.

SA RD explained that he wrote the original draft of his affidavit and included actions he and SA B took between 3 and 7 February 2019 at the beginning of the investigation. He reviewed SA B's affidavit but did not rely on it before executing his own on 4 October 2019. He reviewed their recorded initial interview with A1C JL along with notes he took of her second interview. SA RD also reviewed their interview with SrA CG who was present in Appellee's apartment during the incident in question. He explained how he finalized his affidavit with the assistance of the legal office and did not recall anything they recommended he take out. He affirmed their revisions included "things that they added," which he reviewed and confirmed were accurate. He relayed he valued their legal opinion as regards probable cause from their knowledge of the case.

SA RD reviewed the SANE report the day after it was prepared before he gave it to SA B. On cross-examination he was asked by trial defense counsel if he agreed "that by not including the statement from the SANE from [A1C JL] saying that she was wearing clothing, that's not presenting the whole picture to the search authority if you omit that?" SA RD paused before replying that

he "really can't say," and explained he did not normally include information from SANE reports when seeking probable cause authorizations. SA RD ultimately agreed that leaving the information out did not present "the whole complete picture" to the authorizing official.

SA RD explained that even though his investigation was closed in October 2019, AFOSI was receptive to "going back to reopen the investigation" if the legal office thought there were "further investigative steps that needed to be done or should be done to support the case." SA RD testified to a hypothetical question that was put to him by the trial defense counsel. The AFOSI agent was told to assume Appellee was "out of this case altogether" and that SrA CG and A1C JL were alone in Appellee's apartment. Counsel then asked the agent if he would have sought DNA evidence to send to the USACIL for testing if A1C JL reported she "felt like [she] had sex," and SrA CG confessed to having sexual intercourse with her. SA RD answered he would still have accomplished DNA testing under those hypothetical circumstances for the purpose of corroborating the statements. The military judge asked if there were any cases where he had not sought DNA corroboration and the agent responded "maybe three or four times" out of "50 to 75 cases."

2. Mr. MT's Testimony

Mr. MT testified at the suppression hearing about the steps he took to process Appellee's buccal swabs and "that he did not do anything differently" the second time he tested Appellee's DNA. He explained that he "performed [his] tasks the way [the USACIL's] procedures are written and the way that [personnel at the USACIL] do it every time." The trial counsel asked if he relied on Appellee's buccal and penile swabs from the first analysis in conducting the second analysis. Mr. MT replied, "No. I did not."

He explained why his 25 October 2019 report nonetheless referenced his earlier, 15 March 2019, report: he explained that he was required to "reference back [to] that first report" because it was necessary for the USACIL's accreditation; he emphasized the laboratory "can't just simply ignore that [earlier report]. We have to state previous work was done in this case" in a subsequent report.

Mr. MT explained it is common practice for the USACIL to receive re-submission samples, also known as reference samples. When the USACIL receives reference samples, the laboratory will treat them as an unknown or "question" sample in determining whether the sample is a known contributor to other DNA profiles. Mr. MT never had to re-analyze samples for DNA analysis following a military judge's ruling to suppress DNA. He had never heard of anyone at the USACIL ever addressing the issue of re-analysis following a ruling to suppress DNA and was unsure of the protocol.

Mr. MT knew at the time he completed the affidavit that the unknown male was in fact Appellee. He nevertheless regarded Appellee's original reference sample as "unknown" and used this term in his report and his affidavit because the original reference sample was no longer valid for forensic analysis.[10] In his thinking, "it's as if that first one doesn't exist," and "has gone from being attributed to an individual to now it's an unknown." Because he could not validly attribute the contributing sample discovered in the analysis of A1C JL's vaginal swabs to Appellee, he attributed it to an "unknown male individual."

E. Military Judge's Second Ruling Granting the Motion to Suppress

On 6 November 2019, the military judge granted Appellee's motion to suppress the second search and seizure of his DNA because the authorizing official who allowed the search was left without "the full picture of evidence and information" and, "like previously, the Government tried to pick and choose what facts to provide." The Government, she found, "knew how imperative it was to provide a complete picture to the [second] search authority" because "the Government had already had the previous search of [Appellee]'s DNA suppressed because of false statements [SA B] provided to the [first] search authority."

The military judge found the information relied on by the authorizing official to determine probable cause was incomplete and therefore misleading. The military judge found SA RD, like SA B, had "intentionally and recklessly" omitted information from his affidavit. Her findings focused on the AFOSI agent's failure to include four facts, only the first of which was raised by the Defense and contested at the suppression hearing: (1) that A1C JL told the SANE that she was clothed when she woke up at 0300; (2) that SrA CG disclosed to SA RD he observed Appellee and A1C JL were clothed when they came into the living room after being alone together in the spare bedroom for approximately 10 to 20 minutes; (3) that SrA CG admitted to having sex with A1C JL on the night in question in two separate AFOSI interviews, and not just the second interview on 7 February 2019 that SA RD references in his affidavit; and (4) that A1C JL told SA RD she was living with her ex-boyfriend during the time in question. SA RD was not questioned at the hearing about omissions (2) through (4).

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[10] Mr. MT testified that he did not know Appellee's DNA obtained from penile swabs had been "suppressed," per se, when he completed the affidavit, but understood that "the oral swabs from the initial submission were no longer valid." The trial counsel asked, "So you didn't know it was suppressed. But you knew something happened in the court of law that now requires you to re-accomplish a second analysis?" Mr. MT acknowledged, "That's correct. Yes."

The military judge also took exception to the manner in which SA RD presented information in his affidavit. First, the military judge took issue with how SA RD composed his affidavit by separating two exculpatory facts: information that Appellee sent texts to A1C JL in which Appellee revealed she had sex with SrA CG and not with Appellee was not together with an admission the agents later obtained from SrA CG that he had sex with A1C JL on the night in question. Instead, SA RD presented this information in chronological order as he did with other investigative steps the AFOSI agents had taken.[11] Referencing the text messages, the military judge found that "[s]uch a statement in a vacuum could lead a search authority to believe the statement was not true, or the Accused was simply making an exculpatory statement." The military judge also took issue with SA RD's summary of his interview with A1C JL where he used bold and underlined text to emphasize his leading question to her, "Okay um was it just vaginal intercourse . . . ?" The military judge found this placed too great an emphasis on the "conclusory question" because SA RD's "assertion of vaginal intercourse is not a fact."

In addition to finding SA RD intentionally and recklessly omitted information, the military judge found Mr. MT failed to disclose to the authorizing official that he had previously tested Appellee's DNA. The military judge determined that Appellee met his burden to demonstrate that the inclusion of the facts SA RD omitted from his affidavit "would have extinguished probable cause." Her determination made it unnecessary to resolve whether, after setting aside Mr. MT's statement that the military judge found to be false—that his examination of vaginal swabs revealed DNA from an "unknown male individual" he knew was Appellee—the Government proved that the remaining information was sufficient to establish probable cause.

Further, the military judge ruled that the new DNA evidence was derivative of the initially tainted evidence she had suppressed. She explained the new request for Appellee's DNA "came only after the Court suppressed the first search and seizure," and the second authorization was based on information SA B and SA RD collected together. The military judge also relied on the fact that Mr. MT, who ran the original test of Appellee's DNA, wrote an affidavit in support of probable cause for the second authorization. Once Appellee's DNA was seized for the second time, it was sent to the same lab where it was analyzed by Mr. MT. The military judge found Mr. MT "conducted an independent analysis to compare [Appellee's DNA] to the previously submitted samples by

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[11] SA RD's affidavit described sequentially the texts Appellee sent to A1C JL on 3 February 2019, the agents' interview of Appellee on 4 February 2019, and their second interviews of A1C JL and SrA CG on 5 February 2019 and 7 February 2019, respectively.

[A1C] JL and SrA [CG]." He then "generated a report that referenced back to the original report," and both reports relied on Appellee's penile swabs which had been suppressed. The military judge found, "While Mr. [MT] conducted an independent examination of [Appellee's] buccal swabs, the resulting test is certainly derivative of the first, as evidenced from [Mr. MT's] reference to the original test and its results in the report."

The military judge concluded the actions of SA RD and Mr. MT tainted the second authorization and rejected the Government's explanation that the October 2019 search affidavits contained only information SA RD and Mr. MT had lawfully obtained. The military judge also rejected the Government's contention that it "would have sent [A1C] JL's and SrA [CG]'s samples to be tested, even without the Accused's sample," and that "[w]hen the results came back showing the presence of a third individual,"[12] the Government would then have "collect[ed] the Accused's DNA at that point." The military judge gave four reasons why she found this line of reasoning flawed and ruled the October 2019 search did not originate from an independent source.

First, the military judge relied on the conclusion that there was simply no probable cause:

> But for the illegal search, the Government would not know the Accused's DNA was present on [A1C] JL's vaginal swabs. Because neither [A1C] JL nor SrA [CG] provide probable cause to believe a crime had been committed by the Accused, AFOSI would still not have probable cause to request a search authorization for the Accused's DNA. But for the previous illegal search and seizure identifying the Accused as a DNA contributor, nothing indicates the Accused and [A1C] JL were sexually intimate.

On this point the military judge was resolute that "information [A1C] JL and SrA [CG] provide[d] is not evidence of a crime." This is because "[A1C] JL still cannot say whether penetration occurred and SrA [CG] has no knowledge of whether penetration [by Appellee] occurred." To this end, the military judge found as fact that A1C JL "only reported an encounter with [Appellee] because she did not recall any sexual contact with [SrA CG] on the evening of 1–2 February 2019."

Second and related, the military judge found "[A1C] JL was in an intimate relationship with her ex-boyfriend at the time, which may provide an explanation for the third source of DNA." She concluded "it is speculative to believe the explanation for the third source of DNA would have been the Accused rather

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[12] Or, a *second* male contributor to DNA found on A1C JL's vaginal swabs: one of the three DNA contributors was A1C JL.

than [an ex-boyfriend], with whom [A1C] JL was having an intimate relationship at the time of the charged offense."

Third, the military judge found "[t]here is no indication AFOSI was pursuing any leads through a means untainted by the illegality." The military judge found the "Government's decision to seek a new search authorization was prompted by the information gathered during the prior illegal search and only a result of having that search suppressed." The military judge reasoned, "[b]ut for the illegal search, the Government would not know the Accused's DNA was present on [A1C] JL's vaginal swabs."

Fourth, the military judge relied on the fact that "the new request for a search authorization came only after the Court suppressed the first search and seizure" of Appellee's DNA and "[t]he second search authorization was based on information collected by SA [B] and SA [RD] together." The military judge relied on the failure of the Government to "utilize a new, untainted investigator" and "a new, untainted analyst." The military judge concluded, "[i]nstead, the Government is attempting to try to get to the end they know exists, rather than starting with a fresh, untainted beginning."

Ultimately, the military judge concluded the exclusionary rule was appropriate. The military judge explained:[13]

> Finally, exclusion of the evidence will result in appreciable deterrence of future unlawful search and seizures; namely, reinforcing to investigators and legal offices the importance of accurately relaying information to the search authority. In this case, the conduct is sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.

We disagree and find the military judge abused her discretion in suppressing the evidence by applying an erroneously heightened standard for probable cause and finding the evidence was not derived from an independent source as a matter of law.

III. LAW

A. Jurisdiction and Standard of Review for Article 62, UCMJ, Appeals

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[13] The military judge concluded that the good faith exception to the exclusionary rule, *see generally* Mil. R. Evid. 311(c)(3), did not apply because of her finding that SA RD's "knowing and intentional" omission of facts from his affidavit was done "with reckless disregard for the truth."

We have jurisdiction to hear this appeal under Article 62(a)(1)(B), UCMJ, 10 U.S.C. § 862(a)(1)(B), which authorizes the Government to appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Evidence that Appellee's DNA was recovered on the vaginal swabs from A1C JL's SAFE is substantial proof that Appellee penetrated A1C JL's vulva with his penis. Because penetration is an element of the charged offense, the presence of Appellee's DNA is substantial proof of a material fact in the proceeding.

When the Government appeals a ruling under Article 62, UCMJ, this court reviews the military judge's decision "directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (citing *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)). Because this issue is before us pursuant to a Government appeal, we may act only with respect to matters of law. Article 62(b), UCMJ, 10 U.S.C. § 862(b). We may not make findings of fact, as we are limited to determining whether the military judge's factual findings are clearly erroneous or unsupported by the record. *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'" *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)).

B. Fourth Amendment Legal Standards

The Fourth Amendment demands "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."[14] "[U]sing a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search" under the Fourth Amendment. *Maryland v. King*, 569 U.S. 435, 446 (2013); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618 (1989) (blood, urine, and breath samples are searches for Fourth Amendment purposes); *see generally Schmerber v. California*, 384 U.S. 757, 770 (1966) ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.").

We review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F.

[14] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

2016) (citation omitted). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Gore*, 60 M.J. at 187 (citation omitted). This standard requires "more than a mere difference of opinion." *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

However, "[a] military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004) (footnote omitted). An abuse of discretion occurs if the military judge's decision "is *influenced by an erroneous view of the law*." *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (emphasis added) (quoting *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)). "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001) (citation and internal quotation marks omitted).

1. Review of Search Authorizations

When reviewing a search authorization, we "do not review a probable cause determination de novo." *Hoffmann*, 75 M.J. at 125. Instead, we examine whether the person who authorized the search "had a substantial basis for concluding that probable cause existed." *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017) (quoting *United States v. Rogers*, 67 M.J. 162, 164–65 (C.A.A.F. 2009)). Great deference is given to the probable cause determination due to the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (citations omitted). Although a reviewing court's deference is "not boundless," *United States v. Leon*, 468 U.S. 897, 914 (1984), "courts should not invalidate warrants by interpreting affidavits in a hyper-technical, rather than a common sense, manner." *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001) (quoting *Gates*, 462 U.S. at 236).

2. Probable Cause

If the defense challenges evidence seized pursuant to a search authorization on the ground that the authorization was not based upon probable cause, "the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure." Mil. R. Evid. 311(d)(5)(A).

The Supreme Court stated in *Gates* that "[p]robable cause deals 'with probabilities. These are not technical; they are the factual and practical considera-

tions of everyday life on which reasonable and prudent men, not legal technicians, act[.]'" 462 U.S. at 241 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). Probable cause "requires more than bare suspicion, but something less than a preponderance of the evidence." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). It relies on a "common sense decision" based on the totality of the circumstances. *Cowgill*, 68 M.J. at 393 (C.A.A.F. 2010) (quoting *Leedy*, 65 M.J. at 213) (citations and internal quotation marks omitted). As the United States Court of Appeals for the Armed Forces (CAAF) explained in *Leedy*,

> Thus, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false . . . ; there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present. . . . "The duty of the reviewing court is simply to make 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."
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> . . . [P]robable cause is founded not on the determinative features of any particular piece of evidence provided an issuing magistrate . . . but rather upon the overall effect or weight of all factors presented to the magistrate.

Id. at 213 (third alteration in original) (citations omitted).

3. False Information and Omissions

Military Rule of Evidence 311 addresses a motion to exclude evidence obtained from a search authorization that allegedly contains false information. The rule provides:

> *False Statements*. If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to

> the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion must be granted unless the search is otherwise lawful under these rules.

Mil. R. Evid. 311(d)(4)(B). This rule was adopted following *Franks v. Delaware*, 438 U.S. 154 (1978), in which the Supreme Court "expressed the view that the best way to balance the need to protect the probable cause requirement with society's interest in discovering the truth was to delimit the circumstances where affidavits might be challenged." *Cowgill*, 68 M.J. at 391 (citing *Franks*, 438 U.S. at 165–71). "One explicit limitation was to allow review only in cases where there is evidence of deliberate misstatements or reckless disregard for the truth. 'Allegations of negligence or innocent mistake are insufficient.'" *Id.* (quoting *Franks*, 438 U.S. at 171).

Although neither Mil. R. Evid. 311 nor *Franks* expressly extends to omissions, the same general rationale for false statements extends to "material omissions." *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004). "[E]ven if a false statement or omission is included in an affidavit, the Fourth Amendment is not violated if the affidavit would still show probable cause after such falsehood or omission is redacted or corrected." *Id.* (quoting *Gallo*, 55 M.J. at 421).

Therefore, for an accused to be entitled to relief due to matters not presented to the magistrate, the accused "must demonstrate that the omissions were *both* intentional or reckless, *and* that their hypothetical inclusion would have prevented a finding of probable cause." *Mason*, 59 M.J. at 422 (citing *United States v. Figueroa*, 35 M.J. 54, 56–57 (C.M.A. 1992)).

4. Independent Source Doctrine

Evidence obtained as the result of a Fourth Amendment violation must ordinarily be suppressed as if it were the proverbial "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). Such evidence, like the fruit, is cast aside and "generally not admissible at trial." *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

When evidence is initially discovered during, or as a consequence of, an unlawful search, however, it may still be admissible if it is later obtained independently from activities untainted by the initial illegality. *See Murray v. United States*, 487 U.S. 533, 537 (1988); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The ultimate question is whether such evidence is derived from a genuinely independent source. *Murray*, 487 U.S. at 542; *see generally United States v. Marine*, 51 M.J. 425 (C.A.A.F. 1999) (citing *United States v. Williams*, 35 M.J. 323 (C.A.A.F. 1992) (rejecting "*per se* or 'but

for' rule")). The Government has the burden of proving by a preponderance of the evidence that the evidence it seeks to admit "would have been obtained even if the unlawful search or seizure had not been made." Mil. R. Evid. 311(d)(5)(A).

"The evil which the exclusionary rule is guarding against is the use of illegally obtained information to support a search warrant." *United States v. Moreno*, 23 M.J. 622, 625 (A.F.C.M.R. 1986) (citing *Wong Sun*, 371 U.S. at 471). "This goal of basing searches on untainted information is reached just as readily when the magistrate is given only information which was known before the illegal search as it is when the magistrate is given information which is discovered later, but from a different source." *Id.* This is because the independent source doctrine recognizes the exclusionary rule should put "the police in the same, not a worse, position than they would have been in if no police error had occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984) (citations and footnote omitted).

IV. DISCUSSION

The Government challenges the military judge's granting of Appellee's motion to suppress his DNA obtained from a buccal swab on 9 October 2019, which was again sent to the USACIL and forensically analyzed by Mr. MT. The Government asserts the military judge erred in granting the Defense's motion to suppress this evidence.

We analyze the military judge's conclusion that a corrected affidavit would not support a finding of probable cause as well as her conclusion that the second search was derivative of the first. Based on our resolution of these issues, our decision does not reach the applicability of the good faith exception to the exclusionary rule or the inevitable discovery doctrine, which the military judge found were unsupported by the evidence.

A. Probable Cause

The military judge found "neither [A1C] JL nor SrA [CG] provide probable cause to believe a crime had been committed" and thus the Government did "not have probable cause to request a search authorization for the A[ppelee]'s DNA." We examine the information SA RD included in his affidavit and find that along with Mr. MT's affidavit, the military judge erred because the authorizing official "had a substantial basis for concluding that probable cause existed" to seize Appellee's DNA. *Nieto*, 76 M.J. at 105 (quoting *Rogers*, 67 M.J. at 164–65). Great deference is given to the probable cause determination, *Gates*, 462 U.S. at 236, and the military judge erred in not giving the deference that was due. Our examination of the affidavits lead us to conclude that the authorizing official could find probable cause based on the following:

SA RD averred A1C JL returned with Appellee and SrA CG to Appellee's apartment after a night of heavy drinking. Appellee expressed a sexual interest in A1C JL as evident by his suggestion to SrA CG that "something could happen," and asked SrA CG about having a threesome. Appellee reportedly nodded his head towards SrA CG and A1C JL as if to suggest they all should go into the spare bedroom to have sex. A1C JL reported to the AFOSI agents that she awoke two times during the night because she was interrupted by Appellee before leaving the spare bedroom to sleep on a couch in the living room.

The first time A1C JL awoke, she recalled Appellee was on top of her "trying to have sex," and was putting his face on her neck and touching her stomach. She positively identified Appellee by his appearance and voice. Although she was uncertain of her state of undress or whether penetration occurred, her suspicion that she may have been a victim of sexual assault was reinforced the second time she awoke: her next memory after awakening at 0300 was standing naked with Appellee—a man with whom she never before has been intimate—trying to get her to take a shower and he was angry when she refused. SA RD relayed A1C JL told the AFOSI agents she "was scared [Appellee] was trying to get rid of evidence that he had any sexual contact with [her]." Ultimately, A1C JL's suspicions were confirmed to some degree before SA RD sought search authorization for Appellee's DNA: the forensic medical examination and subsequent analysis by the USACIL revealed that A1C JL had semen from two men in her vagina. One of the men was SrA CG; the other man was yet unidentified.

We find the information provided to the search authorizing official supports a "fair probability" that seizure of Appellee's DNA would identify Appellee as the unidentified male contributor. *See Leedy*, 65 M.J. at 213. This is so even if SA RD properly conveyed A1C JL's uncertainty whether penetration occurred and if she was unclothed. *See United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) (probable cause "does not demand any showing that such a belief be correct or more likely true than false"); *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999) ("[T]he requisite 'fair probability' is something more than a bare suspicion, but need not reach the fifty percent mark.").

The information A1C JL relayed to the AFOSI agents was enough because "[p]robable cause 'is not a high bar.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). It "does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Id.* at 588. "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* (quoting *Gates*, 462 U.S. at 243 n.13). Ap-

pellee's physical proximity to A1C JL and "trying to have sex" with her, followed by his anger when she refused to take a shower, resists Appellee's innocent explanation that he was looking for clothing as she slept and then tried to get her to take a shower because she spilled beer on herself earlier in the evening. A reasonable authorizing official could attach a degree of suspicion to Appellee's acts and properly order the seizure of Appellee's DNA to find evidence that Appellee was the second of two contributors of male DNA that was found in A1C JL's body.

With the issue of probable cause resolved, we nonetheless assume *arguendo* that SA RD recklessly or deliberately left information out of his affidavit as found by the military judge. Although the evidence of record raises questions about the military judge's factfinding, we need not decide whether her determination of SA RD's intent was clearly erroneous. Instead, the issue that resolves the matter is one of law which we review de novo:[15] whether it was an abuse of discretion for the military judge to find that inclusion of the omitted information in a corrected affidavit would have extinguished probable cause. *See Mason*, 59 M.J. at 422. We conclude that it was.

The military judge applied an erroneously heightened legal standard for probable cause, concluding the authorizing official was denied "the full picture of evidence and information." The military judge similarly erred finding the Government "knew how imperative it was to provide a *complete picture* to the search authority" as "the Government had already had the previous search of [Appellee]'s DNA suppressed because of false statements [SA B] provided to the search authority." (Emphasis added). The military judge abused her discretion because an affidavit is not required to include "every piece of information gathered in the course of an investigation." *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008) (quoting *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)); *see also United States v. Spinelli*, 393 U.S. 410, 419 (1969) ("[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."); *United States v. Montieth*, 662 F.3d 660, 665 (4th Cir. 2011) ("[T]o require that the affiant amass every piece of conceivable evidence before seeking a warrant is to misunderstand the burden of probable cause."). The proper test under the circumstances is not whether investigators provided the full and complete picture, but whether the omitted information was "material," *see Mason*, 59 M.J. at 422, that is, if it was "necessary to the finding of probable cause." *Franks*, 438 U.S. at 155–56.

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[15] *See, e.g.*, *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citation omitted) ("[W]e review the legal question of sufficiency for finding probable cause de novo using a totality of the circumstances test.").

Using "the totality-of-the-circumstances analysis" authorized by *Gates*, 462 U.S. at 233, we find the military judge erred because the omitted information was not material or necessary, and a practical, common sense reading of a "corrected" October 2019 affidavit supports a "fair probability," *Leedy*, 65 M.J. at 213, that Appellee's DNA would match the unidentified DNA found on A1C JL's vaginal swabs, even with the inclusion of information that was left out. Guided by an incorrect view of the legal standard for probable cause, the military judge's ruling focused on four principal omissions that she found would have extinguished probable cause if the information had been presented to the search authorizing official.[16] We examine each omission in turn.

The first and most significant to the military judge was the finding that SA RD "failed to include [in his affidavit] that [A1C] JL told the SANE her clothing was on." Essential to this finding is the implicit finding that A1C JL awoke just once, and that Appellee was on top of her and she was wearing clothes when she did. However, when considered along with information in SA RD's affidavit, an alternative, even more likely, reading of the SANE report—captured in the nurse's words, not A1C JL's—is that A1C JL relayed waking up to two separate altercations with Appellee, and not just one: the SANE relays A1C JL's account of the shower incident at 0300 hours, then back in time to the sexual assault that preceded it, followed by a second reference to the shower incident when A1C JL recalled being clothed when she awoke, and then back in time again when A1C JL relates that she felt like she had sex.

The error in factfinding is not that the military judge's reading of the SANE report differs from our own, but the supposition that if SA RD had included the report in his affidavit, then the authorizing official would have reached the same conclusion as the military judge—that A1C JL's statement described waking up just once to altercations with Appellee and not twice. A1C JL told the nurse her clothing was on when she awoke at 0300; her next memory—as relayed to the AFOSI agents—was of Appellee trying to make her take a shower. That A1C JL may have been clothed later in the night just before the shower incident does little to discount her statements to the AFOSI agents that Appellee tried to have sex with her earlier as she slept when she was less certain if she was clothed. SA RD's affidavit prepared with the assistance of a judge advocate sufficiently captured A1C JL's fragmented and inconsistent

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[16] The military judge did not make a finding that any of the omitted information was "material," per se. *See Mason*, 59 M.J. at 422. We assume for purposes of this appeal only, that the military judge erroneously reached the conclusion that it was; she found the omitted "information, if included, would have affected the search authority's finding of probable cause because it would have extinguished probable cause."

recollection about being clothed during the sexual assault.[17] SA RD's failure to include information that A1C JL relayed to the SANE was not consequential to determining probable cause, and thus, the military judge erred in finding that inclusion of the SANE's narrative would have extinguished probable cause.

Second, we examine SA RD's omissions that SrA CG disclosed to the AFOSI agents that he observed Appellee and A1C JL were clothed when they came into the living room after being alone together in the spare bedroom for approximately 10 to 20 minutes. The focus of the search authorizing official is what happened inside the spare bedroom when Appellee was alone with A1C JL, not what happened when they walked out. SrA CG's statements to the AFOSI agents have little bearing on what went on when Appellee and A1C JL were alone on this or any other occasion during the evening in question, just as A1C JL's state of dress when she left the bedroom has little to no bearing on whether she was vaginally penetrated without her consent.

Third, we examine SA RD's omission that SrA CG admitted to having sex with A1C JL on the night in question in two separate AFOSI interviews, and not just the second interview on 7 February 2019 that SA RD references in his affidavit. We find the cumulative inclusion of the same information twice was unnecessary and the omission did not diminish probable cause. An affiant is not required to include every piece of information gathered in the course of an investigation. *Tate*, 524 F.3d at 455 (citation omitted).

Lastly, we consider SA RD's omission that A1C JL mentioned that she lived with her ex-boyfriend during the incident in question when she was interviewed a second time by the AFOSI agents on 5 February 2019. The military judge relied on this information to find that probable cause to believe that Appellee was the second source of DNA found on A1C JL's vaginal swabs was lacking. We also consider this finding along with the ex-boyfriend's testimony at a closed hearing that was convened before SA RD prepared his affidavit. Despite the military judge's conclusion to the contrary, it does not follow that A1C JL's living with an ex-boyfriend with whom she was, on unspecified occasions, intimate, defeats probable cause. This is especially so because it was little more than conjecture to find that the ex-boyfriend could be the second of

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[17] In her initial interview with the AFOSI agents, A1C JL "didn't even know if [she] had clothes on" and then recalled she "didn't have any clothes on" when Appellee tried to have sex with her. In a second interview, she recalled wearing a shirt, but was unsure if she also wore underwear or pants. This conflicting information relayed A1C JL's uncertainty about being clothed and was included in SA RD's affidavit given to the authorizing official.

two male contributors of DNA found in A1C JL's body. Thus, the military judge's finding is not fairly supported by the record.

We conclude that the hypothetical inclusion of the omitted information would not have prevented a finding of probable cause if it had been presented to the search authorizing official. *Mason*, 59 M.J. at 422. The totality of the circumstances establish probable cause and the military judge abused her discretion in finding otherwise.

B. The Search and Seizure was not Derivative of Suppressed Evidence

The military judge also suppressed Appellee's DNA because she found the second search in October 2019 was derived from the first and, therefore, was fruit of the poisonous tree within the meaning of *Wong Sun*. The crux of her ruling is that military personnel—judge advocates and investigators alike—already knew Appellee's DNA was present on A1C JL's vaginal swabs when they went to seize it again, and so the second search was fouled by knowledge the Government acquired the first time it unlawfully obtained Appellee's DNA. Even so, we are convinced as a matter of law that the second search—approved by an authorizing official with no prior involvement or knowledge of evidence that had been suppressed—was not tainted or derivative of the first.

Because the record establishes the fruits of the first search were found to be unlawful and suppressed, the question to be resolved is whether the second search was "come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488 (citation omitted). Evidence is not excluded where the connection between unlawful government conduct and discovery and seizure of evidence is "so attenuated as to dissipate the taint." *Nardone*, 308 U.S. at 341. The "fruit of the poisonous tree" doctrine has no application when the Government learns about evidence from an independent source. *Wong Sun*, 371 U.S. at 487–88. The ultimate question is whether such evidence is derived from a genuinely independent source. *Murray*, 487 U.S. at 542.

We find the military judge abused her discretion in finding the seizure of Appellee's DNA in October 2019 was not independent of knowledge the Government acquired from the first seizure in February that she suppressed. Upon receipt of her first ruling, military personnel were aware of faults in the first authorization. The flaws were not founded in the legality by which the AFOSI agents obtained DNA from A1C JL and SrA CG or statements from witnesses, but in SA B's misrepresentation of facts to the first authorizing official who relied on them to find probable cause. The military judge found "the Government's decision to seek a new search authorization" was prompted, *inter alia*,

by "having that [first] search suppressed."[18] However, it was an erroneous view of the law to conclude that military personnel, prompted by her adverse ruling on challenged evidence, exploited the initial illegality. This is so because the independent source doctrine recognizes the exclusionary rule should put "the police in the same, not a *worse*, position than they would have been in if no police error had occurred." *Nix*, 467 U.S. at 443; *see also Murray*, 487 U.S. at 541 ("Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one." (citing *Nix*, 467 U.S. at 443)). The facts SA B had misrepresented, and the authorizing official who relied on them, played no part in the investigation after the military judge granted Appellee's first motion to suppress.

Consequently, the information in SA RD's affidavit that the Government relies on in support of the second authorization is not tainted, and the military judge's finding to the contrary is clearly erroneous. Military personnel had untainted knowledge that A1C JL's vaginal swabs included semen from an unidentified male contributor in addition to SrA CG whose semen was found in her vagina. During their investigation, SA B and SA RD determined that the only men who were present in Appellee's apartment while A1C JL was passed out drunk and asleep were Appellee and SrA CG. As previously described, Appellee had shown a sexual interest in A1C JL in his living room, and his conduct when he was alone with her in the spare bedroom and when she was naked in the bathroom was not above suspicion. A1C JL awoke to someone trying to have sex with her; she identified that person as Appellee from his voice and face; she was concerned about what to do if she was pregnant "with him;" she wanted a rape kit but was unfamiliar with the medical care she could receive from TRICARE; and then she reported Appellee's possible sexual assault to her first sergeant.

On these facts, it cannot be said that the Government exploited any illegality by pursuing a second search authorization that was independent of SA B's misrepresentations that initially resulted in suppression. *See Wong Sun*, 371 U.S. at 488. The military judge reached the opposite conclusion, erroneously finding the Government failed to use an "untainted investigator" and an "untainted analyst." We consider each finding in turn.

The military judge erroneously concluded SA B's earlier actions tainted SA RD. The military judge regarded SA B as though the agent herself was tainted,

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[18] The military judge's conclusion that AFOSI agents were not "pursuing any leads through a means untainted by the illegality" is inapposite as it was judge advocates and not investigators who were working to determine the next steps. Government attorneys, not AFOSI special agents, spearheaded the effort that caused SA RD to reopen the closed AFOSI investigation and seek a second authorization untainted by the first.

relying on the finding that "[t]he second search authorization was based on information collected by SA [B] and SA [RD] together." However, SA B alone misinformed the first authorizing official and the information SA RD relayed in his affidavit is independent of the initial illegality. The shortcoming of the first search was the misinformation SA B relayed to the first authorizing official, none of which SA RD repeated in his own affidavit. Thus, the military judge clearly erred in finding SA B's actions tainted SA RD.

As found by the military judge, upon receiving Appellee's DNA in buccal swabs that were obtained from the second authorization, Mr. MT "conducted an independent analysis to compare it to the previously submitted samples by [A1C] JL and SrA [CG]." He then "generated a report that referenced back to the original report," and both reports relied on information that was suppressed. The military judge found, "While Mr. [MT] conducted an independent examination of the buccal swabs, the resulting test is certainly derivative of the first, as evidenced from the reference to the original test and its results in the report." The military judge's finding as to the derivative nature of the "resulting test" is clearly erroneous because the military judge failed to properly distinguish Mr. MT's untainted, independent analysis on the one hand from the later report he prepared on the other. Even though his 25 October 2019 report improperly compared untainted information against the first analysis of Appellee's DNA, which was maintained in the USACIL database and had been suppressed, it does not follow that the analysis that the military judge found to be "independent" was tainted by Mr. MT's subsequent action in preparing his report. The military judge clearly erred in finding Mr. MT's second analysis of Appellee's DNA was derived from the first and thus tainted.

Contrary to the military judge's factfinding, there is no evidence in the record that government attorneys or investigators sought to exploit SA B's misinformation or their knowledge that Appellee's DNA was present on A1C JL's vaginal swabs because of it. By pursuing the second authorization military personnel were simply starting anew "by means sufficiently distinguishable to be purged of the primary taint." *Id.* (citation omitted). The operative facts in SA RD's and Mr. MT's affidavits were all in the possession of the authorities before the fruit of the first search authorization that was suppressed, and those facts constitute probable cause to support the second authorization. Appellee's Fourth Amendment rights were protected by the independent source requirement for obtaining a second search authorization. Ultimately, evidence from the analysis of Appellee's DNA came into the hands of the Government lawfully and was independent of information obtained from the first seizure that the military judge suppressed.

The Government proved by a preponderance of the evidence that it pursued admissible, forensically-sound evidence to determine if Appellee could be the

source of the unidentified male DNA, and its pursuit was irrespective of information derived from the February 2019 buccal and penile swabs that were suppressed. Mil. R. Evid. 311(d)(5)(A) (the prosecution has the burden of proving evidence was not obtained as a result of an unlawful search or seizure). We are convinced the October 2019 seizure of Appellee's DNA is genuinely independent of the knowledge military personnel acquired from the suppression of the earlier seizure of his DNA. *See Murray*, 487 U.S. at 542. The military judge abused her discretion in finding otherwise.[19]

V. CONCLUSION

The appeal of the United States under Article 62, UCMJ, is **GRANTED**. The military judge's ruling to grant the defense motion to suppress evidence of Appellee's DNA seized by the Government on 9 October 2019 is **REVERSED**. The record is returned to The Judge Advocate General for remand to the military judge for action consistent with this opinion.[20]

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

[19] Further, we note that suppression contravenes the exclusionary rule's purpose of ensuring the benefits of appreciable deterrence of future unlawful searches or seizures outweigh the costs to the justice system. Mil. R. Evid. 311(a)(3). This purpose can be assured by placing the Government and Appellee in the same positions they would have been in had the impermissible conduct not taken place. This is because the independent source doctrine recognizes the exclusionary rule should put "the police in the same, not a *worse*, position than they would have been in if no police error had occurred." *Nix*, 467 U.S. at 443.

[20] Our decision does not undertake to resolve the admissibility of specific areas of testimony of a witness or a particular report.

APPENDIX B

United States v. Holloway

United States Air Force Court of Criminal Appeals

February 22, 2000, Decided

ACM 32868

Reporter
2000 CCA LEXIS 45 *; 2000 WL 283904

UNITED STATES v. Airman Basic SETH A. HOLLOWAY, United States Air Force

Notice: **[*1]** NOT FOR PUBLICATION

Prior History: Sentence adjudged 17 January 1997 by GCM convened at Incirlik Air Base, Turkey. Military Judge: Robin D. Walmsley. Approved sentence: Dishonorable discharge, confinement for 3 years, and forfeiture of all pay and allowances.

Disposition: AFFIRMED.

Core Terms

rape, photographs, roommate, sexual intercourse, camera, conspiracy, authorization, military, seizure, seized, film, indecent assault, reasonable doubt, dormitory room

Case Summary

Procedural Posture
Appellant filed an appeal from a ruling of a military judge entered at a General Court Martial, Incirlik Air Base, Turkey. The military judge sentenced appellant to a dishonorable discharge, confinement for three years, and forfeiture of all pay after finding that appellant had committed rape.

Overview
Appellant and his roommate hosted a party. The victim was one of the guests. While at the party, the victim became drunk and passed out. Appellant and some of the other airmen discussed the idea of having sexual intercourse with the unconscious woman. Appellant went ahead and did so. Appellant was convicted by general court-martial of conspiracy to commit rape, rape, and indecent assault. The evidence was legally and factually sufficient to sustain a finding of guilty to conspiracy to commit rape. The evidence was factually sufficient to sustain a finding of guilty to rape. The military judge did not commit prejudicial error when he did not grant a defense motion to suppress photographs that were obtained from film seized from appellant's dormitory room. However, application of art. 57, Unif. Code Mil. Justice to appellant's sentence violated the Ex Post Facto clause of the U.S. Constitution.

Outcome
The military judge's ruling was affirmed, because the evidence presented at the General Court Martial supported the convictions and sentence.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN1 **Appeals, Standards of Review**

Art. 66(c), Unif. Code Mil. Justice, 10 U.S.C.S. § 866(c), requires that the court approve only those findings of guilty that it determines to be correct in both law and fact.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2 **Appeals, Standards of Review**

The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a reasonable factfinder could have found the appellant guilty of all elements of the offense beyond a reasonable doubt.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN3 **Appeals, Standards of Review**

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witness, the court itself is convinced of the appellant's guilt beyond a reasonable doubt. The court must find, beyond a reasonable doubt, proof of every element and fact of the charged offense. The court does not require that the evidence be free from conflict.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Military & Veterans Law > Military Offenses > Conspiracy

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN4 **Conspiracy, Elements**

Conspiracy consists of two elements under art. 81, Unif. Code Mil. Justice, 10 U.S.C.S. § 881. First, an accused must enter into an agreement with one or more people to commit an offense under the code. Second, while the agreement is in effect, and the accused remains a party to the agreement, either the accused or a co-conspirator performs an overt act to effect the object of the conspiracy. Manual for Courts-Martial, Part IV, Para. 5(b) (1995).

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN5 **Conspiracy, Elements**

The agreement in a conspiracy need not be in any particular form or manifested in any formal words. In fact the meeting of the minds can be silent or simply a mutual understanding among the parties. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Military & Veterans Law > Military Offenses > Conspiracy

HN6 **Inchoate Crimes, Conspiracy**

To sustain a finding of guilty to a charge of conspiracy, the agreement need only be implied.

Criminal Law & Procedure > Defenses > Consent

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Rape > Elements

HN7 **Defenses, Consent**

The elements of rape are that the accused committed an act of sexual intercourse and the act was done by force and without consent. Manual for Courts-Martial, Part IV, Para. 45(b)(1). Furthermore, consent may not be inferred if the victim is unable to resist because of the lack of physical faculties. All of the surrounding circumstances are to be considered in determining whether a victim gave consent. Manual for Courts-Martial, Part IV, Para. 45(c)(1)(b).

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

HN8 **Sex Crimes, Sexual Assault**

The passive acquiescence of an insensate, or sleeping woman is not construed as consent.

Criminal Law & Procedure > ... > Sexual Assault > Rape > Elements

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Defenses > Ignorance & Mistake

HN9 **Rape, Elements**

Mistake as to consent of a female may be a valid defense to a charge of rape under art. 120, Unif. Code Mil. Justice. However, the mistake must be both honest and reasonable. In order to be reasonable, the accused must not be reckless or negligent. The accused must be seen as exercising due care with respect to the truth of the matter in issue.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN10 **Abuse of Discretion, Evidence**

A court reviews a military judge's evidentiary ruling for abuse of discretion. The military judge's findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. The court reviews conclusions of law de novo.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Military & Veterans Law > Military Justice > Search & Seizure > Seizures

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN11 **Search & Seizure, Expectation of Privacy**

Mil. R. Evid. 311(a)(2) excludes evidence of an unlawful search or seizure if the accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the U.S. Constitution as applied to members of the armed forces.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > General Overview

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > General Overview

Military & Veterans Law > Military Justice > Search & Seizure > General Overview

HN12[] **Exceptions to Exclusionary Rule, Inevitable Discovery**

Mil. R. Evid. 311(b)(2) authorizes an exception to the exclusionary rule if the evidence of an unlawful search or seizure would have been obtained even if such unlawful search or seizure had not been made. This exception is known as the inevitable discovery rule.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

HN13[] **Exceptions to Exclusionary Rule, Inevitable Discovery**

The inevitable discovery rule is applicable when the routine procedures of a law enforcement agency would inevitably find the same evidence, even in the absence of a prior or parallel investigation.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Independent Source Doctrine

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

HN14[] **Exceptions to Exclusionary Rule, Independent Source Doctrine**

The independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. Further, this doctrine applies when the evidence is actually obtained through the independent and voluntary acts of third parties.

Counsel: Appellate Counsel for Appellant: Colonel Douglas H. Kohrt and Major Kevin P. Koehler.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel Michael J. Breslin, and Captain Tony R. Roberts.

Judges: Before SPISAK, HEAD, and ROBERTS, Appellate Military Judges. Senior Judge SPISAK and Judge ROBERTS concur.

Opinion by: HEAD

Opinion

OPINION OF THE COURT

HEAD, Judge:

Contrary to his pleas, the appellant was convicted by general court-martial composed of officer members, of conspiracy to commit rape, rape, and indecent assault,

in violation of Articles 81, 120, and 134, UCMJ, 10 U.S.C. §§ 881, 920, 934. His approved sentence was a dishonorable discharge, 3 years' confinement, and forfeiture of all pay and allowances. The appellant asserts four errors. The appellant claims (1) the evidence is legally and factually insufficient to sustain a finding of guilty to conspiracy to commit **[*2]** rape; (2) the evidence is factually insufficient to sustain a finding of guilty to rape; (3) the military judge committed prejudicial error when he failed to grant a defense motion to suppress photographs which were obtained from film illegally seized from his dormitory room; and, (4) that application of Article 57, UCMJ, to his sentence violated the *Ex Post Facto* clause of the Constitution. We agree with his final assignment of error and order appropriate administrative relief. Finding no other errors, we affirm.

I. LEGAL AND FACTUAL SUFFICIENCY

HN1[] Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilty that we determine to be correct in both law and fact. HN2[] The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a reasonable factfinder could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. United States v. Turner, 25 M.J. 324 (C.M.A. 1987) (citing Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)); United States v. Ladell, 30 M.J. 672, 673 (A.F.C.M.R. 1990). HN3[] The test for **[*3]** factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witness, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. Turner, 25 M.J. at 325. We must find, beyond a reasonable doubt, proof of every element and fact of the charged offense. We do not require that the evidence be free from conflict. United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

A. Conspiracy to commit rape

On the evening of 24 March 1996, the appellant and his roommate hosted a party at their dormitory room. GF was one of the guests who attended the party. While at the party, GF became intoxicated and passed out on the appellant's roommate's bed. Later that evening, the appellant was standing outside his room talking with his roommate and some other airmen when he made comments concerning how good GF looked and about having sex with her. He asked his roommate "Would you do her?" and then asked this same question of another airman, MS. According to testimony, he told his roommate and MS, "You do her, I'll do her. Do you want to do her? She's drunk." Although his roommate told the appellant **[*4]** he would not touch GF, MS said, "Yes." The appellant went back into the room and, according to his testimony had consensual sexual intercourse with GF. MS testified he walked into the room while the appellant was engaged in sexual intercourse with GF, and she seemed to be a willing partner. Once the appellant left the room, MS testified he had consensual sexual intercourse with GF. While the appellant and MS were in the room, the door to the room was locked. A little later, the appellant and MS went back into the room and put GF's clothes back on her. They then carried her from the bed to a couch. Finally, GF testified she did not consent to either act of sexual intercourse but rather was so drunk she did not realize what was happening to her. Testimony from various witnesses and a Blood Alcohol test performed after the rape indicates the victim was very intoxicated at the time of the offenses.

HN4[] Conspiracy consists of two elements under Article 81, UCMJ. First, an accused must enter into an agreement with one or more people to commit an offense under the code. Second, while the agreement is in effect, and the accused remains a party to the agreement, either the accused or a co-conspirator **[*5]** performs an overt act to effect the object of the conspiracy. *Manual For Courts-Martial, United States, (MCM),* Part IV, P 5(b) (1995 ed.).

HN5[] The agreement in a conspiracy need not be in any particular form or manifested in any formal words. United States v. Cobb, 45 M.J. 82, 84 (1996). In fact the meeting of the minds "can be silent" or simply a "mutual understanding among the parties." Cobb, 45 M.J. at 84-85 (citing United States v. Barnes, 38 M.J. 72, 75 (C.M.A. 1993)). It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. United States v. Layne, 29 M.J. 48, 51 (C.M.A. 1989). HN6[] To sustain a finding of guilty to a charge of conspiracy, the agreement need only be implied. Cobb, 45 M.J. at 85.

We disagree with the appellant's assertion that the evidence was neither legally nor factually sufficient to support his conviction for conspiracy to commit rape. In our view, the appellant's statements to MS that they have sexual intercourse with a drunken, incapacitated female, the acceptance **[*6]** of the appellant's offer by

MS to "do her," along with the actions of locking the door, the dressing and moving of the victim by them after engaging in sexual intercourse with her, are more than a sufficient basis on which a reasonable factfinder could conclude that the appellant committed the offense. After reviewing the record of trial, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt.

Rape

HN7[] The elements of rape are that the accused committed an act of sexual intercourse and the act was done by force and without consent. *MCM,* Part IV, P 45(b)(1). Furthermore, consent may not be inferred if the victim is unable to resist because of the lack of physical faculties. All of the surrounding circumstances are to be considered in determining whether a victim gave consent. *MCM,* Part IV, P 45(c)(1)(b).

The appellant claims the evidence is factually insufficient because it shows that GF either consented to the sexual intercourse or the appellant had an honest and reasonable belief that she was consenting. The appellant testified that after entering his dormitory room, he attempted to wake GF by shaking her on the shoulder. She awoke, smiled at him **[*7]** and then pulled him towards her. After engaging in foreplay, GF told him she wanted to "do it." They then proceeded to engage in sexual intercourse. GF however, testified that she had passed out from drinking and awoke to find the appellant on top of her engaging in sexual intercourse with her. She admitted she did nothing to try to stop him, but explained that it all seemed like a dream to her and that she felt she could not move. She repeatedly stated she did not consent to sexual intercourse with the appellant. Accordingly, there is no dispute that sexual intercourse occurred between GF and the appellant. The real controversy is whether GF consented to the act or whether the appellant had an honest and reasonable belief that she had consented.

HN8[] The "passive acquiescence of an insensate, or sleeping woman" is not construed as consent. *United States v. Briggs, 46 M.J. 699, 701 (A.F. Ct. Crim. App. 1996)*. We are satisfied by the victim's testimony, as well as that from other witnesses, that she did not consent. Nevertheless, HN9[] mistake as to consent of a female may be a valid defense to a charge of rape under Article 120, UCMJ. *United States v. Willis, 41 M.J. 435, 437 (1995)*. **[*8]** However, the mistake must be both honest and reasonable. *United States v. True, 41 M.J. 424, 426 (1995)*. In order to be reasonable, the accused must not be reckless or negligent. The accused must be seen as exercising due care with respect to the truth of the matter in issue. *United States v. Greaves, 40 M.J. 432, 437 n.5 (C.M.A. 1994)*. However, the appellant's own words to his friends, "she's still drunk" and "you do her, I'll do her. Do you want to do her? She's drunk," along with his actions of locking the door, dressing her and moving her from the bed to a couch, belie any such mistake.

Our review of the record convinces us that GF did not consent to sexual intercourse with the appellant and that the appellant did not have an honest and reasonable belief that she did. *True, 41 M.J. 424*; *United States v. Mathai, 34 M.J. 33 (C.M.A. 1992)*. Rather, we are convinced beyond a reasonable doubt that the appellant is guilty of rape. Article 66(c), UCMJ, *10 U.S.C. § 866(c)*.

II. FAILURE TO GRANT A

DEFENSE MOTION TO SUPPRESS

A. Factual Background

In the early morning hours of 24 March 1996, the **[*9]** security police were informed of an allegation of rape in one of the base dormitories. GF identified the appellant as one of the perpetrators. The appellant was placed under apprehension and taken to the security police headquarters. Thereafter, agents from the Air Force Office of Special Investigations (AFOSI) conducted a search of the appellant's dormitory room. The agents however had not obtained a search authorization for the room because they mistakenly assumed that the on-call AFOSI duty agent had already done so. This agent, after being notified of the rape, responded to the hospital emergency room where a rape protocol was being performed on GF. He did not participate in the search and mistakenly thought that the other AFOSI agents would obtain a search authorization.

During the search, the appellant's roommate's camera was seized from the top of the roommate's nightstand, which was located in the common area of the room. AFOSI agents testified it was a routine practice for the AFOSI to seize cameras, film, videotape recorders, or

videotape found at a crime scene. On 25 March 1996, the film from the roommate's camera was developed and the resulting photographs contained evidence **[*10]** of an indecent assault by the appellant against GF.

On 26 March 1996, the legal office informed the AFOSI that their search of the appellant's room was illegal because they had failed to obtain a proper search authorization. The legal office instructed the AFOSI not to mention the search or any evidence obtained from it in any subsequent witness or subject interviews. Up to this time, the AFOSI had made no mention of the camera or the photographs in any interviews. On this same day, a witness who had seen the actions of the appellant, which were depicted in the photographs, contacted the AFOSI and informed them that the appellant's roommate took pictures of the appellant with GF on 24 March 1996. Prior to this witness contacting them, the AFOSI agents were still investigating the rape, but had no knowledge of this witness. On 27 March 1996, the appellant's roommate admitted taking the pictures.

Appellant contends that he had a reasonable expectation of privacy in his dormitory room and a privacy interest in its contents. The AFOSI's failure to obtain a search authorization violated the *Fourth Amendment of the Constitution* and constituted an unreasonable entry. Further, he contends **[*11]** there is no other basis under the law, including the doctrine of inevitable discovery, which would allow a search of his room, absent a properly executed warrant. Based upon these facts, the appellant asserts that the photographs must be suppressed.

B. Discussion

During his ruling on the motion to suppress, the military judge commented that while he felt the appellant had a reasonable expectation of privacy in the common area of his room, he expressed doubt that the appellant had standing to object to the search of his roommate's camera and the seizure of the film. The military judge would be correct in his thinking had the AFOSI agents been in the appellant's room legally. However, the appellant had standing to contest the legality AFOSI's initial entry into the room. *United States v. Thatcher, 28 M.J. 20, 23 (C.M.A. 1989)*.

HN10[↑] We review a military judge's evidentiary ruling for abuse of discretion. The military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." *United States v. Owens, 51 M.J. 204, 209 (1999)* (citing *United States v. Reister, 44 M.J. 409, 413 (1996)*). **[*12]** We review conclusions of law *de novo. Id*.

HN11[↑] Mil. R. Evid. 311(a)(2) excludes evidence of an unlawful search or seizure if:

> The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

However, ***HN12***[↑] Mil. R. Evid. 311(b)(2) authorizes an exception to this exclusionary rule if the evidence of an unlawful search or seizure would have been obtained even if such unlawful search or seizure had not been made. This exception is known as the inevitable discovery rule. *Nix v. Williams, 467 U.S. 431, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984)*; *United States v. Kozak, 12 M.J. 389 (C.M.A. 1982)*. ***HN13***[↑] The inevitable discovery rule is applicable "when the routine procedures of a law enforcement agency would inevitably find the same evidence, even in the absence of a prior or parallel investigation." *United States v. Owens, 51 M.J. 204, 210-211 (1999)*.

We hold that the military judge **[*13]** did not abuse his discretion when he admitted the photographs of the indecent assault into evidence. While the rape investigation was being actively pursued, a witness to the indecent assault, unknown to the AFOSI at that time, approached them within two days of the offense. He provided eyewitness testimony about the indecent assault and the fact that photographs had been taken. Further, he told them who took the photographs. Shortly thereafter the appellant's roommate was re-interviewed by the AFOSI and he confirmed he took photographs of the appellant and GF with his camera. He had not mentioned the photographs during his first interview as he felt the photographs had nothing to do with the rape allegation. At the time of this second interview, the roommate was not aware that the AFOSI had seized his camera from the dormitory. It was only after the AFOSI talked to him about the photographs that he knew he no longer possessed the camera.

This new information was timely, specifically identified the evidence in question, and provided sufficient information on where the evidence could be located.

Had the AFOSI not known of the photographs, this information from the witness would have **[*14]** led them to the photographer who readily admitted their existence. This evidence provided sufficient probable cause to support a search authorization for the camera and the photographs. Based upon these facts, the AFOSI would have pursued this new lead and would have inevitably discovered the camera and seized it and the film.

Finally, while the camera and film were admitted into evidence under the theory of inevitable discovery, these items also would have qualified for admission pursuant to the "independent source" doctrine. *Murray v. United States, 487 U.S. 533, 537, 101 L. Ed. 2d 472, 108 S. Ct. 2529 (1988)*; *United States v. Marquardt, 39 M.J. 239, 240 (C.M.A. 1994)*. ***HN14***[↑] This doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. *Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182 (1920)*. Further, this doctrine applies when the evidence is actually obtained through the independent and voluntary acts of third parties. *United States v. Fogg, 52 M.J. 144, 151 (1999)*. The witness who voluntarily **[*15]** contacted the AFOSI on 26 March 1996, would be such an independent source. However, we do not reach our result on this basis, because the prosecution did not rely on the independent source doctrine to support admissibility of the evidence in question.

III. Ex Post Facto Application of Article 57, UCMJ

The appellant's *Ex Post Facto* claims regarding Article 57, UCMJ, were resolved in his favor by the United States Court of Appeals for the Armed Forces in *United States v. Gorski, 47 M.J. 370 (1997)*. Accordingly, collection of adjudged forfeitures prior to the date of the convening authority's action pursuant to Article 57, UCMJ, are declared to be without legal effect. Any such forfeiture already collected from the appellant will be restored at the appropriate rank. The case need not be returned to this Court following administrative correction unless further appellate review is required.

IV. Conclusion

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the accused occurred. Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge SPISAK and Judge ROBERTS concur.

End of Document

United States v. Stevenson

United States Navy-Marine Corps Court of Criminal Appeals

December 10, 2009, Decided

NMCCA 200301272

Reporter
2009 CCA LEXIS 445 *; 2009 WL 4691176

UNITED STATES OF AMERICA v. WALTER S. STEVENSON, HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Later proceeding at *United States v. Stevenson, 68 M.J. 410, 2009 CAAF LEXIS 1387 (C.A.A.F., Dec. 18, 2009)*

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 31 October 2001. Military Judge: CDR Nels Kelstrom, JAGC, USN. Convening Authority: Commander, Navy Personnel Command, Millington, TN. Staff Judge Advocate's Recommendation: CDR W.C. Horrigan, JAGC, USN.

United States v. Stevenson, 66 M.J. 15, 2008 CAAF LEXIS 230 (C.A.A.F., 2008)

Core Terms

blood, assailant, search warrant, military, rape, probable cause, suppression, illegal search, interview, omissions, clothing, seized, naked, attacker, Clinic, search warrant affidavit, obtain a search warrant, trial counsel, deliberately, intruder, assault, seizure, dark, warrant application, defense counsel, black male, authorization, allegations, recklessly, questions

Case Summary

Procedural Posture
Appellant servicemember was convicted of rape but asserted that DNA evidence was illegally obtained from blood drawn by a Veterans Administration hospital and subsequently from a sample provided pursuant to an illegal search warrant. A mandate from the U.S. Court of Appeals for the Armed Forces required consideration of whether the warrant was valid and obtained from a source independent of the initial illegal seizure.

Overview
The warrant affidavit stated that the servicemember was previously observed naked in the victim's housing area and that the rapist was naked when he entered victim's residence, but the affidavit omitted evidence from the victim that the servicemember was clothed before the rape. The affidavit also stated that the victim and the servicemember had a common employer, but omitted information that their workplaces were at different locations. The military appellate court held that inclusion of the omitted information in the warrant affidavit would not have established probable cause, and that the warrant was not derived from a source of information independent from the prior illegal search and seizure. The omissions from the warrant affidavit were at least reckless and bolstered the erroneous conclusions that the servicemember's nudity was probative of his guilt and that the servicemember was familiar with the victim through their employment. Further, there was insufficient probable cause to indicate that the warrant

would have been sought in the absence of the prior illegal blood sample, especially since the investigating agents stated that a warrant was not previously contemplated.

Outcome
The general court-martial findings and sentence were set aside, and the case was remanded with rehearing authorized.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > General Overview

HN1 **Search Warrants, Probable Cause**

A doctrine prohibits the admission of evidence obtained through deliberate or reckless misrepresentations in a search warrant affidavit unless there is probable cause in the affidavit independent of the deliberate or recklessly included information.

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Attenuation

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Derivative Evidence

HN2 **Fruit of the Poisonous Tree, Attenuation**

A doctrine permits the admission of evidence from a lawful seizure if the same evidence was previously seized through illegal means only if the lawful seizure was derived from a source of information independent of the previous invalid one.

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Evidence, Evidentiary Rulings**

A military appellate court reviews a military judge's decision to suppress or admit evidence for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN4 **Search & Seizure, Searches Requiring Probable Cause**

Non-consensual extraction of blood from an individual may be made pursuant to a valid search authorization, supported by probable cause. Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f)(2), Manual Courts-Martial. An appropriate official, such as a magistrate, may make a probable cause determination based upon affidavits signed by law enforcement. Rule 315(f)(2)(A).

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Examination of Affiants

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > General Overview

HN5 **Affirmations & Oaths, Examination of Affiants**

While deference should normally be given to a magistrate's probable cause determination, this does not preclude inquiry into the knowing or reckless falsity of the search warrant affidavit on which that

determination was based. If an affiant deliberately or recklessly misrepresents facts in the search warrant affidavit, the evidence seized pursuant to that warrant is inadmissible if, after excising and setting aside the misrepresented facts, there is insufficient information remaining in the affidavit to support a probable cause determination. Mil. R. Evid. 311(g)(2), Manual Courts-Martial. This remedy is unavailable to a defendant if the police's misrepresentations were merely negligent.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

Evidence > Burdens of Proof > Preponderance of Evidence

HN6 **Burdens of Proof, Allocation**

If an affiant deliberately or recklessly omits information from a search warrant affidavit that may have borne upon a magistrate's finding of probable cause, a military appellate court must determine whether the hypothetical inclusion of the omitted information would have extinguished probable cause. The government bears the burden of proving by preponderance of the evidence that probable cause would remain if the intentionally or recklessly omitted facts were included in the affidavit. If the government fails to meet this burden, the evidence must be excluded unless the search was otherwise lawful under the Military Rules of Evidence.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > General Overview

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Rule Application & Interpretation

HN7 **Search & Seizure, Exclusionary Rule**

The exclusionary rule prohibits the introduction into evidence of items seized during an illegal search, testimony about knowledge gained during an illegal search, and derivative evidence acquired directly or indirectly from an illegal search. When a search pursuant to a warrant follows a prior illegal search of a person or property, the question is whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue. The independent source doctrine balances two competing interests: the interests of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime. The overriding principle of the doctrine is to put the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred.

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Derivative Evidence

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Rule Application & Interpretation

HN8 **Fruit of the Poisonous Tree, Derivative Evidence**

Courts analyzing whether a search pursuant to a warrant conducted after an illegal search was genuinely derived from an independent source must conduct a two-pronged inquiry. The first question is whether a police officer's decision to seek the warrant was prompted by information he gathered during the prior illegal search. Second, a court must determine if information obtained during the illegal search was presented to the magistrate that affected his decision to issue the warrant. If the government fails either of these tests, the evidence is inadmissible.

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Derivative Evidence

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Rule Application & Interpretation

HN9 **Fruit of the Poisonous Tree, Derivative Evidence**

Courts are not bound by after-the-fact assurances by law enforcement that they would have sought a warrant absent an illegal search.

Counsel: For Appellant: LCDR M. Eric Eversole, JAGC, USN; LT Heather Cassidy, JAGC, USN.

For Appellee: LT Timothy Delgado, JAGC, USN.

Judges: Before F.D. MITCHELL, L.T. BOOKER, J.A. MAKSYM, Appellate Military Judges. Senior Judge MITCHELL and Senior Judge BOOKER concur.

Opinion by: J.A. MAKSYM

Opinion

OPINION OF THE COURT

MAKSYM, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, *10 U.S.C. § 920*. The appellant was sentenced to confinement for 36 months and a dishonorable discharge. The convening authority approved the sentence as adjudged.

This case is before us for a third time. A detailed procedural history of the case is provided in Part I of this opinion. In its current posture, the case is on remand from the Court of Appeals of the Armed Forces (CAAF) for our consideration of two related questions: "first, to determine whether the warrant was **[*2]** derivative from a source of information independent from the seizure and search of Appellant's blood at the [Veteran's Administration] hospital; and second, to consider whether the warrant was valid in light of Appellant's argument that statements and omissions to the magistrate were not made in good faith." *United States v. Stevenson, 66 M.J. 15, 20 (C.A.A.F. 2008)*(*Stevenson IV*).

After considering the questions in inverse order, we hold that omissions from the search warrant affidavit were made with reckless disregard for the truth and that if the omitted information had been included the affidavit would not have established probable cause. Furthermore, we hold that the search warrant was not derivative from a source of information independent from the prior illegal search and seizure. Accordingly, in our decretal paragraph we set aside both the findings and the sentence, with a rehearing authorized. *Arts. 59(a)* and *66(c), UCMJ*.

I. Factual and Procedural Background

A. The rape

In the early morning hours of 23 November 1992, K, the 25-year-old wife of a deployed Navy Sailor, awoke in her dark Navy housing unit to a male intruder holding a knife against her back. Appellate Exhibit LXVIII, **[*3]** Exhibit C, Naval Criminal Investigative Service [1] (NCIS) Results of Interview (ROI) of 23 Nov 1992 at 1. The man told K that he had a knife, instructed her to be quiet and, after asking her a few questions, lifted her nightshirt over her head, obstructing her vision. *Id*; AE LXIX, NCIS ROI of 2 Dec 1992 at 2. The intruder then began licking her back, removed her underwear, and rubbed his genitalia over her back and buttocks. AE LXVIII, Ex. C, at 1-2.

Eventually the assailant turned K over onto her back and ordered her not to look at him. *Id*. at 2. At this point, in addition to her nightshirt, her head was covered by blankets and a pillow. AE LXIX, NCIS ROI of 2 Dec 1992 at 2. He then began licking the front of her body and performed oral sex on her. AE LXVIII, Ex. C, at 1-2. After several unsuccessful attempts to achieve an erection, the assailant finally penetrated K's vagina with his penis and began raping her. *Id*. at 2. When the intruder finished raping K, he bound **[*4]** her feet and hands together and left the house. *Id*. The attack lasted approximately 20 minutes. *Id*. After the assailant left, K was able to untie herself and went to a neighbor's residence for help. *Id*. She then sought medical treatment at Tripler Army Medical Center and reported the sexual assault to authorities. *Id*. at 1.

B. The initial investigation

[1] During the initial investigation of this crime the current Naval Criminal Investigative Service was known as the Naval Investigative Service. The organization will be referred to by its current name throughout this opinion.

That same day, Special Agent (SA) R. Jewel Seawood from the Hawaii office of NCIS interviewed K at the hospital. *Id*. Asked by SA Seawood to describe her attacker, K explained that she was unable to obtain a good look at her assailant because her face was covered. *Id*. at 2. Based upon the intruder's voice characteristics, however, K deduced that he was a black male. *Id*. at 3. She also estimated that her assailant was around six feet tall and weighed approximately 230 pounds based upon the way he felt on top of her. *Id*.

During a series of interviews over the next two months, law enforcement officials asked K to provide them with more details about her attacker so as to identify him. Many of these questions focused on the intruder's clothing.

K's answers to the questions about her assailant's clothing reflect the extreme limitations placed **[*5]** on her ability to perceive her surroundings, most notably her attacker, amidst the darkness, confusion, and violence that accompanied this sexual assault. During her initial interview with SA Seawood, K stated that her assailant wore dark suede gloves. AE LXVIII, Ex. C at 2. She also stated that she heard her attacker fumbling around with something that sounded like scuba head cover during the attack, but at that time provided no other details about his clothing. *Id*.

On 2 December 1992, NCIS SA Keith Thomas conducted a second interview of K. AE LXIX, NCIS ROI of 2 Dec 92 at 1. During this second interview, SA Thomas asked K whether she recalled feeling any type of material on the assailant's legs during the attack. She responded that she felt "bare skin from [the] assailant's legs and thought he may have been wearing shorts." *Id*. at 2.

The Federal Bureau of Investigation (FBI), acting in response to an NCIS request for assistance in profiling K's attacker, interviewed K on 8 January 1993. AE LXIX, FBI ROI of 8 Jan 93 [2] at 1. K provided previously undisclosed details to FBI SA Mary J. Counts about her assailant's state of dress during the attack. K told SA Counts that she did not hear **[*6]** the assailant disrobe during the attack and heard "no zippers, buttons, rustling, the sound of clothes dropping to the floor, elastic from men's underwear . . [sic] nothing." *Id*. at 4. K also stated that she heard her attacker's bare feet hitting the floor when he left her home. *Id*. at 6.

K also told SA Counts that she was able to "catch a glance" of her attacker when he rolled her over prior to penetrating her. *Id*. at 5. At that time, she saw that her attacker "wore very dark clothes." *Id*. K also described smelling and hearing a "wet suit material" similar to Gore-Tex during the attack. *Id*. at 6. K also told SA Counts that "[b]y his voice, [she] guessed [her assailant] was a black male, in his thirties." *Id*. at 4.

When NCIS agents conducted their crime scene investigation at K's residence, they discovered that the assailant had gained entry to the residence by cutting his way through the screen of an open window. AE LXXVI, Ex. A, "Search Warrant Affidavit" at 3. Agents also seized physical evidence from K's residence and sent these materials, along with K's rape kit, to the United States Army Criminal Investigations Laboratory **[*7]** (USACIL) for DNA testing. AE CIV, Essential Findings of Fact on Motion to Suppress at 1. Forensic analysts tested the crime scene evidence and K's rape kit and discovered DNA remnants from three individuals: K, her husband, and an unidentified third person. AE LXXVI, Ex. A at 3. Investigators concluded that the unidentified source was likely the assailant. *Id*.

NCIS interviewed K's neighbors to determine if they had any relevant information about the assault. One neighbor, J.P., told investigators that while jogging three days prior to the rape, at approximately 2200, he saw a bald, heavy set, naked black male, approximately six feet tall and in his late thirties or early forties, running along a path behind several Navy housing units. AE LXXVI, Ex. A at 3-4. The man startled J.P., who halted in his tracks. *Id*. at 4. When the naked male saw J.P., he stopped, stood still, and attempted to cover his genitals. *Id*. NCIS identified the spot where J.P. saw the naked male and determined that it was 50 feet from the southwest corner of K's residence. *Id*.

NCIS continued to investigate the case for nearly two years, but was unable to identify K's attacker. AE CIV at 1. In 1994, NCIS closed the **[*8]** case in accordance with local NCIS office policy. *Id*. As part of their close-out, NCIS Hawaii evidence custodians destroyed most of the physical evidence gathered during the investigation, including K's rape kit and all accompanying chain of custody documents. AE CIII, Essential Findings of Fact on Defense Motion to Dismiss Due to Pre-Preferral Delay, at 2. However, USACIL still had DNA samples from the rape kit and other physical evidence. *Id*.

At the time NCIS closed the case, the appellant was one

[2] The document erroneously lists the date of interview as 1/8/92.

of a number of persons of interest, but was never ruled in or out as a suspect. *Id*. at 2. The appellant was placed on the Temporary Disability Retired List (TDRL) in July 1994 and returned to the continental United States. *Id*. at 2; AE CIV at 1.

C. The cold case investigation

In 1997, NCIS cold case agent Bruce Warshawsky reopened the case and began reviewing the circumstances surrounding K's sexual assault. AE CIV at 1. SA Warshawsky focused his attention on a Department of the Navy incident report from June 1992 which identified the appellant as a suspect in a "Peeping Tom" incident in the same Navy housing area as K's residence. *Id*.

The report related the events of 8 June 1992, five months **[*9]** prior to the attack. AE LXVIII, Ex. A. On that day, at around 0515, A.B. observed her neighbor, later identified as the appellant, completely naked, staring at her through her house window. *Id*. When the individual realized that he had been seen by A.B., he ran away. *Id*. Police arrested the appellant for indecent exposure, but later released him to his command; the record does not contain any evidence that the appellant received a criminal conviction or administrative action as a result of this incident. AE LXVIII at 1. The appellant denied that he had committed this act. AE LXIX at 3.

SA Warshawsky noted similarities between the "Peeping Tom" incident, K's sexual assault, and J.P.'s story, and began targeting the appellant as a possible suspect in the rape. AE CIV at 1. As the first step in his investigation, SA Warshawsky searched the Defense Enrollment Eligibility Reporting System and ascertained that the appellant's blood type matched that of the unidentified DNA source from the rape kit and crime scene. Record at 588.

With this knowledge, SA Warshawsky set out to locate the appellant and obtain a sample of his blood for DNA comparison purposes. AE CIV at 1. SA Warshawsky discovered **[*10]** that the appellant was no longer on active duty, having been transferred to the TDRL, and was residing in the vicinity of Memphis, Tennessee. *Id*. He also discovered that the appellant was receiving routine medical care from the Veteran's Administration (VA) Hospital in Memphis. *Id*. SA Warshawksy set out to "prove or disprove" the appellant's involvement in the crime. Record at 589.

SA Warshawsky, based in Hawaii, next sent a lead to the NCIS office in Memphis, to interrogate the appellant and obtain a sample of the appellant's blood. AE XV, Ruling on the Motion to Suppress Evidence, at 1. SA John McNutt of the Memphis office received SA Warshawky's request and became the lead Memphis agent working the case. *Id*. SA McNutt discovered that the VA hospital was treating the appellant for both physical and mental health related issues. *Id*. Concerned about the appellant's mental state, SA McNutt consulted with an NCIS psychologist and determined that approaching the appellant and either interviewing him or asking for consent to draw his blood would not be the safest option for both the agents and the appellant. Record at 74-76.

D. The first blood draw

At the suggestion of his superior, SA McNutt **[*11]** contacted VA regional counsel Ron Dooley and explained his predicament. AE XV at 2. After learning that the VA routinely conducted blood draws on the appellant, SA McNutt asked Mr. Dooley to arrange for the draw of a sample of the appellant's blood during one of these visits for analysis as part of the NCIS investigation. *Id*. Mr. Dooley offered the VA's assistance, stating that the VA routinely provided blood samples to civilian police agencies. *Id*. at 2. On 3 June 1998, during a routine blood draw, a VA health provider filled a second vial of the appellant's blood and provided this vial to NCIS. *Id*. at 2-3. USACIL analysis of this sample confirmed that the appellant was the source of the unidentified DNA found at the crime scene and in K's rape kit. AE CV at 2.

E. The suppression of the VA blood test

Armed with this new evidence, the Government preferred charges against the appellant on 16 December 1998 and, after conducting an Article 32, UCMJ, investigation, referred charges against him to a general court-martial on 5 February 1999. The defense moved to suppress the results of the VA blood test on the grounds that the blood was obtained in violation of the *Fourth Amendment's* prohibition **[*12]** against unreasonable search and seizure and the *Due Process Clause of the Fifth Amendment*. AE VII. The Government argued that the evidence was admissible under MILITARY RULE OF EVIDENCE 312(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), which permits the admission of evidence obtained during a bodily intrusion if the intrusion was

conducted for valid medical purposes. AE VIII. The military judge disagreed with the Government, found violations of both the *Fourth* and *Fifth Amendments*, and, on 27 April 1999, suppressed the results of the VA blood draw. AE XV at 7. The focus of the ruling was on the appellant's status as a member of the TDRL when the blood was drawn and seized. *Id*. The Government subsequently appealed the military judge's ruling to this court pursuant to Article 62, UCMJ.

F. The search warrant

Subsequent to the military judge's ruling, NCIS SA Gail Beasley and Navy trial counsel began discussing other options for acquiring a sample of the appellant's DNA. AE LIX, Ex. B, "Stipulation of Expected Testimony of [Trial Counsel]" at 1. At first, the two contemplated looking for DNA remnants at the brig, where the appellant had been in pretrial confinement (PTC), or at **[*13]** the transient personnel unit where he resided after his release from PTC. [3] *Id*. Trial counsel decided against this course of action, however, believing that this seizure would likely be suppressed as "fruit of the poisonous tree" from the VA blood draw. *Id*.

In the face of this roadblock, trial counsel and SA Beasley decided that obtaining a search warrant was their most feasible course of action. *Id*. at 1-2. The record is devoid of any prior consideration having been given to securing a warrant to facilitate collection of the appellant's bodily fluids. SA Beasley drafted her search warrant affidavit and asked trial counsel and a Memphis-area Special Assistant United States Attorney to review it. Record at 351-60. On 15 September 1999, SA Beasley presented her affidavit to a United States Magistrate Judge of the Western District of Tennessee, who issued the search warrant. AE LXXVI, Ex. A. NCIS executed this search warrant and received a vial of the appellant's blood on 22 September 1999. Prosecution Exhibit 7.

The magistrate relied upon a number of **[*14]** factual assertions made in the affidavit which form the basis for the appellant's current allegations that NCIS acted in bad faith during the search warrant process. As outlined above, while the Government was pursuing its search warrant, it also was simultaneously appealing the military judge's suppression of the initial VA blood draw to this court. On 10 October 1999, this court affirmed the military judge's suppression of the original VA blood draw based upon a violation of the *Fourth Amendment*. *United States v. Stevenson I, 52 M.J. 504, 510 (N.M.Ct.Crim.App. 1999)*. CAAF reversed our ruling on 2 August 2000 and remanded the case with guidance to the trial judge as to the proper standard to apply to determine if the VA blood draw violated the *Fourth Amendment*. *United States v. Stevenson, 53 M.J. 257, 260-61 (C.A.A.F. 2000)*(*Stevenson II*). When the trial resumed, a successor military judge admitted, over objection, evidence of both the VA blood draw and blood drawn pursuant to the warrant. AE CIV; AE CV. The appellant was convicted on 31 October 2001.

This court affirmed the appellant's conviction on 24 July 2006. [4] *United States v. Stevenson III, 65 M.J. 639, 650 (N.M.Ct.Crim.App. 2006)*. **[*15]** CAAF subsequently mandated two issues for our review. *Stevenson IV, 66 M.J. at 19-20*. We will first consider whether the warrant obtained after the initial trial judge's suppression of the VA blood draw was valid in light of the appellant's allegations of bad faith statements and omissions made during the search warrant application process. We will then examine whether the warrant was derivative from a source of information independent from the search and seizure of appellant's blood at the VA hospital.

II. Discussion

Our analysis of the two mandated issues before us is guided by the principles articulated in two separate but related doctrines. ***HN1***[] The first doctrine prohibits the admission of evidence obtained through deliberate or reckless misrepresentations in a search warrant affidavit unless there is probable cause in the affidavit independent of the deliberate or recklessly included information. *Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)*. ***HN2***[] The second permits the admission of evidence **[*16]** from a lawful seizure if the same evidence was previously seized through illegal means only if the lawful seizure was derived from a source of information independent of the previous invalid one. *Murray v. United States, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)*.

[3] The military judge released the appellant from pretrial confinement approximately four months after suppressing the VA blood draw results.

[4] Citing excessive post-trial delay, this court granted sentencing relief and affirmed only that portion of the appellant's sentence as extended to 36 months confinement and a bad-conduct discharge.

HN3[] We review a military judge's decision to suppress or admit evidence for an abuse of discretion. United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id*. (citing United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)).

A. Validity of search authorization in light of alleged bad faith and omissions in search warrant process.

HN4[] "Nonconsensual extraction of blood from an individual may be made pursuant to a valid search authorization, supported by probable cause." United States v. Carter, 54 M.J. 414, 418 (C.A.A.F. 2001)(citing MILITARY RULE OF EVIDENCE 312(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)). Probable cause exists when there **[*17]** is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. MIL. R. EVID. 315(f)(2). An appropriate official, such as a magistrate, may make a probable cause determination based upon affidavits signed by law enforcement. MIL. R. EVID. 315(f)(2)(A).

HN5[] While deference should normally be given to a magistrate's probable cause determination, this does "'not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based.'" Carter, 54 M.J. at 419 (quoting United States v. Leon, 468 U.S. 897, 914-15, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984))(internal citation omitted). If an affiant deliberately or recklessly misrepresents facts in a search warrant affidavit, the evidence seized pursuant to that warrant is inadmissible if, after excising and setting aside the misrepresented facts, there is insufficient information remaining in the affidavit to support a probable cause determination. MIL. R. EVID. 311(g)(2); *see also* Franks, 438 U.S. at 171-72. This remedy is unavailable to a defendant if the police's misrepresentations were merely negligent. Franks, 438 U.S. at 171.

Omissions of information from a search warrant affidavit **[*18]** are analyzed similarly. United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992). HN6[] If an affiant deliberately or recklessly omits information from a search warrant affidavit that may have borne upon a magistrate's finding of probable cause, a reviewing court must determine whether the hypothetical inclusion of the omitted information would have extinguished probable cause. United States v. Mason, 59 M.J. 416, 422 (C.A.A.F. 2004). The Government bears the burden of proving by preponderance of the evidence that probable cause would remain if the intentionally or recklessly omitted facts were included in the affidavit. *Cf*. MIL. R. EVID. 311(g)(2). If the Government fails to meet this burden, the evidence must be excluded unless the search was otherwise lawful under the Military Rules of Evidence. *Id*.

Here, the appellant alleges that SA Beasley deliberately or recklessly omitted facts from her affidavit that did not comport with her claim that the appellant was most likely naked when he entered K's residence. The appellant also asserts that SA Beasley improperly omitted information from the affidavit which weakened her argument that the appellant targeted K while doing part-time work for **[*19]** Nurse Finders, a temporary health care worker placement agency. Finally, the appellant argues that SA Beasley deliberately misled the federal magistrate by not disclosing the military judge's recent suppression of the VA blood draw or even the existence of court-martial proceedings against the appellant.

Omissions or misstatements regarding the assailant's nudity

SA Beasley's affidavit makes repeated conclusory allegations that the assailant who raped K entered her residence naked. AE LXXVI, Ex. A. The affidavit alleges that K "heard nothing to indicate the perpetrator disrobed before the rape or redressed after the rape" and that K "could tell [the assailant] was barefooted" when he left her house after the assault. *Id*. at 2. The affidavit further concludes that the "assailant that raped [K] most likely entered the residence naked." *Id*. at 5.

Foremost among the evidence cited in support of SA Beasley's conclusion is K's statement to the FBI that "she never heard the perpetrator remove any clothing, i.e. zippers, buttons, rustling sounds, elastic from underwear, or the sound of clothes dropping to the floor." *Id*. at 2. The affidavit quotes this language almost verbatim from the FBI's **[*20]** summary of its 8 January 1993 interview with K. *See* AE LXIX, FBI ROI of 8 Jan 93, at 4.

Glaringly missing from the affidavit, however, are several of K's statements that speak directly to her assailant's state of dress at the time of the assault. Paramount among these is K's statement, located in the FBI summary a mere three paragraphs after the passage SA Beasley's quoted nearly verbatim, that

immediately before the assailant penetrated K she caught a glance at him and observed that "he wore very dark clothes." *Id*. at 5. Similarly missing is K's statement from her FBI interview that "she smelled and heard 'wet suit material' like Goretex" during the attack. *Id*. at 6. Once more, this statement is located in K's statement three paragraphs below the verbatim quote. Likewise absent is the victim's statement to NCIS during her first interview that she heard the intruder fumbling around during the attack with something resembling a scuba head cover. AE LXVIII, Ex. C, at 2. Finally, SA Beasley's affidavit omits any reference to NCIS's 2 December 1992 interview with K, during which she stated that "she did feel bare skin from her assailant's legs, and thought he may have been wearing shorts." **[*21]** AE LXIX, "NCIS ROI of 2 Dec 92," at 2.

The affidavit juxtaposes its conclusions about the assailant's "likely" nudity with A.B.'s identification of the appellant as a "Peeping Tom" five months prior to the rape and J.P.'s identification of a naked black male standing in front of K's residence three nights before the rape. AE LXXVI, Ex. A at 3-4. As written, the affidavit leads the reader to the inevitable conclusion that the intruder and appellant were one in the same.

We are convinced that the probable cause landscape would have been substantially altered if SA Beasley had not made these material omissions. Had she included all of relevant facts known about the assailant's state of clothing, a reader of the affidavit would likely have focused on the only concrete statements K made about her attacker's clothing: that he wore very dark clothes and possibly wore shorts or Gore-Tex material of some sort. We are also certain that the omission of this information was at the very least reckless, and thus places on the Government the burden of proving by preponderance of the evidence that probable cause would remain if the omitted facts were included in the affidavit. [5]

Omissions about Nurse Finders

As further support for its nexus between the assailant and the appellant, the affidavit states that K's purse was stolen on the night of the rape and abandoned near K's place of employment, the Straub Medical Clinic. AE LXXVI, Ex. A at 4. It also notes that, at the time of the rape, the appellant was employed part-time by Nurse Finders, a health care worker employment agency which provided personnel assistance to **[*23]** the Straub Medical Clinic. *Id*. According to the affidavit, because Nurse Finders "serviced the Straub Medical Clinic and [K] worked at the Straub Medical Clinic, it is possible that [the appellant] had seen [K] prior to 23Nov92 [sic] and was knowledgeable of the fact that [K] worked there." *Id*.

Absent from the affidavit, however, is uncontroverted evidence that on the date of the rape the appellant worked at a clinic not in the vicinity of K's place of work. AE CV at 4-5. Similarly absent is information, in NCIS's possession at the time, that there were at least ten Straub Clinics throughout the Honolulu area and that there was no evidence that the appellant had ever worked at any of these clinics. *Id*. at 5.

We conclude that these omissions were made with reckless disregard for the truth and believe the military judge's legal conclusion that these omissions were instances of mere professional negligence constituted an abuse of discretion. The affidavit's assertions about Nurse Finders contributed substantially to the nexus between the appellant and the assailant who entered K's home. We are convinced that the omission of this information by experienced criminal investigators employed **[*24]** by the United States was reckless.

Failure to disclose the military judge's suppression of the VA blood draw

The appellant also asserts that SA Beasley deliberately misled the federal magistrate by not disclosing the existence of court-martial proceedings against the appellant during which a military judge had just suppressed an illegal draw of the appellant's blood. Based upon our review of the record, we conclude that the military judge properly exercised his discretion in holding that the purpose of the omission was "not to mislead the magistrate and thereby enhance the likelihood that a search warrant would be issued, but to avoid possibly tainting the magistrate." AE CV at 4.

[5] We are cognizant that **[*22]** the military judge did not deal squarely with this issue at the trial level. We contemplated returning this case pursuant to *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)*, for a hearing to address this evidentiary gap. However, given the serious allegations of what in best light can be described as recklessly selective exaggeration of the state of the evidence and particularized excision of adverse facts for consideration by a United States magistrate-judge in a key warrant application outlined within the record, the age of this case, and the interests of judicial economy, we have exercised our inherent powers under Article 66, UCMJ, to find the facts and make the conclusions of law necessary to effectuate a final resolution of this case.

Remedy for improper omissions from affidavit

We turn now to the next step of our analysis and ask whether probable cause would have been extinguished had SA Beasley included in the affidavit the improperly omitted facts about the assailant's clothing and deleted all references to Nurse Finders. *See* Franks, 438 U.S. at 171; Mason, 59 M.J. at 422. We conclude that probable cause would have been extinguished if SA Beasley had made these corrections.

If this information were corrected, the affidavit would have described **[*25]** K's assailant as a black male with O positive blood approximately 6 feet tall and 230 pounds, wearing dark clothes and possibly a Gore-Tex scuba hood and shorts. With this more accurate description of K's attacker, the appellant's nexus with the rape would have been considerably more tenuous. He would have been described as a black male with the same blood type living in the same area who was identified by his next door neighbor five months earlier as a naked Peeping Tom. While J.P. spotted a naked black man in the vicinity of K's home two nights prior to the attack, there is no indication in the record that J.P. ever identified the appellant as the man he observed that evening. Had the affidavit accurately reflected the facts, the nexus between the assailant and the appellant would have been much too speculative to justify the issuance of a search warrant. We cannot overstate the importance the rather selective choice of factual submission had on a neutral and detached magistrate. The very limited facts, gilded with a connection between the appellant and reports of a naked stalker in the neighborhood outlined nothing less than a *prima facie* case of culpability against the appellant. **[*26]** As set forth, the magistrate judge had little choice but to grant the warrant application.

As corrected, we do not find these facts sufficient to establish probable cause. We conclude that the military judge abused his discretion by admitting evidence seized pursuant to this search warrant.

B. The Independent Source Doctrine

We also hold that the blood seized pursuant to the search warrant was not obtained from a source independent of the illegal blood draw. ***HN7***[↑] The exclusionary rule prohibits the introduction into evidence of items seized during an illegal search, testimony about knowledge gained during an illegal search, and derivative evidence acquired directly or indirectly from an illegal search. Murray, 487 U.S. at 536-37 (citing Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914); Silverman v. United States, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961); and Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)). When a search pursuant to a warrant follows a prior illegal search of a person or property, the question is "whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue." Murray, 487 U.S. at 542. The independent source doctrine balances **[*27]** two competing interests: "the interests of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime." Id. at 537 (quoting Nix v. Williams, 467 U.S. 431, 443, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)). The overriding principle of the doctrine is to "put[] the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred." *Id*.

HN8[↑] Courts analyzing whether a search pursuant to a warrant conducted after an illegal search was genuinely derived from an "independent source" must conduct a two-pronged inquiry. Murray, 487 U.S. at 542. The first question is whether the police officer's decision to seek the warrant was prompted by information he gathered during the prior illegal search. Second, a court must determine if information obtained during the illegal search was presented to the magistrate that affected his decision to issue the warrant. If the Government fails either of these tests, the evidence is inadmissible.

The appellant has focused his argument on the first prong of the Murray test, arguing that NCIS would not have sought a search warrant but for the illegal draw and its resulting identification **[*28]** of the appellant as K's attacker.

Neither this court nor CAAF has yet applied this prong of the *Murray* test, although it has been adopted and applied by nearly all of the circuits in some manner. *See e.g.* United States v. Hearn, 563 F.3d 95, 102 (5th Cir. 2009)("did the illegal search affect or motivate the officers' decision to procure the search warrant"), *cert. denied, Hammond v. United States, 130 S. Ct. 227, 175 L. Ed. 2d 158 (2009)*; United States v. Mowatt, 513 F.3d 395, 404 (4th Cir. 2008)("evidence recovered in the later search is not admissible unless the government establishes that 'no information gained from the illegal [search] affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it.'" (quoting Murray, 487 U.S. at 540)); United

States v. Dessesaure, 429 F.3d 359, 367 (1st Cir. 2005)(stating that the relevant inquiry is "whether '[the police's] decision to seek the warrant was prompted by what they had seen during their initial entry'")(quoting Murray, 487 U.S. at 542); United States v. Herrold, 962 F.2d 1131, 1140 (3rd Cir. 1992)("we must determine if, without regard to information obtained during the original entry, the police would **[*29]** have applied for the search warrant").

We hold that there is insufficient evidence in the record to conclude that NCIS would have sought a search warrant had the prior VA illegal blood draw never occurred. In fact, the substantial weight of the evidence in the record weighs in favor of the opposite conclusion.

During several pretrial motions hearings, multiple NCIS agents admitted that NCIS never even considered the possibility of obtaining a search warrant prior to the illegal blood draw. For example, defense counsel questioned SA McNutt at length as to whether he contemplated applying for a search warrant prior to the VA blood draw:

> Q: Let me ask you again. At any time during your review did you review that investigation to determine whether or not you had probable cause to believe you could obtain a search warrant for Mr. Stevenson's blood?
> A: No.
> . . . .
> Q: At any time in this case did you request a search authorization for Mr. Stevenson's blood?
> A: No.
> Q: What impact, if any, did Mr. Dooley's advice to you regarding the Veteran's Administrations [sic] ability to assist you have on your decision not to seek a search authorization?
>
> A: Based on -- on Mr. Dooley's statement that it could be **[*30]** done, plus after Mr. Dooley told us the procedure, I also contacted again Agent Sasaki at our headquarters. And she apparently ran this by our gen -- the NCIS general counsel, who, in turn, told her there was no problem with that. So, based on that, I-I thought we had a-a procedure to obtain that blood that was workable.

Record at 79-80.

> Q: Now, do you know why at this time you didn't try to get a warrant?
> A: It just wasn't a-a consideration at that time.
> Q: Was there some sort of emergency that required you to get Stevenson's blood immediately?
> A: No.
> Q: Was there -- so you didn't think Stevenson's going out of the country or that somehow any evidence would be taken if you wanted to get a warrant, right?
> A: No, no.
> Q: So, you could have waited and gotten a warrant if you had wanted to?
> A: Yes.
> . . . .
> Q: But at least we can agree that you could have taken the time to attempt to get a warrant?
> A: Yes.

Id. at 83-84.

During a separate pretrial hearing, SA Beasley testified that she did not begin working on her search warrant affidavit until after the military judge suppressed the initial VA blood draw.

> [W]hen we [trial counsel LCDR Miller and I] first discussed the affidavit, it was after the suppression **[*31]** hearing. And at that point, she asked me to hold off, not to go forward with the affidavit. After the confinement hearing, we have another conversation about the search warrant . . . [a]nd at that point she said to go ahead and apply for the search warrant.

Record at 368.

SA Beasley's testimony is supported by trial counsel's Stipulation of Expected Testimony. AE LIX, Ex. B. The stipulation helps illuminate the Government's thought process following the military judge's suppression of the VA blood draw:

> LCDR Miller and Beasley decided that because they could not use the VA blood, they would try the probable cause route because they now had new information since the time the original investigation was closed. The new information was about the victim's purse and where it was found, and how that information tied into information on where Mr. Stevenson worked with Nurse Finders.

Id. at 1-2. The stipulation of expected testimony illuminates two important facts which clarify the Government's thought processes at the time of the illegal VA blood draw and the subsequent search warrant application. First, the Navy trial counsel providing legal guidance to NCIS with the search warrant application **[*32]** believed that the Government did not have probable cause to seize the appellant's blood at the time of the VA blood draw. Second, and more importantly, the Government only became

motivated to obtain a search warrant after it learned the appellant worked for Nurse Finders and that the company provided temporary workers to the Straub Clinic, K's place of employment.

This is problematic, since NCIS first learned of the appellant's part-time employment at Nurse Finders in March 1999 from the appellant's detailed defense counsel. [6] Record at 623-24. Defense counsel disclosed the appellant's employment at Nurse Finders because the Government had denied his request for investigative assistance and he was seeking NCIS's help in obtaining the appellant's Nurse Finders employment records. *Id*. It was only after appellant's defense attorney disclosed the appellant's employment at Nurse Finders that NCIS contacted the company and determined that it placed temporary workers in positions at the Straub Clinic. *Id*.

Detailed defense counsel would never have been detailed to defend the appellant had the **[*33]** Government not illegally drawn the appellant's blood and subsequently preferred charges against him. The illegal blood draw left defense counsel in the tenuous position of defending the appellant in the face of overwhelming, scientific-based evidence of guilt. In his attempt to defend his client against the Government's evidence, the defense counsel disclosed the appellant's part-time employment during routine discovery practice. This information is thus derivative of the illegal blood draw and both motivated the Government to obtain the search warrant and affected the magistrate's decision to issue the warrant. *See Murray, 487 U.S. at 542*.

The Government asks us to conclude that had the VA hospital rejected NCIS's request to seize the appellant's blood, the agency would have applied for a search warrant and seized the blood legally. As support for this claim, the Government points to a statement by SA McNutt at a pretrial *Article 39(a), UCMJ*, session:

> Q: If Mr. Dooley, the general counsel, had indicated that he would not be able to provide you a sample of the blood, at that time would you have looked more closely at the possibility of obtaining a search authorization based upon probable **[*34]** cause?
> A: That-that would have been one option. I would have probably have gone to our experts at headquarters and asked if other possible avenues that could be taken.
> Record at 88.

We do not find SA McNutt's equivocal statement to be dispositive about the strength of NCIS's resolve to pursue a search warrant in this case. Nor do we find SA Warshawsky's interest in "prov[ing] or disprov[ing]" the appellant's involvement in the crime to be determinative of NCIS's motivations to obtain a search warrant. We therefore reject as speculative the Government's conclusions that NCIS would inevitably have obtained a warrant to draw a sample of the appellant's blood. Based upon a thorough examination of the record, we hold that there is insufficient evidence that the Government would have obtained a search warrant if the illegal blood draw at the VA had not taken place. As such, we hold that the Government has failed to meet this prong of the *Murray* test.

Our conclusion squares with results reached by the circuits. In the recent case of *United States v. Siciliano, 578 F.3d 61, 71 (1st Cir. 2009)*, the First Circuit upheld a district court's suppression of evidence where a police officer did not testify **[*35]** convincingly that a prior illegal search had not impacted his decision to seek a later search warrant. We find *Siciliano* to be analogous to the case before us.

We find this case to be dissimilar from circuit precedent where this *Murray* prong has been satisfied. Had the record contained any evidence that NCIS had begun applying for a search warrant when they conducted their illegal blood draw, our conclusion may be different. *See, e.g.,* *Segura v. United States, 468 U.S. 796, 800, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)*; *Hearn, 563 F.3d at 102* ("because the officers had begun preparing the search warrant application well before their purported illegal entry . . . it is clear that information obtained during the purported illegal entry did not motivate the officers to seek the warrant").

We similarly lack any testimony or evidence that NCIS had already decided to seek a warrant prior to the illegal search. *United States v. Salas, 879 F.2d 530, 538 (9th Cir. 1989)*(finding "uncontradicted" evidence that officer had decided to obtain warrant prior to illegal entry); *Dessesaure, 429 F.3d at 369* (finding police entered apartment to freeze scene in anticipation of obtaining search warrant).

Similarly absent are any unequivocal **[*36]** assurances from law enforcement that it would have applied for a warrant had it not conducted the illegal search. *United*

[6] The Government stipulated to this fact. Record at 623. SA Beasley also testified to it. *Id*. at 638.

States v. Runyan, 290 F.3d 223, 236-37 (5th Cir. 2002)(finding agent testified that customs regulations required him to apply for a warrant under the circumstances); United States v. Grosenheider, 200 F.3d 321, 328 (5th Cir. 2000)(finding officer's testimony that he would have applied for a warrant had illegal search never happened credible). Certainly, HN9[] courts are not bound by after-the-fact assurances by law enforcement that they would have sought a warrant absent the illegal search. Dessesaure, 429 F.3d at 369 (citing Murray, 487 U.S. at 540 n.2). Notwithstanding their inherent reliability or unreliability, however, unequivocal assurances of this sort are completely missing from our record.

Nor do we have here substantial evidence of probable cause from which we could conclude that NCIS would inevitably have sought a warrant had they not engaged in their illegal search. United States v. Price, 558 F.3d 270, 282 (3rd Cir. 2009)(finding that given the weight of the evidence, "it seems impossible that the police would not have applied for a warrant") *cert. denied*, *130 S. Ct. 375, 175 L. Ed. 2d 157 (2009)*; **[*37]** United States v. Silva, 554 F.3d 13, 19 (1st Cir. 2009)(holding that after excising improperly included evidence from affidavit, "ample evidence remained" of probable cause); United States v. Swope, 542 F.3d 609, 616 (8th Cir. 2008) *cert. denied*, *129 S. Ct. 1018, 173 L. Ed. 2d 307 (2009)*; Herrold, 962 F.2d at 1140-41 (finding it "inconceivable" that police would not have taken steps toward obtaining warrant); United States v. Johnson, 994 F.2d 980, 987 (2nd Cir. 1993).

Conclusion

Having found constitutional error, we test this error for harmlessness beyond a reasonable doubt. United States v. Thompson, 67 M.J. 106, 107-08 (C.A.A.F. 2009). As the overwhelming majority of the evidence proving the appellant's guilt was derived from DNA analysis of the blood seized during the appellant's two blood draws, this error was not harmless beyond a reasonable doubt. The findings of guilty and the sentence are set aside. The record is returned to the Judge Advocate General for remand to an appropriate convening authority with a rehearing authorized.

Senior Judge MITCHELL and Senior Judge BOOKER concur.

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