IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
First Lieutenant (O-2) **ADALBERTO BRINKMAN-CORONEL,** United States Army, Appellant	)	Crim. App. Dkt. No. 20220225 USCA Dkt. No. 24-0159/AR

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

Granted Issues

I. WHETHER THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE FAILED TO RECUSE HIMSELF FROM APPELLANT'S COURT-MARTIAL FOR THE APPEARANCE OF BIAS.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS EVIDENCE DISCOVERED FROM THE SEARCH OF APPELLANT'S "VACUUM PHONE" AND ALL DERIVATIVE EVIDENCE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866(d). This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On May 3, 2022, a military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of attempted sexual assault and sexual abuse of a child, absence from his appointed place of duty, communicating indecent language, wrongfully possessing child pornography, and three specifications of wrongfully distributing child pornography in violation of Articles 80, 86, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 886, and 934 [UCMJ] (2019). (JA 245). On May 4, 2022, the military judge sentenced

Appellant to confinement for nine years and ten days, and a dismissal. (JA 248). On March 22, 2024, the CCA affirmed the findings and sentence.[1] (JA 03). On October 7, 2024, this Court granted Appellant's petition for grant of review and ordered briefing on this matter. (JA 1).

Statement of Facts

In April 2021, Appellant made plans via an online dating application to have a sexual encounter with a 14-year-old boy. (JA 153–62). Appellant was not chatting with a real 14-year-old boy; instead, the fictitious boy was an undercover law enforcement agent. (JA 153–62). After Appellant showed up for sex with the fictitious boy, Army Criminal Investigative Division [CID] agents apprehended him and seized his phone. (JA 162, 164–66, 168). Investigators released Appellant to his company commander, who imposed conditions on his liberty. (JA 172–76).

When Appellant failed to show up two days later at either staff duty or morning formation as ordered, Appellant's commander and CID searched for him. (JA 182–87, 190). After speaking with Appellant's husband, both Appellant's unit and CID feared for Appellant's well-being. (JA 186). After Appellant's husband informed CID about suspicious messages regarding a hidden phone in an old vacuum and provided CID with consent to search the apartment for clues regarding

[1] Judge Hayes, dissenting in part, argued that although the military judge did not abuse his discretion in presiding over Appellant's court-martial, he did abuse his discretion when he denied Appellant's motion to suppress evidence discovered from a search of Appellant's "vacuum phone." (JA 16).

Appellant's whereabouts, CID located the second phone. (JA 190–99). The CID agents found a phone in a vacuum [vacuum phone] and a quick manual search of the phone revealed "goodbye" messages to Appellant's loved ones. (JA 190–99). Additional forensic examination was conducted on this phone in an effort to locate Appellant. (JA 200–03). While looking for clues of Appellant's whereabouts, a CID digital forensic examiner found images and videos of suspected child pornography. (JA 203–04). After a magistrate authorization, additional searches of this phone revealed that Appellant distributed videos containing child pornography and chatted about his interest in young boys with other users. (JA 205–39).

Additional facts are incorporated below.

Summary of Argument

I. The lower court did not err.

The lower court did not err when finding that the military judge did not abuse his discretion when he denied defense's motion to disqualify himself from Appellant's court-martial. The specific circumstances listed in Rules for Court-Martial [R.C.M.] 902(b) did not require the military judge to disqualify himself from Appellant's court-martial. The surrounding circumstances also did not warrant the military judge to disqualify himself upon a reasonable appearance of bias under R.C.M. 902(a).

The military judge's former role as a special victim prosecutor [SVP] is a common career progression for a military judge. The fact that he was formerly the SVP in the same jurisdiction had no bearing on Appellant's case because the military judge sectioned himself off prior to Appellant's case reaching his office. The military judge disclosed that he kept notes and files of the cases he was conflicted on and that he had no familiarity with Appellant's case. It was reasonable for him, based on the steps he took and the plain language of the R.C.M., to deny defense's motion to disqualify himself as the military judge.

Additionally, the military judge had a professional relationship with counsel from both parties. There is no evidence on the record to suggest that this relationship created an appearance of bias. Even if this court were to disagree and find that the military judge should have disqualified himself, reversal is not warranted.

II. The military judge did not abuse his discretion.

The military judge did not abuse his discretion when he denied defense's motion to suppress the evidence recovered from Appellant's vacuum phone. The military judge's decision relied upon evidence that the record supported and he did not misapply the law. The military judge did not abuse his discretion when he found Appellant's husband provided lawful consent to search Appellant's premises and the vacuum phone in a good faith effort to locate Appellant. The facts on the

record reasonably supported the finding that Appellant's husband had common authority over the premises and the vacuum phone. However, even if he did not, he had apparent authority and investigators were acting in good faith when relying upon his apparent authority. The military judge's finding that investigators did not exceed the broad scope of consent Appellant's husband gave was not clearly erroneous.

The military judge's finding that investigators also operated under a valid and good faith emergency exception to the Fourth Amendment was also not an abuse of discretion. The facts before the military judge reasonably supported the finding that investigators and Appellant's commander were acting in a good faith effort to locate him and save his life. Not only were their efforts in good faith, but Appellant's actual attempt to take his own life corroborated this belief. Although certain efforts were more fruitful than others, it was ultimately the efforts of law enforcement and Appellant's commander that saved Appellant's life.

I. WHETHER THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE FAILED TO RECUSE HIMSELF FROM APPELLANT'S COURT-MARTIAL FOR THE APPEARANCE OF BIAS.

Additional Facts

Prior to assuming his judicial duties, the military judge served as the "special victim prosecutor for Hawaii from 2018 until approximately May of 2021." (JA

39). In that capacity, the military judge worked with both the detailed trial and defense counsel and assisted them with investigations involving sexual assault, child abuse, and domestic violence while they were serving as military justice advisors for brigades within the 25th Infantry Division. (JA 39–40). The military judge also worked professionally with the assistant trial counsel who was a special victim's counsel from 2020 until 2021. (JA 40). The military judge did not supervise any of the three counsel and classified his relationship with them as "professional." (JA 40).

The military judge clarified that he "[knew] nothing of [the] case except what's been provided to [him] by counsel through the course of this court-martial referral process. And [] just to be sure, [he] checked files . . . ." (JA 40). The military judge sua sponte volunteered this information at the beginning of Appellant's arraignment, prior to inviting either side to inquire whether there were grounds to challenge his qualifications to sit as military judge. (JA 40–41).

Trial defense counsel subsequently conducted voir dire. (JA 41). During voir dire, the military judge repeatedly affirmed that he knew nothing of the case. (JA 41). The military judge volunteered that, from the context of Charge I, he assumed the charge was related to Operation Keiki Shield [OKS]. (JA 41–42). Although Appellant's misconduct occurred toward the end of the military judge's tenure as SVP, he was not present in any meetings regarding Appellant's case. (JA

42). The military judge was confident that this was so because he kept files on cases that he reviewed and because he was "sectioned off" during this time, presumably to avoid conflicts of interest. (JA 42). The military judge confirmed that neither trial counsel, nor any other member of the government, ever sought his advice on Appellant's case when he was the SVP. (JA 42).

Appellant, through trial defense counsel, sought to disqualify the military judge under R.C.M. 902, first arguing that the military judge's "impartiality might reasonably be questioned just based off of [his] background as a [SVP] . . . during a timeframe in which some of this misconduct did arise." (JA 43–44). Second, Appellant argued the military judge should be disqualified based upon his relationships and work with both trial counsel. (JA 44). The military judge denied Appellant's challenge. (JA 45). Shortly thereafter, Appellant elected to be tried by the military judge alone. (JA 46).

Standard of Review

This court reviews a "military judge's disqualification decision . . . for an abuse of discretion." *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (citation omitted). "A military judge's ruling constitutes an abuse of discretion if it is arbitrary, fanciful, clearly unreasonable or clearly erroneous." *Id*. The court cannot find an abuse of discretion if it "merely would reach a different conclusion." *Id*.

Law

"An accused has a constitutional right to an impartial judge." *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001) (citation omitted). This right is implemented via R.C.M. 902, which provides for "two bases for disqualification of a military judge." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011). First, "a military judge shall disqualify himself . . . in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). Second, "[a] military judge shall disqualify himself . . . (1) [w]here [he] has a personal bias or prejudice concerning a party of personal knowledge of disputed evidentiary facts concerning the proceeding[; or] (2) [w]here the military judge has acted as counsel . . . to any offense charged or in the same case generally." R.C.M. 902(b). "There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings." *United States v. Foster*, 64 M.J. 331, 332 (C.A.A.F. 2007) (citation omitted).

Argument

1. There was no appearance of bias.[2]

The appearance of bias is judged objectively, and this court should consider "[a]ny conduct that would lead a reasonable man knowing all the circumstances to

[2] Appellant does not argue that this Court should consider whether actual bias existed but limits his argument to apparent bias. (Appellant's Br. 17, n.6). For that reason, the government does not address actual bias and would rely on its brief to the CCA if this Court were to consider that matter.

the conclusion that the judge's impartiality might reasonably be questioned." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012). "When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *Martinez*, 70 M.J. at 157–58.

Appellant argues that the military judge should have disqualified himself because "the timeline of [Appellant's] charged offenses—May 24, 2019, to April 2021—occurred during the military judge's tenure as the SVP and in the same jurisdiction where he served as the 'subject matter expert for all of Hawaii.'" (Appellant's Br. 18–19). According to Appellant, this provided the military judge with perspective regarding "tactics and techniques" law enforcement used. (Appellant's Br. 19–20).

Appellant's conduct did not come to light until April 2021 when he was apprehended after trying to meet up a fictitious 14 year-old for sex. This is also when law enforcement first discovered that Appellant potentially possessed images and videos of child pornography dating back to May 2019. By this time, the military judge had begun his transition to his role as a judge and "sectioned" himself off investigations; he specifically stated that he never worked on Appellant's case in any capacity. (JA 42–43). Accordingly, Appellant's focus on

conduct back in May 2019 is of no import since nobody in Hawaii was aware of Appellant's illicit activities until April 2021 at the earliest.

Further, the military judge's prior professional interactions with trial and defense counsel in this matter were neither unusual nor improper. For example,

> [b]oth before and after service in the judiciary, a judge advocate typically will serve in a variety of assignments as a staff attorney and supervisor. Such assignments normally include duties both within and outside the field of criminal law. In the course of such assignments, the officer is likely to develop numerous friendships as well as patterns of social activity. These relationships are nurtured by the military's emphasis on a shared mission and unit cohesion, as well as traditions and customs concerning personal, social, and professional relationships that transcend normal duty hours.

Butcher, 56 M.J. at 91.

The fact that both trial and defense counsel had previous professional interactions with the military judge, standing alone, does not create an appearance of bias. *See Uribe*, 80 M.J. at 447 (recognizing "the world of career JAG Corps officers is relatively small and cohesive, with professional relationships the norm and friendships common"); *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000) (acknowledging that "[p]ersonal relationships between members of the judiciary and . . . participants in the court-martial process do not necessarily require disqualification").

Here, the military judge specifically stated on the record that none of his prior interactions with counsel for both sides would have any impact on his

decisions, and nothing demonstrates that his previous professional interactions with counsel inappropriately influenced decisions that he made. *See United States v. Sullivan*, 74 M.J. 488, 454 (C.A.A.F. 2015) (finding that the military judge did not abuse his discretion in failing to disqualify himself since he "specifically stated on the record that none of his associations with court-martial participants would influence any of his decisions"). Moreover, the military judge did not have relationships with counsel that were close or unusual, and his associations did not exceed what might reasonably be expected under the circumstances. *Uribe*, 80 M.J. at 447. Thus, the military judge's professional interactions with counsel for both sides did not create an appearance of bias in this case. *See United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995) (stating "[w]here the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that Appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of R.C.M. 902(a) are fully met").

2. Even if this court decides that the military judge should have disqualified himself, reversal is not required.

"Because not every judicial disqualification requires reversal, [this Court should follow] the standards announced by the Supreme Court in *Liljeberg* to determine whether a military judge's conduct warrants that remedy to vindicate

public confidence in the military justice system." *Martinez*, 70 M.J. at 157–58 (citation omitted). In *Liljeberg v. Health Servs. Acquisition Corp*., the Court examined three factors in assessing "whether a judgment should be vacated" based upon a judge's appearance of partiality: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." 486 U.S. 847, 864 (1988).

First, Appellant did not personally suffer any specific injustice at the hands of the military judge. *See Uribe*, 80 M.J. at 449. Appellant points to the military judge's adverse ruling on his motion to suppress and the fact that he granted most of the government's motion to admit evidence pursuant to Military Rules of Evidence [Mil. R. Evid.] 404(b) as evidence of injustice to him. (Appellant's Br. 21–22). However, "a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).

The military judge issued two rulings that "were thorough, well-reasoned, and legally correct." *United States v. Black*, 80 M.J. 570, 571 (Army Ct. Crim. App. 2020). In addition, "the mere fact that the military judge adversely ruled on some of Appellant's motions and objections does not necessarily demonstrate any

risk of prejudice." *Uribe*, 80 M.J. at 449; *see also Quintanilla*, 56 M.J. at 44 (noting "that remarks, comments, or rulings . . . do not constitute bias or partiality, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible"). Lastly, the government's case against Appellant was strong since they caught Appellant in the act of attempting to engage in illicit conduct with a minor and given the text message evidence of the exchange with the fictitious 14 year-old. *See Uribe*, 80 M.J. at 450 (recognizing that the first *Liljeberg* factor favored the government, in part, given the strength of the government's evidence against Appellant, which included his recorded admission).

"The second *Liljeberg* factor examines whether granting relief would encourage a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Uribe*, 80 M.J. at 449. Here, Appellant promptly challenged the military judge based upon his previous assignment as SVP and professional relationship with counsel. Therefore, counsel diligently pursued the possible disqualification and "[i]t is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future." *Butcher*, 56 M.J. at 93.

Finally, an objective review of the circumstances surrounding Appellant's case does not undermine the public's confidence in the military justice system. *Uribe*, 80 M.J. at 449. The military judge "was nothing less than a neutral,

detached, and impartial trier of fact." *Black*, 80 M.J. at 577. Further, Appellant's case did not "involve intimate personal relationships, extensive interaction, conduct bearing on the merits of the proceeds, or other factors that could undermine the basic fairness of the judicial process." *Butcher*, 56 M.J. at 93.

Affirming the findings and sentence in this case "would not upset public confidence in the judicial process. To the contrary, a decision to reverse the findings and sentence would increase the risk 'that the public will lose faith in the judicial system.'" *Uribe*, 80 M.J. at 450.

Granted Issue II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS EVIDENCE DISCOVERED FROM THE SEARCH OF APPELLANT'S "VACUUM PHONE" AND ALL DERIVATIVE EVIDENCE.

Additional Facts

Captain [CPT] RZ served as Appellant's company commander in April 2021. (JA 172–73). On 4 April 2021, a CID agent contacted CPT RZ to inform him that CID had Appellant in their custody and that CPT RZ had to come to the CID office to take custody of him. (JA 176). Captain RZ subsequently picked up Appellant from the CID office and imposed conditions on his liberty. (JA 176–77). Specifically, CPT RZ required Appellant to check-in with the staff duty officer every four hours between 0600 and 2200 hours beginning on April 5, 2021. (JA

178). Appellant initially complied with CPT RZ's reporting requirements on April 5, 2021. (JA 178, 181, 182).

1. Appellant fails to report and is missing.

On April 6, 2021, although CPT RZ again required Appellant to report to the staff duty officer every four hours between 0600 and 2200 hours and ordered him to appear at morning formation at 0630 hours (JA 178–81, 189), Appellant failed to report to the staff duty officer at 0600, and did not report for morning formation at 0630. (JA 182). Captain RZ went to Appellant's apartment, but Appellant was not there even though another part of the conditions on Appellant's liberty required him to either be at home or at work. (JA 183).

When Appellant did not report at the staff duty desk or show up for morning formation on April 6, 2021, CPT RZ felt something was "very, very wrong" because Appellant was "shaken" when CPT RZ picked him up from CID two days earlier and Appellant had "a lot of stressors going on." (JA 50, 59). He reached out to Appellant's husband, informed him generally of Appellant's recent misconduct and asked for permission to search the apartment as part of a health and welfare check on Appellant. (JA 50, 53, 78). In fact, CPT RZ remained on the phone with Appellant's husband while searching room to room in the apartment for Appellant. (JA 51–52).

Appellant and his husband were married before the charged offenses occurred and remained married in April 2021. (JA 70–71, 244). Appellant's husband lived with Appellant at their apartment on Wheeler Army Airfield before he moved to Michigan at the end of March 2021, just before the undercover sting operation occurred that resulted in Appellant's apprehension on April 4, 2021. (JA 71–72). Appellant's husband had moved to Michigan in anticipation of Appellant joining him after Appellant's pending military separation for cocaine use. (JA 67, 72). While Appellant's husband and Appellant did not share bank accounts or a cell phone plan, Appellant's husband retained access to the apartment they shared in Hawaii. (JA 73, 79, 81, 391).

2. Appellant's concerning Facebook messages.

While CPT RZ was searching Appellant's home for him, his husband told CPT RZ about the "cryptic" and concerning Facebook Messenger messages he recently received from Appellant along with the presence of a hidden vacuum phone. (JA 51, 54). While CPT RZ located the appropriate vacuum cleaner, he could not find the phone inside of it. (JA 51).

Appellant's husband relayed that on April 5, 2021,[3] Appellant's husband woke up to four messages sent to him via Facebook Messenger. (JA 72, 74).

[3] For a concise timeline of key events please refer to the Government Response to Defense Motion to Suppress Evidence, March 18, 2022. (JA 317–21).

Appellant's husband described the messages as "unsettling," as Appellant told Appellant's husband to immediately come to Hawaii on the next available flight and come to their apartment to find the vacuum phone. (JA 73, 75–76). Appellant also provided the password to the vacuum phone. (JA 74). Hours later, Appellant messaged Appellant's husband to "please disregard the previous messages[,] I had a crisis [but] I'm better now." (JA 76, 391).

Nonetheless, Appellant's husband wanted to talk with Appellant despite this "disregard" message. (JA 74). When Appellant's husband subsequently spoke with Appellant, he noted that Appellant seemed "exhausted," but ultimately, he was laughing and joking at the end of their call, leading Appellant's husband to believe he was fine. (JA 74–75). Notably, Appellant did not tell him that he had been recently apprehended as part of the undercover sting operation. (JA 74).

3. Captain RZ fears the worst and requests CID's assistance.

Captain RZ found the vacuum cleaner that Appellant's husband described, but he could not find a cell phone within it. (JA 185). Since he was very concerned about Appellant's mental state based upon his recent apprehension, the messages Appellant's husband brought to his attention, and Appellant's apparent absence, CPT RZ feared that Appellant would or did harm himself. (JA 59–60, 65, 66). This was especially true after Appellant did not respond to CPT RZ's attempts to contact

him. (JA 53–54). Based on the seemingly escalating situation, CPT RZ contacted CID for help locating Appellant. (JA 186–87).

At approximately 1300, CID agents, including SA DS, went to Appellant's apartment on April 6, 2021, to help find him. (JA 190–91). While CID historically did not become involved in searches for soldiers who failed to report, they did so in Appellant's case because they apprehended Appellant less than two days previously in an undercover sting operation. (JA 96–97). Additionally, CID's new policy instructed them to become involved in missing persons investigations sooner based on recent events garnering media attention involving missing persons at Fort Cavazos. (JA 107).

Consequently, CID also entered Appellant's home, and the housing community assisted by opening the door and permitting agents to enter because the housing authority is permitted to enter residences in an emergency. (JA 69, 98–100, 114–15). Special Agent KJ was designated the "family member liaison" for the search. (JA 88). She kept contact with Appellant's husband and also coordinated with other agents who were assisting with the search. (JA 89–90). Throughout the search, six to seven agents were actively looking for Appellant at his known frequented locations, conducting canvass interviews, and reviewing any devices that may have had clues pertaining to Appellant's whereabouts. (JA 90, 100).

4. CID finds a receipt for Benadryl and "goodbye videos."

After giving CPT RZ permission to enter and search the residence he had shared with Appellant, Appellant's husband also gave CID information about Appellant's bank accounts, forwarded to them the concerning Facebook Messenger messages he received, and gave permission for agents to look at Appellant's vacuum phone to locate him. (JA 79–80, 86–87). Appellant's husband gave CID broad authority since he told CID to "do what they had to do to find [his] husband." (JA 81, 88, 95). Appellant's husband also implored CID to get Appellant medical attention if they found him since Appellant was "not okay" at the time. (JA 86).

The agents subsequently looked in Appellant's apartment for any sign he was still alive. (JA 114). Instead of finding such a sign, SA DG found a receipt on the kitchen counter dated 5 April 2021 for two bottles of Benadryl. (JA 115–18). Before arriving at the apartment, SA DS learned that a phone containing potential suicide video messages was located inside of a vacuum. (JA 191). Once inside of Appellant's apartment, SA DS found the vacuum phone with the screen unlocked, phone on, and battery nearly depleted. [4] (JA 192, 199). Next, SA DS watched the

[4] When SA DS found the phone, he noted it had seven percent battery, so he "placed the phone in airplane mode" because this was considered a "best practice[]" and because he did not have a Faraday bag. (JA 101). Special Agent DS did not need to enter the pin code to access the device because "it was already

four videos, which were recorded between 2157 and 2230 hours on April 4, 2021. (JA 192–94, 241).

In the videos, Appellant made the following statements:

> I know that you guys might find out about what I did, and I'm sorry. I wish I could turn back time, but I cannot.
>
> I was ill and I thought I wanted certain things since . . . I could remember and that doesn't fit in this world.
>
> I made the biggest mistake of my life. There's no going back after that. This was completely my fault.

(JA 196). The general theme from each of the four videos was that they were "goodbye videos for a man who was about to either commit suicide or disappear permanently." (JA 105–06, 566). Special Agent DS disregarded best practice and went with his "gut" when he did this quick "manual search" of the device to see if there was any information in the four goodbye videos that would have indicated where Appellant was located. (JA 109–10).

After reviewing the four videos, SA DS did not look through the phone further out of a concern that his manual search may "alter [the] data." (JA 111). For these reasons, "at that point, it was determined that the best course of action would (sic) . . . to collect the device based off the consent and turn it into the DFE

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open and there were notifications displaying on the screen." (JA 104, 408, 410). Once he received confirmation that he had consent to review the device, he viewed the four videos himself on the scene. (JA 102). After reviewing the videos, SA DS "documented the device and turned it into the evidence custodian to be taken to the CDFE cell." (JA 102).

so they could conduct an examination . . . in the most forensically sound matters (sic)." (JA 111).

5. CID forensically examines the vacuum phone for clues to find Appellant.

On April 6, 2021, while CID and Appellant's unit searched Hawaii for Appellant, SA JP, an expert in digital forensics, performed a digital forensic extraction of the vacuum phone to look for recent activity that Appellant was still alive (such as financial transactions) and extract the four known "goodbye" videos. (JA 91, 93–94, 121–22). Specifically, SA JP was asked to extract the vacuum phone to look for potential signs of life, recent activity, financial transactions, and the four videos Appellant's husband previously identified. (JA 162).

Special Agent JP initially "[ran] into issues . . . obtaining the extraction" of Appellant's vacuum phone. (JA 126). Special Agent JP recalled that the extraction took quite a while and that he was unable to complete the extraction until approximately 1900 on April 6, 2021.[5] (JA 126). Once he was able to perform the extraction, SA JP began by searching for the "goodbye" messages, which he found by sorting videos by the most recent ones. (JA 122, 129–30). He used this as a

[5] Special Agent DS testified that he located and watched the videos around 1500, prior to documenting the evidence and returning the device to CID. (JA 102, 109). This timeline would suggest that SA JP was likely attempting to access the phone and download into a readable format from approximately 1630 until 1900. (JA 126, 535). Special Agent JP stated he briefed the office at approximately 2050 that night on what he had found prior to going home for the evening. (JA 535, 552).

baseline for Appellant's last known activity since the timestamp for the videos was around 2200 hours on April 4, 2021. (JA 126). While arranging the "table view" of recent videos from the device on his computer screen, SA JP also observed suspected child pornography in the group of recent videos. (JA 123–24, 131). Special Agent JP used the table view because it "allowed [him] to sort instead of filter."[6] (JA 123). This was important, because SA JP was "looking for all recent activity . . . [,] any signs of life[7] or anything additional that would help [them] find him." (JA 124). While in table view, SA JP saw a thumbnail of a media file from around the end of March 2021 of a "pre-pubescent male" in the same "pane" also containing the "goodbye" videos. (JA 123, 132, 141–42).

Although SA JP made a note of the suspected child pornography, he did not investigate the matter further because "the priority at that point was looking for signs of life." (JA 124). After reviewing the goodbye videos, SA JP searched for recent communications Appellant had with others to determine if that could lead to Appellant's current whereabouts. (JA 124). During this search, SA JP also identified messages from late March 2021 between Appellant and another user on

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[6] Special Agent stated he used "sort" instead of "filter" because the filter function would imply that [he] would be removing items from [the search]." Whereas the sort function would not remove any potentially helpful information but rather organize the information in chronological order. (JA 129).

[7] Special Agent JP defined "signs of life" as synonymous with "last activity" or anything that "where [Appellant] would be." (JA 128).

the Telegram chat application discussing engaging in sexual activity with a boy. (JA 124, 205, 210, 254). Despite these efforts, SA JP did not find any media or data during his examination on April 6, 2021, that yielded clues of Appellant's current whereabouts. (JA 140). At this point, "it was getting relatively late into the night,"[8] so SA JP briefed the office regarding the suspected child pornography and planned to continue to review the phone the next day. (JA 125, 320). Special Agent JP intended to search the vacuum phone again the following day but did not since Appellant had been found. (JA 125). CID later obtained specific legal authorization to search the vacuum phone for child pornography based on what SA JP observed during his search of the vacuum phone. (JA 126, 137).

After nearly a full day of searching for appellant, at 2340 on April 6, 2021, CPT RZ filed a missing person's report with the local police on behalf of Appellant's husband. (JA 188, 413). Thanks in part to this report, the Honolulu Police identified Appellant as a missing person at the Doubletree Hotel in Honolulu after he called the police to report a theft. (JA 56). Appellant was in "bad shape" when officers found him since he had taken many pills and was incoherent. (JA 56–57, 418–19). Appellant subsequently spent three weeks in the hospital for kidney failure and mental health concerns. (JA 57).

[8] Special Agent JP briefed SA KJ at approximately 2050 on April 6, 2021. (JA 320).

Standard of Review

"This Court reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion." *United States v. Shields*, 83 M.J. 226 (C.A.A.F. 2023). When reviewing a "military judge's denial of a motion to suppress for an abuse of discretion, [this Court views] the evidence in the light most favorable to the prevailing party." *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018) (citation omitted).

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations omitted). For example, a "military judge abuses his discretion when his findings of fact are clearly erroneous or he misapprehends the law." *Eugene*, 78 M.J. at 134 (citation omitted). "When reviewing a lower court's decision 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.'" *Shields*, 83 M.J. at 230 (quoting *United States v. Blackburn*, 80 M.J. 205, 211 (C.A.A.F. 2020)).

Law

"The Fourth Amendment protects against unreasonable searches and seizures such that ordinarily searches are prohibited absent a search warrant except for a few specifically established and well-delineated exceptions." *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022) (citations omitted).

1. Consent searches.

One exception to the Fourt Amendment is voluntary consent searches, "which can be provided either from the individual whose property is searched, or from a third party who possesses common authority over that property." *Id*. "The validity of the third-party consent does not hinge on niceties of property law or on legal technicalities, but is instead determined by whether the third party has joint access or control of the property for most purposes." *Id*. In addition, a "person has apparent common authority to consent to a search if investigators reasonably believe that the person has authority to consent to a search, even if the person does not actually have such authority." *Id*. at n.1 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990)).

Under Mil. R. Evid. 314(e)(5), the government has the burden to prove by clear and convincing evidence "that a third party has joint access and control to the degree that such control confers a right to consent to search." *Black*, 82 M.J. at 451. "The degree of control a third party possesses over property is a question of

fact [while] [w]hether that control is sufficient to establish common authority is a question of law." *Id*. (citation omitted). "The scope of a consent search or seizure is limited to the authority granted in the consent and may be withdrawn at any time." *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016).

2. Emergency searches.

A second exception to the search warrant requirement of the Fourth Amendment is emergency searches conducted to save a person's life or for a related purpose. Specifically, Mil. R. Evid. 314(i) provides that "[e]vidence obtained from emergency searches of persons or property conducted to save life, or for a related purpose, is admissible provided that the search was conducted in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury." The rationale for this emergency search doctrine is best summarized below:

> [A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of 'dead bodies,' the police may find the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the

> apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms 'exigent circumstances' . . . e.g., smoke coming out of a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.

United States v. Muniz, 23 M.J. 201, 207–08 (C.M.A. 1987).

Argument

The military judge did not abuse his discretion by admitting the contents of the vacuum phone into evidence for three reasons. First, Appellant's husband, had the authority to and did grant consent for law enforcement to search Appellant's apartment and vacuum phone. Second, even if Appellant's husband did not have actual authority to consent to a search, he had apparent authority. Third, the search of the vacuum phone was a legitimate emergency search intended to locate a suicidal officer and prevent him from harming or killing himself.

1. Appellant's husband had common authority over the apartment and the items within it when he granted lawful consent to search Appellant's apartment and vacuum phone.

The military judge correctly found that Appellant's husband's instruction for CID to "do what they had to do to find [his] husband" was indicative of broad consent for CID to search their shared apartment and the vacuum phone inside of it. (JA 572). Even though Appellant's husband had just left Hawaii, he still had access to the apartment. (JA 572–73). In his time of crisis, Appellant reached out to his husband to request that he return to their apartment in Hawaii and provided

him with the passcode to the vacuum phone. (JA 573). Appellant placed no restrictions on the use of his shared apartment with his husband or the vacuum phone. (JA 573). In fact, nobody would have known about the vacuum phone but for Appellant's husband's actions in alerting authorities to its existence, its secret location, and its passcode to unlock it. (JA 573).

2. Even assuming the vacuum phone was an item reasonably outside of Appellant's husband's common authority, Appellant's express grant of control and access to the phone removed this distinction.

Here, Appellant's husband possessed common authority over the apartment he shared with Appellant; thus, he could validly consent to a search of the premises and items within it. *United States v. Matlock*, 415 U.S. 164, 171 (1974). However, as this Court found in *United States v. Weston*, "[c]ommon authority over a home extends to all items within the home *unless* the item reasonably appears to be within the exclusive domain of the third party." 67 M.J. 390, 392 (C.A.A.F. 2009). Assuming arguendo that Appellant's vacuum phone was an item that may have been reasonably outside the exclusive domain of Appellant's husband, Appellant's express disclosures to his husband regarding the location and access to the phone removed this distinction.

In fact, "where 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."

United States v. Basinski, 226 F.3d 829, 834 (7th Cir. 2000) (citations omitted). Further, "[t]hird-party consent to a search can legitimately be given whether the premises to be searched are as expansive as a house or as minute as a briefcase." *Id.* "The key to consent is actual or apparent authority over the area to be searched." *Id*. (citation omitted); *see also United States v. Crain*, 33 F.3d 480, 484 (5th Cir. 1994) (holding that the defendant assumed the risk that a car's co-occupant might consent to a search of the car since he had permission to drive it on a late-night highway trip); *United States v. Jackson*, 598 F.3d 340, 347 (7th Cir. 2010) (recognizing that "the third-party consent exception to the warrant requirement is premised on the assumption of the risk concept" and that "common-authority rights under the Fourth Amendment can be broader than the rights that property law provides"). Again, Appellant's husband shared the apartment in Hawaii with Appellant (JA 71–72), which empowered him as one who had actual and apparent authority to authorize a search of it and the items within it that he reasonably exercised authority over.

3. Even assuming Appellant's husband did not have common authority over the vacuum phone, it reasonably appeared to investigators that he did.

Appellant argues that "his husband did not have common authority over the vacuum phone" and that the military judge "incorrectly focused on the house when addressing Appellant's husband's common authority over the property." (Appellant's Br. 14–15). Even if, assuming arguendo, this was true, it appeared to

CID that Appellant's husband had apparent authority over the vacuum phone since he had the passcode to it. The Fourth Amendment does not require factual accuracy; instead, it requires law enforcement to be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990); *Shields*, 83 M.J. at 232 ("We reiterate that as 'always under the Fourth Amendment, the standard is reasonableness.'") (quoting *Richards*, 76 M.J. at 369). Here, CID reasonably believed Appellant's husband had authority over the vacuum phone since they were married, he provided the passcode to agents, and broadly instructed them to act as needed to find Appellant. *See Basinski*, 226 F.3d at 834 (observing that "apparent authority turns on the government's knowledge of the third party's use of, control over, and access to the container to be searched, because these characteristics are particularly probative of whether the individual has authority over the property").

Thus, CID agents reasonably acted upon Appellant's husband's apparent authority and broad consent mandate in conducting a search of the vacuum phone. *See* Mil R. Evid. 314(e)(2) (providing that "[a]person may grant consent to search property when the person exercises control over that property"). Here, Appellant's husband exercised sufficient control over the vacuum phone to warrant a reasonable belief on behalf of CID that he could legally provide consent to search. By way of contrast, in *United States v. Black*, the soldier lent his cell phone to a fellow soldier "to send text messages and make phone calls, play games, and watch

YouTube," which the military judge determined specifically "cabined" the borrowing soldier's "common authority over the phone."[9] *Black*, 82 M.J. at 449, 453.

Here, the military judge appropriately determined that Appellant placed no limitations on the vacuum phone when he told his husband about it and where to find it. *See also United States v. Rader*, 65 M.J. 30, 31, 34 (C.A.A.F. 2007) (finding that the "Appellant's roommate had sufficient access and control of Appellant's computer to consent to the search and seizure of unencrypted files in Appellant's non-password-protected computer"). This was a conclusion the record reasonably supported, as Appellant provided no express limitations and subsequently removed any implied limitations when he revealed the phone's secret location and passcode. (JA 392).

Additionally, Appellant's relationship with his husband was akin to the relationship in *Weston*, or to the roommate relationship in *Radar* (even more so), rather than the friend or coworker relationship in *Black*. *Compare Black*, 82 M.J. at 449, *with Weston*, 67 M.J. at 392–93 and *Rader*, 65 M.J. at 31. As this Court stated in *Weston*, "the consent of one who possesses common authority [or other

[9] Importantly, as this Court noted, *Black* stood for the proposition that the military judge *did not abuse his discretion* in making this determination, not that this was the only reasonable holding or that the judges of this Court would have even made the same ruling. 82 M.J. at 456.

sufficient relationship] over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." 67 M.J. at 392 (quoting *Matlock*, 415 U.S. at 170–71).

4. The military judge did not abuse his discretion when he found that Appellant did not unequivocally withdraw consent to Appellant's husband.

Contrary to Appellant's argument, Appellant never unequivocally acted to withdraw his husband's consent. (Appellant's Br. 38). As an initial matter, Appellant did not actually withdraw consent to search in this matter. As the military judge found at trial, Appellant's "disregard" message "was not a 'disallow' message." (JA 573). In other words, Appellant "never told [his husband] [that] he could not come to the house or unlock and view the [vacuum] phone." (JA 573). The military judge's factual finding was a reasonable interpretation of the evidence.

To effectuate a withdrawal of consent, "there must be some communication understandable to those conducting the search that the consent has been withdrawn." *United States v. Coleman*, 14 M.J. 1014, 1016 (C.M.A. 1982); *see also Eugene*, 78 M.J. at 134 (noting that while no "magic words" are required to effectuate withdrawal of consent, there must be "some unequivocal act or statement"). The military judge properly relied on facts in the record when he found that Appellant's messages to his husband provided him with a "five-step plan" which included: 1) directions to immediately book the next available flight

from Michigan to Hawaii, 2) locate a vehicle parked at the beach, 3) return to their home, 4) locate the vacuum phone (along with the password to access the phone), and 5) directions to watch videos on the vacuum phone. (JA 573).

According to Appellant, his message that *unequivocally* revoked consent to the vacuum phone was: "please disregard the previous messages. I had a crisis. I'm better now." (JA 393). The military judge was well within his discretion when he found that the term "disregard" was not a clear and unequivocal withdrawal of consent. (JA 572). Appellant's *actions* also make clear that he did not revoke consent.

In *Resister*, this Court examined whether a third party's common authority over the apartment extended to contents of a closed logbook that was located on a shelf in the apartment and found that an Appellant's failure to place any "express restrictions" on a third-party's access to an item, although not dispositive, is a factor for the military judge to consider. 44 M.J. 409, 414 (C.A.A.F. 1996); *see also Black*, 82 M.J. at 452. This Court went on to inquire "whether the logbook [in question] was in a place that was impliedly off-limits to [the third party]." *Id.* Here, dissimilar to *Resister*, although the vacuum phone would have ordinarily been in a location that would have implied limitations to a third-party, Appellant expressly provided the secret location and passcode to his husband. By providing

his husband with this information, Appellant removed any such limitation that may have existed.

Referring back to Appellant's five-step plan, although Appellant did not leave the keys in the location described or park the vehicle where he claimed it would be, he did ultimately leave the vacuum phone, with the "goodbye videos" intact, the passcode unchanged, and in the exact location he described to his husband. (JA 573, n.16). Appellant ultimately did nothing to interfere with, limit, or otherwise cabin his husband's usage or control over the vacuum phone. Thus, he never acted to withdraw consent from his husband's subsequent disclosure of it to law enforcement. The military judge certainly did not abuse his discretion in finding that to be so.

5. Special Agent JP did not exceed the broad scope of consent Appellant's husband provided when conducting his search.

Finally, Appellant argues that SA JP's search of the vacuum phone exceeded the scope of his husband's consent. (Appellant's Br. 39). However, as both the military judge and the CCA majority acknowledged, Appellant's husband provided CID with "broad consent regarding the time, place, and manner of the CID

search." (JA 13). The only term that limited the scope of the search was that the search was limited to actions that were intended to locate Appellant.[10] (JA 13).

"The standard for measuring the scope of consent under the Fourth Amendment is one of objective reasonableness and asks what the typical reasonable person would have understood by the exchange between the law enforcement agent and the person who gives consent." *Jackson*, 598 F.3d at 348 (citations omitted). "Where someone with actual or apparent authority consents to a general search, law enforcement may search anywhere within the general area where the sought-after item could be concealed." *Id*. (citations omitted).

Arguably, Appellant's husband's consent went further since he instructed CID to take any actions to find Appellant. Thus, CID had broad apparent authority to search the vacuum phone as it could have contained clues as to Appellant's

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[10] Appellant attempts to qualify the military judge's ruling as one that failed to consider this limitation on the search. (JA 17; Appellant's Br. 41). This is a distorted view of the military judge's ruling. The military judge expressly quoted the same language when finding that "'Do what you have to do to find my husband' speaks to the *necessarily broad consent* given to CID concerning the house and many items in it." (JA 572) (emphasis added). The military judge referenced this limitation all throughout his ruling, stating: "The same emergency which justified the CID search of the Accused's house and SA DS's manual review of the 'vacuum phone' videos justified the cellphone's deeper digital forensic examination on 6 April 2021. The scope of which was reasonably broad under these unique circumstances. The Accused was missing, and CID was searching for him during the entirety of the digital forensic examiner's role in the case. . . . The digital forensic examination SA [JP] carried out within hours of CID locating the 'vacuum phone' was part of a hybrid consent and emergency search." (JA 573–74).

travel or communications, which could be used to help locate Appellant. (JA 573–75). Appellant's argument that CID's search exceeded that scope is misguided. (Appellant's Br. 41–42; JA 17–18). On this point, the lower court's reliance on *United States v. Shields* is dispositive.[11] (JA 15).

In *Shields*, the Appellant surrendered his cell phone to military law enforcement pursuant to a search authorization. 83 M.J. at 228. The search authorization provided access to "all location data stored on [Appellant's] phone or within any application within the phone for 23 Dec [20]18." *Id.* Using the same software CID used in this Appellant's case, Cellebrite, the investigating agent in *Shields* organized the extracted data into a readable format so he could begin his search. *Id.* The examiner proceeded to organize the images on the Appellant's phone in the "thumbnail" and "table view." *Id.* at 229. The examiner's intent was

[11] Appellant's attempt to distinguish *Shields* is not persuasive. As *Shields* recognizes, the "Fourth Amendment protects against *unreasonable* searches and seizures." 83 M.J. at 231 (emphasis added). As this Court said in *Shields*, "always under the Fourth Amendment, the standard is reasonableness." *Id.* at 232. While acknowledging that the facts of Appellant's case differ and therefore the analysis of what was reasonable differs, the same logic applies. Just as "[a] search conducted pursuant to a search authorization is presumptively reasonable[,]" *Shields*, 83 M.J. at 231, a military judge's finding that a search was conducted pursuant to lawful consent is considered "in the light most favorable to the prevailing party" and "will not be overturned unless . . . clearly erroneous or unsupported by the record." *Resister*, 44 M.J. at 413. This is arguably a more deferential standard than the one analyzed in *Shields*.

to sort the images from largest to smallest and then to filter by the date range described in the warrant. *Id.*

"However, before he could apply a date filter to isolate images from December 23, 2018, he immediately noticed a thumbnail image of what he believed to be a depiction of child pornography." *Id.* At trial, defense counsel moved to suppress the contents of the phone arguing that there was no proper reason for the examiner to first sort by file size, and by doing so he violated the Appellant's Fourth Amendment rights. *Id.* The military judge denied the motion finding that the search was conducted lawfully since it was conducted in a reasonable manner and did not exceed the scope of the authorization. *Id.* This Court, in affirming the lower court's holding, reasoned that "when it comes to cell phones and computers, although one search method may be objectively 'better' than another, a search method is not unreasonable simply because it is not optimal." *Id.* at 232. The investigator "was not rummaging through Appellant's phone, even though the defense expert pointed to a different—and perhaps even better—way to conduct the search." *Id.*

In Appellant's case and analogous to *Shields*, SA JP came across the suspected child pornography when organizing Appellant's most recent video activity in a "table view" using the Cellebrite software. (JA 123, 134). Similar to *Shields*, SA JP's search was limited, but in Appellant's case this limitation was to

anything that would help locate Appellant. However, unlike *Shields*, SA JP located the apparent child pornography "in the same pane" or "next to . . . the suicide videos" that he was expressly authorized to view. (JA 123–24, 131). He specifically used the table view and the "timeline feature" because it "allowed [him] to sort instead of filter."[12] (JA 123, 133). Sorting rather than filtering was a more inclusive process that allowed SA JP to view more data that could be helpful in locating Appellant. (JA 128, 133). However, even more persuasive than the facts of *Shields*, here CID did not stumble upon the images that were outside the scope of his cursory search—rather the image was in plain view and adjacent to the videos that were in Appellant's most recent activity.

Although SA JP made a note of the suspected child pornography, he did not investigate the matter further because "the priority at that point was looking for signs of life." (JA 124). Special Agent JP then looked through Appellant's "communication history" to see if Appellant indicated that he intended to meet with someone or where they might go. (JA 124). This was a step that Appellant himself endorsed but argued that it should have done manually and immediately when SA DS initially found the phone in the vacuum. (Appellant's Br. 41). Not

[12] Although the Cellebrite software initially defaulted to organizing in descending order, which put the most recent activity at the bottom, SA JP immediately and without looking at any of the thumbnails scrolled to the bottom of the screen. (JA 130–31).

only does this argument ignore SA DS's explanation that manually manipulating the phone could result in the loss of valuable metadata, but it ignores this Court's precedent in *Shields*—"a search method is not unreasonable simply because it is not optimal." 83 M.J. at 232.

Additionally, using the Cellebrite software, SA JP could review the metadata associated with Appellant's messages which would provide additional insight into where Appellant was when he sent the messages.[13] (JA 124). Manually manipulating the vacuum phone could alter the metadata—a point Appellant ignored (Appellant's Br. 41), but trial defense counsel acknowledged during the motion to suppress hearing. (JA 17, 14). Although Appellant argued that different or better methods could have been employed to find Appellant, this is not the standard. *See Shields*, 83 M.J. at 231, 234 (citing *Dalia v. United States*, 441 U.S. 238, 257 (1979) ("Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant . . . .")). Special

[13] Special Agent JP also looked through Appellant's USAA transactions in an effort to locate him. (JA 125).

Agent JP worked "relatively late into the night" looking for clues to locate Appellant. (JA 125). He searched his recent videos, communications, bank account transactions, and location metadata; his failure to employ certain methods does not render his efforts unreasonable, and certainly do not imply bad faith. (JA 124–25).

6. Agents lawfully searched the vacuum phone as part of an emergency search to locate a soldier seemingly intent on committing suicide.

The military judge identified several factors both before and after entry into Appellant's apartment that demonstrated CID's need "to locate [Appellant] and prevent[] immediate or ongoing personal injury (suicide):" 1) [Appellant]'s 'shaken' appearance following his arrest for a serious child-sex related offense, 2) the messages to his husband which made it clear he was contemplating a lengthy disappearance, 3) [Appellant]'s disappearance from the home and failure to check-in with his unit and show up for formation and work call . . . 4) discovery of a receipt indicating the recent purchase of two bottles of Benadryl and a box of cough drops (indicative of potential efforts to overdose), 5) the finding of a secret, hidden, cellphone in a vacuum as [Appellant] notes to his husband during a period of 'crisis;' and 6) a cursory review of that cellphone which had 'goodbye videos' for loved ones indicating a clear intent to cause himself immediate self-harm or disappearance." (JA 571). These findings are well-supported by the record and certainly not clearly erroneous.

The collective circumstances surrounding Appellant's sudden disappearance after his apprehension for serious child-sex related charges were indicative of someone experiencing a mental health crisis, which was subsequently confirmed when local civilian police located Appellant the day after CID's search of the vacuum phone. The search of Appellant's vacuum phone satisfied the emergency search exception because CID "reasonably believed that an emergency existed at the time" of the search. *United States v. Korda*, 36 M.J. 578, 581 (A.F.C.M.R. 1992) (citations omitted).

The facts and circumstances available to CID at the time justified the perception that an emergency existed and that a search of the vacuum phone could aid in figuring out where Appellant was at the time. *See United States v. Curry*, 48 M.J. 115, 116 (C.A.A.F. 1998) (affirming the military judge's ruling that the military police validly entered Appellant's barracks room given the emergency at hand and read Appellant's suicide notes "as part and parcel of the emergency entry to see if Appellant had done anything else to himself such as ingesting pills or poison"); *Korda*, 36 M.J. at 582 (finding that an emergency search for a "suicide" note was reasonable since it could provide "a co-worker, acquaintance, or psychiatrist with a clue to [the missing airman's] location"); *United States v. Atkins*, 17 M.J. 970, 971 (A.C.M.R. 1984) (finding that the civilian police lawfully found contraband in Appellant's garage since their assessment of the emergency

situation was reasonable and made in good faith as they feared "that someone was in a vehicle inside a closed garage with the motor running and thus in danger of carbon monoxide poisoning").

Appellant and the dissent argue that the factors the military judge relied upon are conclusions in search of a rationale "to justify a warrantless emergency search" or "textbook subterfuge." (Appellant's Br. 29, 31, 35). The record does not support Appellant's claims, rather it shows that agents acted in good faith and Appellant's attempt to use the benefit of hindsight does not negate the reasonableness of CID's actions at the time, which the military judge and the CCA majority correctly found. (JA 14–15, 572).

First, Appellant claims the connection between the apprehension and Appellant's failure to check in was tenuous because "the arrest occurred two days before Appellant failed to check in with staff duty" and "most people would appear 'shaken'" following an arrest for any type of offense. (Appellant's Br. 27). The fact that two days had passed before Appellant left and failed to report is of no import, as Appellant had more time to think about his recent actions and the strength of the government's case as it related to the ultimate sexual assault of a child specification. Appellant knew that he would likely be going to prison at some point and that he would likely be labeled as a child sex predator. Agents also apprehended Appellant for a serious crime (sexual assault of a child) and not just

some petty misdemeanor. Appellant ultimately faced a maximum punishment of confinement for 30 years in addition to a mandatory dismissal for this offense alone. *See* Manual for Courts-Martial, United States (2019 ed.) (MCM), pt. IV, ¶ 62.d.(2).

One could certainly feel that their career, marriage, and life as they know it could be over in the face of such serious charges and overwhelming evidence. Thus, Appellant appeared "shaken" for good measure given these considerations and it was reasonable for CPT RZ and CID to have serious concerns regarding Appellant's safety.

Second, Appellant asserts that the "crisis" had ended by the time he went missing because he assured his husband "that he was 'better now' and instructed him to 'disregard the previous [suicide-type] messages.'" (Appellant's Br. 27). Again, Appellant divorces these arguments from the proper context, as Appellant's husband had no idea at the time that Appellant was recently apprehended on child-sex related crimes. This was an important stressor in Appellant's life at the time as shown above, and Appellant's husband could not appreciate all the thoughts and concerns that Appellant had at the time since Appellant did not share his recent legal predicament with his husband.

Despite not knowing the full circumstances at the time Appellant sent the messages, Appellant's husband described Appellant as "exhausted," and stated that

"everything was building up on him and he didn't know what else to do. But he [stated he] was better now." (JA 74–75). Appellant's husband interpreted these messages as Appellant clearly expressing that he "had an intention of harming himself." (JA 76). Despite the "disregard" message Appellant's husband stated he "still had to get him on the phone" to be reassured. (JA 76). All of this was a "red flag" and caused him to feel "concerned." (JA 75–76). But without knowing the full extent of what Appellant was dealing with, his fears were assuaged by Appellant's assurances. (JA 76).

The mere fact that Appellant hid this information from his husband and now had disappeared after sending those threatening messages was a reasonable cause for concern. Once CID informed Appellant's husband of the full nature of Appellant's circumstances, he told CID to do whatever they needed to do to find Appellant, and requested that if they found him, they needed to get him medical attention because "he's not mentally okay." (JA 79, 81, 86).

Third, Appellant claims that he was "on chargeable leave" on the day that he missed one check-in after otherwise complying with the conditions on liberty. (Appellant's Br. 7, 28). Appellant argues that the government could always manufacture exigent circumstances requiring warrantless searches since a soldier is always at risk of self-harm when the soldier is missing or has gone AWOL. (Appellant's Br. 29). Appellant ignores the specific circumstances at issue in this

case at the time in casting this broad argument. When Appellant missed his check-in and failed to comply with the conditions on his liberty, CPT RZ was immediately and legitimately worried about Appellant's mental state given his recent apprehension and the seriousness of the legal issues he faced. The existence of the suicide messages only increased the alarm over Appellant's mental state. Thus, this is not a case where a soldier simply left. Instead, (1) CID was actively investigating Appellant for serious charges at the time that left him "shaken;" (2) Appellant failed to comply with conditions imposed on his liberty within 36 hours of their imposition; and (3) sent his husband cryptic messages indicating that he intended to harm himself. (JA 571). Under these circumstances, Appellant's commander and CID were justified in believing that an emergency existed—and their subsequent actions were reasonable based on these fears.

Next, Appellant makes much of the fact that the vacuum phone was not Appellant's "everyday cell phone," which had been seized a few days before after Appellant's apprehension on 4 April 2021. (Appellant's Br. 39–40). This fact made the vacuum phone more important to search since it was the phone Appellant most recently before his disappearance. The vacuum phone would be the best phone to search for recent clues of Appellant's whereabouts such as other people he texted goodbye to or confirmation of a hotel booking. While Appellant faults CID for not examining "Appellant's Google search history" on the vacuum phone

in their attempt to find him (Appellant's Br. 33), Appellant's use of hindsight practices that should have been used does not negate the fact that CID was reasonably justified in looking at the vacuum phone for clues of Appellant's current whereabouts.

In sum, the military judge did not abuse his discretion in finding that the home entry and the vacuum cell phone examination were reasonably justified emergency actions CID took to find Appellant under the circumstances at the time. Law enforcement acted in good faith with Appellant's well-being in mind, as CID engaged in a multi-agent effort to find Appellant as quickly as possible to prevent his suicide, similar to how law enforcement looked for a suicidal airman in *Korda*, 36 M.J. at 580–82. Consequently, there is no support for Appellant's accusations that both CPT RZ and CID colluded to create some sort of subterfuge to search for child pornography in the vacuum phone.

Conclusion

Wherefore, the government respectfully requests that this Honorable Court affirm the lower court's decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 11,233 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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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 November 18, 2024.

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