IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE RESPONSE TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
Private First Class (E-3) **ETHEN D. BLACK,** United States Army, Appellant	)	Crim. App. No. ARMY 20210310
	)	USCA Dkt. No. 22-0066/AR

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

Issue Presented

WHETHER THE ARMY COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY (1) CREATING A NOVEL TEST FOR COMMON AUTHORITY, (2) FAILING TO GIVE DEFERENCE TO THE MILITARY JUDGE'S FINDINGS, (3) COMPARING A MODERN CELL PHONE TO A TRADITIONAL "CONTAINER," AND (4) FINDING ERROR BASED ON A DIFFERENCE OF OPINION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. §862 (2016) [UCMJ]. This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ.

Statement of the Case

Appellant is charged with possession of child pornography, in violation of Article 134, UCMJ. (R. at 7–8). On April 16, 2021, the parties litigated Appellant's motion to suppress evidence. (R. at 11–86). On April 19, 2021, the military judge granted Appellant's motion to suppress. (App. Ex. VIII). The government requested reconsideration, which the military judge denied on April 30, 2021. (App. Ex. XII). In accordance with Article 62, UCMJ, the government submitted an interlocutory appeal to the Army Court. (App. Ex. XIII). On October 22, 2021, following oral argument, the Army Court of Criminal Appeals

(CCA) reversed the military judge's ruling. *United States v. Black*, ARMY MISC 20210310, 2021 CCA LEXIS 559, at *1 (Army Ct. Crim. App. Oct. 22, 2021) (mem. op.). Appellant petitioned this court for review on December 21, 2021.

Statement of Facts

In October 2020, Appellant conducted training with his unit at the Joint Readiness Training Center (JRTC) in Fort Polk, Louisiana. (App. Ex. VIII, p. 1). At approximately 2000 on October 10, 2020, Private First Class (PFC) WA asked if he could borrow Appellant's cell phone. (App. Ex. VIII, p. 1; R. 14–15). They generally discussed PFC WA's intended use of the phone, including calling and texting his girlfriend, using the YouTube app, and playing the game "Among Us." (App. Ex. VIII, p. 1; R. at 16).

Appellant did not restrict PFC WA's use of the phone nor forbid PFC WA from sharing the phone with others.[1] (App. Ex. VIII, p. 1; App. Ex. VI; R. at 20–21). None of the folders or apps PFC WA accessed were password-protected or encrypted. (App. Ex. VI; R. at 20). Appellant gave PFC WA his personal identification number (PIN) to unlock the entire phone. (App. Ex. VIII, p. 1; App. Ex. IV, encl. 2). Appellant wrote the PIN on the table in staff duty. (App. Ex. VIII, p. 1; App. Ex. IV, encl. 2). Appellant left to go to sleep. (R. at 42).

[1] For this reason, there was no "agreed-to parameters of use," as Appellant suggests. (Appellant's Br. 3).

While PFC WA used Appellant's phone, a notification appeared on the screen regarding "a photo gallery." (App. Ex. VIII, p. 1; R. at 17). He attempted to "'swipe'" it away, but inadvertently opened "an array of pictures." (App. Ex. IV, encl. 1; R. at 17, 19). One photograph focused on the buttocks of a clothed, female soldier in their company, and it appeared to have been taken without her knowledge. (App. Ex. VIII, p. 1; R. at 17). Private First Class WA immediately showed the photographs to Specialist (SPC) DV and PFC NM. (App. Ex. VIII, p. 1; App. Ex. IV). The soldiers observed additional, similar photographs. (App. Ex. IV; App. Ex. X, Sworn Statements of PFC NM and SPC DV). They also observed images of civilian women and "clothed children bent over" in public places. (App. Ex. IV, encls. 2–3; App. Ex. X, Sworn Statement of SPC DV). Additionally, PFC WA saw a folder "that appeared to have pornographic materials." (App. Ex. IV).

The soldiers thought the images were a "SHARP issue," so SPC DV called the acting First Sergeant, Sergeant First Class (SFC) JM, to report the photographs. (App. Ex. VIII, p. 1; App. Ex. IV, encl. 3; R. at 21, 25). When SFC JM arrived at approximately 0125 on October 11, 2020, SPC DV said that Appellant had "inappropriate photos of Soldiers and civilians on his phone that are sexual in nature," also describing similar photos of clothed civilian adults and children. (App. Ex. IV, encl. 2). Wishing to verify the photos, SFC JM asked to see the

phone because he believed this to be a sexual harassment issue, which would be in "'CID's lane.'" (App. Ex. VIII, p. 2).

Private First Class WA voluntarily unlocked and gave SFC JM the phone with the same gallery open "to show him the pictures, so he would know [what] the whole situation was, so he could possibly take action, like actions that I couldn't take myself." (R. at 22-23; App. Ex. VI, ex. 2; App. Ex. VIII, pp. 1–2). After SFC JM observed photos that were "zoomed in" on a child, he became concerned that other inappropriate photographs might be on the phone. (App. Ex. VIII, p. 2; R. at 29). He exited the folder he was viewing, looked at other folder icons in the gallery, and ultimately found what he believed to be child pornography. (App. Ex. VIII, p. 2; R. at 31–33). He exited the photo gallery, put the phone down, and told the other soldiers to leave the phone alone and not to inform Appellant. (App. Ex. VIII, p. 2; R. at 34). Then, SFC JM called U.S. Army Criminal Investigation Command (CID), but he could not reach any agents. (R. at 34). He texted the brigade sexual assault response coordinator and briefed the commander. (R. at 34).

The following morning, SFC JM coordinated with the brigade judge advocate who successfully contacted CID at approximately 0854 on October 11, 2020. (App. Ex. VI, ex. 4). At approximately 1015 on October 11, 2020, SFC JM approached Appellant in his tent and told him to take his cell phone and leave with

him. (App. Ex. VIII, p. 2; R. at 43). Law enforcement handcuffed Appellant, took his phone and wallet, and transported them to the Fort Polk CID office. (App. Ex. VIII, p. 2). No one informed Appellant that they found anything on his phone.[2] (App. Ex. VIII, p. 2).

At 1242, Special Agent (SA) JM informed Appellant that he was suspected of possessing, viewing, distributing, and manufacturing child pornography. (App. Ex. VIII; App. Ex. VI). Appellant requested an attorney. (App. Ex. VI, ex. 4). Special Agent JM then asked Appellant for consent to search his phone. (App. Ex. XI, ex. 4, 5). Appellant gave his written consent at 1253. (App. Ex. VIII, p. 3; App. Ex. VI, ex. 5). At the time Appellant voluntarily consented to the search of his phone, he was unaware that PFC WA, SFC JM, or the other soldiers had seen the photos on his cell phone. (App. Ex. VIII, p. 3). Instead, Appellant's "line of thought" when he consented to the search was, "well, if you're going to search i[t] anyways why say no in the first place?" (R. at 49).

At 1347, a magistrate verbally authorized the seizure and search of the phone. (App. Ex. VI, ex. 4). At 1545, SA JM extracted photos, revealing known images of child pornography. (App. Ex. VI). On 15 October 2020, CID executed

[2] Appellant testified that SFC JM told him, "We have reason to believe you are doing something on your phone you shouldn't be doing," or words to that effect. (R. at 44). Sergeant First Class JM testified that he said, "Someone's here to see you," or "CID is here," and does not recall saying "anything to him about what was on his phone." (R. at 35, 38).

another search warrant on Appellant's barracks room and electronics, discovering additional child pornography on Appellant's laptop. (App. Ex. VI, ex. 4). Appellant had 4,009 images and 409 videos of child pornography on his phone and 20 images of child pornography on his laptop. (App. Ex. VI). The military judge granted the defense motion to suppress all of this evidence, and denied the government's requested reconsideration. (App. Exs. VIII, IX).

Summary of Argument

The military judge abused his discretion in two ways. First, he misapplied the law of common authority by ignoring the legal consequences of unlimited physical access to Appellant's phone and failing to perform the complete *Matlock*[3] test. Second, the military judge incorrectly applied the *Brown*[4] principles to the question of whether Appellant's consent attenuated any taint of a prior unlawful search. Therefore, this court should affirm the decision of the Army CCA.[5]

Standard of Review

In an Article 62, UCMJ, appeal, "this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party

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[3] *United States v. Matlock*, 415 U.S. 164 (1974).
[4] *Brown v. Illinois*, 422 U.S. 590 (1975).
[5] The military judge also misapplied the exclusionary rule and inevitable discovery. As this response concentrates on the issues Appellant raises in his petition, Appellee does not address these two additional bases. Appellee wishes to preserve these arguments in the event this Court orders supplemental pleadings.

which prevailed at trial." *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017). On matters of fact with respect to appeals under Article 62, UCMJ, we are "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *Id*. (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). Findings of law are reviewed de novo. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015).

A motion to suppress is reviewed for an abuse of discretion. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007) (citing *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002)). A military judge abuses his discretion when he: (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010); *United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013)).

Law and Argument

A. The appropriate question for this Court is whether the military judge abused his discretion in granting Appellant's motion to suppress.

Appellant requests review based on alleged errors in the Army Court's opinion, but this is an incorrect starting place. (Appellant's Br. 1). Most often in Article 62, UCMJ, appeals, "this Court reviews the military judge's decision

directly." *Pugh*, 77 M.J. at 3, 5 (noting "the lower court's opinion is not relevant to our review," and this Court has declined to look at the CCA's decision and "proceed[s] directly to considering the military judge's ruling"); *see also Keefauver*, 74 M.J. at 233 ("When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, we typically have pierced through that intermediate level and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling.") (cleaned up).

This review tracks that outlined in *United States v. Buford*—also an interlocutory Article 62, UCMJ, appeal regarding a motion to suppress evidence based on the Fourth Amendment. 74 M.J. 98, 99 ("The issue before us is whether the military judge abused her discretion when she suppressed the evidence."). Even where this Court granted an assignment of error titled, "Whether the Army Court of Criminal Appeals erred . . . in finding that the military judge's suppression of the identification evidence was an abuse of discretion," this Court actually evaluated whether "*the military judge* abused his discretion in suppressing" evidence. *United States v. Baker*, 70 M.J. 283, 284 (C.A.A.F. 2011) (emphasis added). Thus, to the extent this Court reviews the Army CCA's decision, it is only after first reviewing the military judge's decision. *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996). With this in mind, "regardless of the

wording of the certified issue," Appellee focuses on the military judge's abuse of discretion. *Id*.

B. Private First Class WA had common authority over the phone and consented to SFC JM's search.

The Constitution of the United States prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. A Fourth Amendment "search" is defined as "government intrusion into an individual's reasonable expectation of privacy." *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (citing *Soldal v. Cook County*, 506 U.S. 56, 69 (1992)). The Supreme Court has stated, "[t]he touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citations omitted). "[A] search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "[V]alid consent" is a "well-recognized exception" to the prohibition against warrantless searches. *Id*. at 219, 222. The consent exception extends to a third party with "'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" *Rader*, 65 M.J. at 32 (quoting *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

Common authority is "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize . . . the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the search." *Id.* at 33 (quoting *Matlock*, 415 U.S. at 171). A defendant who permits another to use his property may assume the risk that the person will allow others to access the property in his absence. *Matlock*, 415 U.S. at 171 n.7. Military Rule of Evidence 314(e)(2) recognizes this concept: a third party "may grant consent to search property when the person exercises control over that property."

"The control a third party exercises over property or effects is a question of fact." *Rader*, 65 M.J. at 33 (citation omitted). "Whether these facts rise to the level of 'joint access or control for most purposes,' is a question of law." *Id.* (citation and quotations omitted). Even if a third party does not have actual authority to grant consent, a search will not be suppressed if law enforcement reasonably believed the third party had authority to grant consent. *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

For two reasons, the military judge abused his discretion. First, PFC WA possessed common authority over the phone when Appellant provided unlimited physical access to it, and placed no restrictions—verbal or electronic—over the folders inside. Appellant also assumed the risk that PFC WA would authorize a

search in his own right—something the military judge entirely failed to address. Second, PFC WA consented to SFC JM's search when he placed no restrictions upon SFC JM's search and instead wanted to "help the investigation" such that SFC JM could learn "the whole situation." (App. Ex. VI, ex. 2, p.1; R. at 23).

1. Private First Class WA's joint access or control over the phone during his overnight guard shift amounted to common authority.

The manner in which Appellant provided his phone to PFC WA frustrated Appellant's expectation of privacy and amounted to common authority. Specifically, Appellant gave PFC WA his phone unsupervised for twelve hours, provided PFC WA the PIN code that unlocked it and gave unlimited access to the device, failed to verbally limit PFC WA's access or forbid him—or others—from viewing certain folders, and did not password-protect or encrypt any area of his phone. (R. at 14, 20–21, 43, 46). Of great consequence, Appellant conceded that he "did not expressly forbid [PFC WA] from going into certain areas" of his phone.[6] (R. at 55). Yet, despite acknowledging that PFC WA "had the ability to delve into any area of the phone," the military judge concluded that PFC WA did

[6] Appellant initially testified he limited PFC WA's access, and that PFC WA "promise[d] to restrict his use to those limits." (R. at 42). However, Appellant later conceded that he gave PFC WA the PIN to his phone and "did not expressly forbid him from going into certain areas" of his phone, including the photo gallery. (R. at 43, 45–46). Private First Class WA confirmed this later statement, testifying that Appellant "basically gave [him] free range on the phone." (R. at 16). The military judge concluded "the accused did not expressly restrict PFC [WA]'s use of the cell phone or its content." (App. Ex. VIII, p. 1).

not have "unfettered authority to use the phone" and did not possess common authority. (R. at 43, 45–46; App. Ex. VIII, p. 5). This was an abuse of discretion.

a. The military judge improperly focused on Appellant's supposed "understanding" of PFC WA's use of the cell phone.

The military judge improperly weighed Appellant's "expectation" as to whether PFC WA "would do anything more than make phone calls, send text messages, play games, and watch YouTube." (App. Ex. VIII, p. 5). This allowed Appellant's alleged, subjective, undeclared expectations to control. It was an abuse of discretion to afford Appellant an expectation of privacy based only on his subjective desires without also considering what was objectively reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Douglas, J., concurring) (noting that a subjective expectation of privacy must still "be one that society is prepared to recognize as 'reasonable'"). Instead, the military judge allowed Appellant's unspoken expectations to reign. Upon petition to this Court, Appellant similarly stakes his claim on "implied restrictions." (Appellant's Br. 22). Appellant's argument, however, perpetuates the same faulty logic: that unspoken, implied agreements would override tangible, physical access. (Appellant's Br. 4, 22–23).

The first reason this is incorrect is because the parties disagreed about whether anything was actually "impliedly off-limits." *Reister*, 44 M.J. 409, 414 (C.A.A.F. 1996). Whereas Appellant testified that PFC WA "set the limitations on himself," (R. at 45), PFC WA disagreed and stated Appellant "basically gave me

free range on the phone." (R. at 16). Even the military judge held "PFC [WA] had the ability to delve into any area of the phone," finding that the phone was totally unrestricted. (App. Ex. VIII, p. 5). Therefore, Appellant's "expectation" was an erroneous conclusion of law.[7] (App. Ex. VIII, p. 5). In light of such a stark disagreement as to whether any such unspoken agreement even existed, it surely cannot control a question of third-party consent.

Moreover, Appellant argues his phone was "impliedly off-limits." (Appellant's Br. 22). In so doing, he relies upon a sole adjective—"impliedly"—that this Court used in *United States v. Reister*, 44 M.J. 409, 414 (C.A.A.F. 1996). However, this term offers no refuge for Appellant. This Court emphasized "[t]he pivotal issue in this case was [the victim's] 'degree of control' over the property," focusing on the appellant's failure to take steps to secure his logbook. *Id*. at 414 (noting the logbook "was displayed openly," "not in a drawer, chest, lock box, or even a closet," contained "no external indicia of privacy").

Also, while "widely shared social expectations" can play a "significant part" in determining "the authority that co-inhabitants may exercise," the parameters here are not so well-defined. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006); *but*

[7] Appellant argues this was instead a "finding of fact" that bound the Army Court. (Appellant's Br. 24–25). However, it could not be a finding of fact because Appellant never testified as to his "expectation[s]." (R. at 41–46). Thus, even assuming it was a finding of fact, it would be a clearly erroneous one.

see United States v. Weston, 67 M.J. 390, 393 (C.A.A.F. 2009) (declining to "look more generally to society's widely shared social expectations in determining the reasonableness of consent searches"). The record lacks any set of societal expectations as it relates to these junior soldiers, and imposing alleged "understanding[s]" on this case is in error. (Appellant's Br. 22).

b. The military judge erred when he inverted the consequence of restrictions, or lack thereof.

The military judge also erred in his application of common authority when he inverted the consequence of restrictions. Essentially, the military judge expected the third party to expressly seek permission to each space within the phone, as opposed to the well-decided rule that the lack of restrictions establishes joint access or control for most purposes. *Reister*, 44 M.J. at 414 (finding common authority where the appellant "placed no express restrictions on N's access to the apartment" and otherwise left the evidence "displayed openly along with . . . miscellaneous clutter that were available for N's perusal and use"). Thus, when Appellant gave PFC WA his phone and "did not expressly forbid him from going into certain areas" of his phone, (R. at 45), he gave him unlimited access. *See Rader*, 65 M.J. at 34 (agreeing "it would be 'difficult to imagine how there could have been a greater degree of joint access, mutual use, or control'").

By focusing on whether Appellant gave affirmative permission to each folder of the phone, the military judge fell prey to an argument this Court rejected

in *Rader*. 65 M.J. at 34 ("We reject Appellant's argument that A1C Davis did not have control over or authority to consent to a search of the 'My Music' files within the computer because he only had permission to use the computer to play games or conduct maintenance."). The question is not whether the third party had explicit access to internal folders—indeed, the third-party in *Rader* did not have permission to access the "My Music" folder and had never used it before. 65 M.J. at 31. Instead, the lack of restrictions generally establish that an individual has control for most purposes. *Id.* at 34; *see also United States v. Eugene*, ARMY 20160438, 2018 CCA LEXIS 106, at *6 (Army Ct. Crim. App. Feb. 28, 2018) (mem. op.) (appellant permitted his spouse "to register her fingerprint to allow access to the contents" of his phone so "she could pay bills" temporarily, she exercised common authority "over the cellphone and could therefore lawfully authorize its seizure and search" after opening the KiK application to find pictures of underage girls), aff'd, 78 M.J. 132 (C.A.A.F. 2018).

With modern electronics, passwords are paramount. *Rader*, 65 M.J. 30, 31 (C.A.A.F. 2007); *see also Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (finding that where two individuals, Conrad and Trulock, shared a computer but "protected their personal files with passwords," Conrad only had the authority to consent to a "general search of the computer" and not Trulock's "password-protected files" because Trulock "concealed his password from Conrad").

Certainly, consent to use a device can be "limited in scope by its owner to certain applications or files." *Rader*, 65 M.J. at 34. The main way of setting such a limitation—especially without a verbal restriction as seen here—is to password-protect the particular private folder. *Id.* ("In the personal computer context, courts examine whether the relevant files were password-protected or whether the defendant otherwise manifested an intention to restrict third-party access.") (quoting *United States v. Aaron*, 33 F. App'x 180, 184 (6th Cir. 2002) (per curiam) (unpub. op.)).[8]

Not a single file on Appellant's phone was password protected.[9] (R. at 46). Without employing password restrictions upon his photos, Appellant took no steps to affirmatively exclude others. This heavily weighs in favor of finding common

[8] Appellant asserts the Army Court's first error occurred when it "invented a *requirement* to place 'express' restrictions or password protection on an electronic device to prevent ceding common authority over it." (Appellant's Br. 3) (emphasis in original). This is misplaced. The Army Court was not creating a novel legal test, but was correctly distinguishing between the accused's subjective "understanding" of the limitations and objective "*restrictions*," noting the lack of restrictions may give rise to common authority over the device. *Black*, 2021 CCA LEXIS 559, at *9 (emphasis in original). The Army Court was well within federal precedent in drawing such distinction.

[9] Notably, Appellant appeared to have at least basic technological literacy and could employ a password or other electronic restriction if he so wished. For example, Appellant distinguished the "biometric lock" on his phone with the "PIN code" that he chose to share with PFC WA. (R. at 43). Additionally, Appellant was familiar with how to "uninstall the Gallery app entirely, since the Gallery app on [his] phone belongs to Samsung and can be installed/uninstalled from the Google Play Store." (App. Ex. X, ex. 1, p. 32).

authority, and the military judge erred when he failed to mention Appellant's unencrypted and unprotected photo gallery.

2. The military judge misapplied the law when he failed to conduct the other half of the Matlock test—whether assumption of risk applied.

Appellant assumed the risk that PFC WA would, in his own right, permit others to search the phone. This is another method that establishes common authority. *Matlock*, 415 U.S. 164, 171 n.7 ("The authority which justifies the third party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."). The Seventh Circuit noted, "This assumption of risk analysis has predominated in recent Fourth Amendment cases," and it held that an assumption of risk theory could support a finding of common authority. *United States v. Cook*, 530 F.2d 145, 148–49 (7th Cir. 1976). Reviewing *Matlock*, the Seventh Circuit held, "The terms 'mutual use of the property by persons generally having access or control for most purposes' were clearly given content by the later phrase and the determining factor in the decision was that of assumption of the risk." *Id*. at 149. A Nevada district court similarly focused more on the third-party's *ability* to access the phone, as opposed to the authority to access the phone. *See United States v. Alexander*, 2019 U.S. Dist.

LEXIS 77470, at *11–12 (D. Nev. 7 May 2019) (holding the defendant "had to have assumed the risk given the configuration of the phone and [the victim's] access to its entire contents").

Nowhere in the military judge's ruling does he mention assumption of risk. (App. Ex. VIII). This is error. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) ("[I]n allowing [his cousin to share use of a duffel bag] and in leaving it in his house, [the suspect] must be taken to have assumed the risk that [the cousin] would allow someone else to look inside."); *United States v. Basinski*, 226 F.3d 829, 2834 (7th Cir. 2000) ("[W]here a defendant allows a third party to exercise actual or apparent authority over the defendant's property, he is considered to have assumed the risk that the third party might permit access to others, including government agents."). The military judge abused his discretion when he omitted this concept from his analysis.

Indeed, Appellant assumed the risk that PFC WA would permit others to inspect the phone in his own right. Most remarkably, PFC WA's use of the phone was totally unsupervised. (R. at 15). They both knew PFC WA would "use it for the night" while Appellant slept in an entirely separate location—unconcerned as to PFC WA's ability to venture into every crevasse in his phone. (R. at 15, 42). Further, Appellant wrote the PIN to his cell phone "on the table" in the Tactical Communications Node—a public duty location where at least "two people during

night shift [were on duty] at all times." (App. Ex. IV, encl. 1, p. 1; App. Ex. IV, encl. 2, p. 1). Appellant gave his phone to PFC WA alongside two other soldiers also on night-duty that evening and did not tell, intimate, or hint to PFC WA that he "couldn't show the phone to anyone else." (R. at 20, 26, 42; App. Ex. IV, p. 1).

The manner in which Appellant relinquished control of his phone absolutely "assum[ed] the risk" that PFC WA would permit others access to his phone. *Jackson*, 598. F.3d at 347. Therefore, it was an abuse of discretion to hold Appellant did not possess common authority—especially without conducting any analysis on the assumption of risk theory.

3. Private First Class WA consented to SFC JM's search of Appellant's phone.

The military judge held PFC WA "did not consent to a search of the cell phone for child pornography," imposing a requirement not supported in the law. (App. Ex. VIII, p. 5). The military judge believed PFC WA needed to have specifically authorized SFC JM to look in each folder within the phone's photo gallery. (R. at 72–73; App. Ex. VIII, p. 5). This was an abuse of discretion.

The onus is on the person providing consent to impose search restrictions. "The scope of a search is generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citation omitted) (upholding the search of paper bag inside car trunk where the consenting party "did not place any explicit limitation on the scope of the search"). In situations like this, government officials

are not required to separately request permission to search each container inside that which they have received consent to search. *Id*. at 252. Instead, the individual providing consent has the "responsibility to limit the scope of [that] consent." *United States v. McSween*, 53 F.3d 684, 688 (5th Cir. 1995). The "question is *not* to be determined on the basis of the subjective intentions of the consenting party or the subjective interpretation of the searching officer," but simply "what the reasonable person would have believed to be the outer bounds of the consent that was given." *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir. 2003) (emphasis in original); *United States v. Wallace*, 66 M.J. 5, 8 (C.A.A.F. 2008) (holding it is the "objective reasonableness of the consent—not Appellant's supposed impression—that controls").

While consent may be limited, PFC WA placed no such limitations here. (R. at 19–23); Mil. R. Evid. 311(e)(3). Likewise, case law has not found limitations where the third party has provided none. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (rejecting petitioner's argument that his cousin "only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments," and stating: "We will not, however, engage in such metaphysical subtleties in judging the efficacy of [the third party's] consent.").

Private First Class WA—already suspecting the situation could stem deeper, "affect[ing] a whole brigade, possibly," (R. at 21)—offered "to show [SFC JM] the pictures, so he would know what the whole situation was, so he could possibly take action." (R. at 23). In an effort to aid SFC JM's search, PFC WA handed him the phone unlocked and open to the photo gallery. (R. at 84) ("The photos weren't pulled up on the phone, just the gallery in general."). Yet, the military judge erroneously divorced the photos of "clothed, female Soldiers" from the "child pornography," expecting SFC JM to seek permission to look within each folder of the gallery.[10] (App. Ex. VIII, p. 5). Relying upon incorrect legal principles, the military judge drew a limitation between photos outside the "gallery or file containing the photographs of the female Soldiers" and the child pornography, even when PFC WA imposed no such a limitation on SFC JM. (App. Ex. VIII, p.

[10] The military judge further exposed his erroneous view on the record when he told the trial counsel the exact opposite of what the federal case law holds—that "even if they have mutual authority to consent to something, they still have to say, 'Yes, you can search these areas. You can look in this bedroom and not that bedroom.'" (R. at 72). The military judge thought the only relevant question regarding PFC WA's consent for SFC JM to search Appellant's phone was "what exactly did you tell him what he could look at?" (R. at 74). This conversation reveals the military judge's faulty logic—that PFC WA would have had to specifically authorize certain areas, instead of providing the general consent to look in the phone at large.

5). Federal case law does not impute nonexistent restrictions on consent, and it was error for the military judge to do so here.[11]

The military judge's view of consent conflicts with the great weight of federal precedent on this topic. *See e.g., United States v. Davis*, 967 F.2d 84, 88 (2d Cir. 1992) (finding *Jimeno* applied to third party consent scenarios and holding that when the third party "did not place any explicit limitation on the scope of the search," the government agents could reasonably search packages inside a footlocker); *United States v. Rankins*, 1991 U.S. App. LEXIS 19429, at *7–8 (4th Cir. 1991) (holding that when respondent granted the officer "permission to search his car and did not place any explicit limitation on the scope of the search," it was "objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car" that may contain contraband); *United States v. Crain*, 33 F.3d 480, 484 (5th Cir. 1994) (noting where the consenting party "chose not to place any explicit limitations in response to [law enforcement's] general request," that is evidence of "general consent"); *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) ("Generally, consent to search a space includes consent to search containers within

[11] For this same reason, it was erroneous for the military judge to focus on what PFC WA had seen on the phone. It is uncontested that PFC WA had "no reason to believe child pornography was on the phone," (App. Ex. VIII, p. 5), but that has no relevance to the areas in which SFC JM could legally search.

that space where a reasonable officer would construe the consent to extend to the container."); *United States v. Kim*, 105 F.3d 1579, 1582 (9th Cir. 1997) ("The cases upholding searches generally rely on the consent-giver's unlimited access to property to sustain the search.").

Finally, photos of a criminal nature could certainly be located anywhere within Appellant's photo gallery, and therefore it was especially reasonable and within the scope of PFC WA's consent for SFC JM to search all photos on Appellant's phone. After all, PFC WA had notified SFC JM of inappropriate photos and voluntarily gave SFC JM the phone, even knowing the potential for an "unrestricted" SHARP case. (App. Ex. IV, encl. 2; R. at 22). Therefore, when SFC JM was searching for evidence of these inappropriate photos, it was perfectly legitimate to look inside photo gallery folders. *See Jackson*, 598 F.3d at 349 (holding the officer did not exceed the scope of consent when the appellant "placed no limit on the extent of the search," and evidence "could have been located anywhere in the computer case").

Appellant takes issue with the Army Court's analogy between his cell phone and a container. (Appellant's Br. 28). This is a nonissue because the basic legal principle remains that the standard for "measuring the scope" of consent is an objective one: "[W]hat would the typical reasonable person have understood" the exchange to mean?" *Jimeno*, 500 U.S. at 251; *see also United States v. Wallace*,

66 M.J. 5, 8 (C.A.A.F. 2008) (assessing "what would the typical reasonable person have understood by the exchange"). Here, PFC WA asked SFC JM to look at photos; SFC JM looked at photos. (R. at 23; 29). Sergeant First Class JM's search was narrow and objectively reasonable. When SFC JM's search yielded additional criminal photos, this was exactly what PFC WA had in mind when he wanted SFC JM to learn the "whole situation." (R. at 23). For this reason, it was an abuse of discretion for the military judge to fault SFC JM for taking "the initiative to begin viewing other files and folders on the phone," as that was perfectly in line with the broad scope of PFC WA's consent. (App. Ex. VIII, p. 5).

C. Appellant's voluntary consent to search his phone attenuated the taint of SFC JM's purported unlawful search.

"Well established precedent teaches us that the question here is . . . whether his consent was 'an act of free will [sufficient] to purge the primary taint of the unlawful invasion.'" *Kaupp v. Texas*, 538 U.S. 626, 632 (2003) (per curiam) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). "The threshold question is whether consent is voluntary, without influence of the prior unlawful search." *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012). "The granting of consent to search may sufficiently attenuate the taint of a prior violation." *United States v. Conklin*, 63 M.J. 333, 338 (C.A.A.F. 2006).

In analyzing whether an accused's consent to search was obtained by the exploitation of an unlawful search, this court examines three factors espoused by

the Supreme Court in *Brown*: "(1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the original unlawful conduct." *Dease*, 71 M.J. at 122 (citations omitted). "None of these three factors is dispositive of attenuating the taint of the original wrongdoing, but rather they are examined in aggregate to determine the effect of an appellant's consent." *Id*. (citing *Brown*, 422 U.S. at 603–04).

The military judge misapplied each *Brown* factor and arrived at an erroneous conclusion of law when he held "the taint of SFC [JM]'s earlier search" overshadowed Appellant's consent. (App. Ex. VIII, p. 7). First, the record is replete with intervening circumstances sufficient to attenuate any taint from SFC JM's search. Second, the record lacks any purposeful or flagrant police misconduct. Finally, instead of evaluating the record as a whole, the military judge addressed only one detail—how law enforcement learned of Appellant's misconduct. (App. Ex. VIII, p. 8). While that may be a consideration, it is far from the sole consideration. Accordingly, the military judge abused his discretion by using an incomplete and erroneous legal analysis.[12]

1. The military judge misapplied the second *Brown* factor.

[12] Appellee does not concede that the first *Brown* factor weighs in favor of Appellant.

Critical, dispositive details are absent from the military judge's analysis, causing him to misapply the second *Brown* factor—intervening circumstances. Namely, the chronology of consent and the manner in which Appellant provided consent leave no doubt that the second *Brown* factor weighs in favor of the government.[13] Upon review of the totality of these details, the military judge's misapplication becomes clear.

First, the chronology of Appellant's consent demonstrates the lack of taint. Where Appellant enjoyed a full night's sleep, (R. at 42–43), retrieved his phone at shift change around 0800 the next morning, (App. Ex. IV, p. 2; R. at 15), and lounged in the sleeping area reading on his phone until around 1015 when SFC JM came to retrieve him, (R. at 43), his subsequent consent was entirely an act of independent free will. These are "facts or events [that] create a discontinuity between the illegal seizure and the consent such that the original illegality is weakened or attenuated'" and provide a basis for setting aside the military judge's

[13] At trial, the government averred there were no intervening circumstances under the second *Brown* factor. (App. Ex. V). The military judge did not accept this concession as he considered the issue, and he conducted an analysis. (App. Ex. VIII, p. 8); *see United States v. Suarez*, ARMY 20170366, 2017 CCA LEXIS 631 (Army Ct. Crim. App. Sep. 27, 2017) (mem. op.) (holding "when the government concedes an issue at trial *and the military judge accepts the concession*, then the government cannot complain to this court that the military judge erred") (emphasis added). Also, the presence of intervening circumstances is more than just "a legal theory" and is apparent from "the record material before the military judge." *United States v. Lloyd*, 69 M.J. 95, 101 (C.A.A.F. 2010). Thus, this Court may assess whether he correctly applied the law.

ruling. *United States v. Shrum*, 908 F.3d 1219, 1238 (10th Cir. 2018) (quoting *United States v. Fox*, 600 F.3d 1253, 1260 (10th Cir. 2010)).

Moreover, the manner in which Appellant provided consent demonstrates the lack of taint. Prior to his escort to CID, Appellant had not been in continuous custody. (R. at 43); *contra United States v. Shetler*, 665 F.3d 1150, 1159 (9th Cir. 2011) (finding "no intervening circumstances that break the causal chain" where "Shetler spent the intervening period in detention"). In fact, Appellant got his phone back. (App. Ex. IV, p. 2; R. at 15). The change in location from where SFC JM searched his phone to the CID office where Appellant provided consent is also persuasive. (R. at 39); *see United States v. Darnall*, 76 M.J. 326, 331 (C.A.A.F. 2017) (noting "the drive to the CID building" as an intervening circumstance). Once at CID, a different individual, SA JM—an agent uninvolved with SFC JM's search—requested Appellant's consent. (R. at 60–63; App. Ex. VI, encl. 4, p. 2); *see United States v. Lopez-Garcia*, 565 F.3d 1306, 1316 (11th Cir. 2009) (holding that different law enforcement agents could be an intervening circumstance); *but see Conklin*, 63 M.J. at 339 (the offending agents had fully briefed the new agents, and therefore this was not a sufficient intervening circumstance).

Additionally, law enforcement notified Appellant of his rights on three separate occasions—before and after the ride to CID and again line-by-line through the consent form. (R. at 39, 48, 63); *see Brown*, 422 U.S. at 602 (noting the

Miranda warnings were not a "cure-all" but one consideration as to whether consent is "sufficiently a product of free will"); *Conklin*, 63 M.J. at 334 (noting, while "not a panacea," the "subsequent consent may be a good treatment for the poison"); *Darnall*, 76 M.J. at 331 (classifying "Appellant being advised of his rights" as an intervening circumstance).

Most importantly, Appellant talked through his reasoning for providing consent—and it had nothing to do with SFC JM's search. (R. at 49). Appellant was oblivious to any prior search almost twelve hours earlier. (R. at 53; App. Ex. III, encl. 2, p. 1). Instead, after Appellant learned that SA JM would request a search authorization if he were to decline consent, he took a "why say no in the first place" approach. (R. at 49). No "psychological disadvantages" were at play because Appellant had no clue that the "cat [was] already out of the bag." *Conklin*, 63 M.J. at 341 (quoting *Darwin v. Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring in part and dissenting in part) (noting "Appellant did not know of the prior unlawful act, and thus did not face 'the sense of futility' and psychological disadvantages that might arise if the individual concludes 'the cat is already out of the bag'")).

Further, when Appellant provided consent, he did so in a knowledgeable and informed fashion—requesting to speak with an attorney and providing only limited consent to search his cell phone. (App. Ex. VI, encl. 5; R. at 49); *see United States*

v. McGill, 125 F.3d 642, 644 (8th Cir. 1997) (noting the "question turns on whether McGill understood his right to withhold consent" and finding it "apparent" that he did so); *United States v. Whisenton*, 765 F.3d 939, 942 (8th Cir. 2014) (quoting *United States v. Greer*, 607 F.3d 599, 564 (8th Cir. 2010)) (noting the "opportunity 'to pause and reflect, to decline consent, or to revoke consent' help demonstrate that the illegality was attenuated"). Even once Appellant learned that SFC JM had seen the child pornography on his phone, he did not revoke his consent. (R. at 53–54). Appellant was still "waiting for the TMP" and could easily have walked back into CID to change his mind, but he apparently declined to do so. (R. at 53). Consequently, the circumstances surrounding his consent themselves were significant intervening circumstances.

In weighing this *Brown* factor, the military judge erroneously applied a "but-for" analysis—something the Supreme Court, this Honorable Court, and the Army Court have expressly rejected. *See Brown*, 422 U.S. at 607 ("*Wong Sun* squarely rejected, however, the suggestion that the admissibility of statements so obtained should be governed by a simple 'but for' test that would render inadmissible all statements given subsequent to an illegal arrest.") (citing *Wong Sun*, 371 U.S. at 487–488); *Khamsouk*, 57 M.J. at 290 (noting "it is not whether the evidence would have come to light 'but for' the warrantless apprehension").

Rather than asking "the more apt question," which is whether "the evidence to which the instant objection is made has been 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 487–88, the military judge only looked at what CID "relied" upon. (App. Ex. VIII, p. 8). The military judge focused on how CID came to know about Appellant's child pornography—"the results of SFC [JM]'s unlawful search formed the only basis on which the accused was suspected." (App. Ex. VIII, p. 8). The military judge reasoned that because the "CID agents had no other information of wrongdoing by the accused," Appellant would not otherwise be the subject of a CID investigation.[14] (App. Ex. VIII, p. 8). Our precedent rejects this logic.

It does not matter that SFC JM's search led CID to investigate Appellant. *McGill*, 125 F.3d at 644 (quoting *Ramos*, 42 F.3d at 1164) ("Even if consent is the result, in a 'but for' sense, of a Fourth Amendment violation, the consent will validate a subsequent search if the consent is 'sufficiently an act of free will to purge the primary taint.'"). Under *Brown*, the question the military judge should

[14] This is an erroneous finding because law enforcement indeed had other information of Appellant's wrongdoing—namely, the surreptitious photos of his female colleagues. (R. at 17–19). Despite the military judge's footnote saying this misconduct "appear[ed] to have played no part in the subsequent CID investigation," this is contrary to the record. (App. Ex. IX, ex. 1, p. 32) ("One of the items CID is investigating is merely listed as UCMJ Article 134.").

have asked is whether additional circumstances led to consent free and clear of the unlawful search.[15] *See Dease*, 71 M.J. at 122. When he employed the wrong legal standard, he abused his discretion.

2. The military judge misapplied the third *Brown* factor.

Absent from the record is any "purpose and flagrancy of the original unlawful conduct." *Dease*, 71 M.J. at 122 (citing *Brown*, 422 U.S. at 603–04). The facts here demonstrate that not only was SFC JM an innocuous actor, but CID conducted its own independent investigation. Thus, the military judge erroneously ruled that this factor weighed in favor of Appellant. (App. Ex. VIII, p. 8).

Sergeant First Class JM had no idea that by looking in Appellant's phone, he could violate Appellant's constitutional rights. *See Khamsouk*, 57 M.J. at 293 (finding "no evidence in the record that SA Coyle knew he was committing a constitutional violation and notwithstanding that knowledge, intentionally entered unlawfully"). When the trial counsel asked SFC JM whether he understood there to be any "reason why you may not be able to just look at a Soldier's phone," SFC JM's response underlines his harmlessness: "I mean, after you said, I guess, the

[15] To the extent this Court in *Conklin* used the "but-for" analysis, the easily distinguishable facts make it inapplicable to this case. 63 M.J. at 339 ("Simply stated, the AFOSI agents would not have been interested in talking to Appellant but for the information relayed to them as a direct result of the unlawful search that had just taken place."). Unlike the agents in *Conklin*, CID took independent steps not directly on the heels of SFC JM's search and ultimately investigated Appellant's Article 134, UCMJ violation. (R. at 31; App. Ex. IX, ex. 1, p. 32).

Fourth Amendment and whatever else that article was, yeah. I'm assuming I can't do that now." (R. at 37). Moreover, SFC JM was the acting First Sergeant who just learned Appellant had inappropriate photos of "[his] Soldiers"—a phrase he used at least four times—indicating his concern for their safety and wellbeing. (R. at 29). He was trying to do the right thing for his female troops, not to act as an arm of law enforcement. Even after discovering child pornography, SFC JM "still tr[ied] to treat [Appellant] like a Soldier, innocent until proven guilty" and recognized "[t]hat's not [his] lane to judge or anything." (R. at 38).

Further, CID conducted a proper, independent investigation. (App. Ex. VIII, p. 8). Upon receipt of information from the brigade judge advocate, CID immediately approached a magistrate. (App. Exs. VII; VI, encl. 4, p. 1). This step is critical, as it demonstrates CID's good faith effort to protect Appellant's constitutional rights. *Cf. United States v. Leon*, 468 U.S. 897, 922 (1984) (noting that "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search"). Then, instead of forging ahead and using SFC JM's search as ammunition to encourage Appellant to consent to a search, CID returned to the neutral and detached authority to seek a magistrate authorization. (App. Ex. VI, encl. 4, p. 4). Even after Appellant granted consent to search his phone, CID continued to pursue the

magistrate authorization—indicating their sincerity in trying to lawfully gather evidence in this case. (App. Ex. VI, encl. 4, p. 4).

What is absent is any "quality of purposefulness" in CID's conduct. *Brown*, 422 U.S. at 605. Special Agent JM meticulously informed Appellant of his rights, going "line by line" through the consent form. (R. at 63; App. Ex. VI, ex. 4, p. 4); *see United States v. Thomas*, 83 F.3d 259, 260 (8th Cir. 1996) (noting that when an accused was made specifically aware of his right to refuse consent, it was a strong indicator that law enforcement was not attempting to exploit an illegal situation). Further there was no orchestrated ruse, no trickery or fishing expedition, and no tactical use of surprise, fright, or confusion. *Brown*, 422 U.S. at 605; *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) ("The third factor of the attenuation doctrine . . . favor[s] exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant."). Yet, without citing any obligation upon law enforcement to investigate the lawfulness of a prior search conducted by a different party, the military judge abused his discretion when he faulted CID for not "question[ing] the lawful basis of SFC [JM]'s search." (App. Ex. VIII, p. 8).

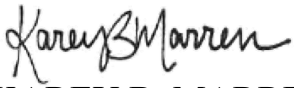
To the extent *Conklin* lowers the bar for the third *Brown* factor, neither SFC JM nor CID fell within that category. *Conklin*, 63 M.J. at 339 (noting that while it was "hesitant to call TSgt Schlegel's actions 'flagrant,' they were certainly unwise,

avoidable, and unlawful"); *see also Darnall*, 76 M.J. at 332 (noting the agent's misconduct need not "be outrageous for the third factor in *Brown* to apply" and faulting the agent for conducting "a hasty and flimsy initial investigation"). Most importantly, SFC JM's search was not "unwise, avoidable, and unlawful" because it was completely legal. *Id*. at 332. Private First Class WA, a person having common authority over Appellant's phone, provided consent to search. *See supra* pp. 13–32; *Matlock*, 415 U.S. at 171; Mil. R. Evid. 314(e)(2). Additionally, whereas the noncommissioned officer in *Conklin* had "previously been involved in an inspection" and already once the subject of appellate criticism, SFC JM had no prior involvement with law enforcement nor any law enforcement training. *Id*. at 335; (R. at 33; App. Ex. VI, ex. 3). The record lacks any indication SFC JM attempted to circumvent Appellant's rights, and he had no knowledge of Appellant's rights. (R. at 38). Moreover, CID delivered more than a "hasty and flimsy" investigation. *Darnall*, 76 M.J. at 332. Unlike the law enforcement officers in *Darnall* who "infringed inexcusably" upon the appellant's rights, *Id*., the same cannot be said about the agents here who thrice approached a military magistrate. (App. Ex. VII, pp. 1–4). Albeit unnecessary, SA JM went so far as to clarify in her case activity summary that the "Search of [Appellant's] phone will be based o[n] the Magistrate Authorization, not of this Consent." (App. Ex. VII, p. 4). This showed abundant care to respect Appellant's constitutional rights.

Finally, CID exercised restraint in this case. Instead of having SFC JM immediately rouse Appellant from sleep and question him, CID told SFC JM to "stand fast" until morning. (App. Ex. IX, ex. 1, p. 26); *compare Conklin*, 63 M.J. at 335 (law enforcement went directly to the DFAC and sought appellant's consent). In fact, SFC JM allowed Appellant to retake possession of the phone. (App. Ex. VIII, p. 2). Therefore, the government actors here exercised patience and fairness such that the military judge abused his discretion when he found SFC JM and CID's actions blameworthy. (App. Ex. VIII, p. 8).

CONCLUSION

WHEREFORE, the United States respectfully requests this honorable court affirm the Army Court's decision setting aside the military judge's ruling.



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1. This brief complies with the type-volume limitation of Rule 21(b) because this brief contains 8,945 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on February 7, 2022.

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