IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee/Cross-Appellant

v.

Jeremy W. HARBORTH
Chief Master-at-Arms (E-7)
U.S. Navy

Appellant/Cross-Appellee

BRIEF ON BEHALF OF APPELLANT/CROSS-APPELLEE

Crim. App. Dkt. No. 202200157

USCA Dkt. No. 24-0124/NA
USCA Dkt. No. 24-0125/NA

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ISSUES PRESENTED

I.

DID THE MILITARY JUDGE ERR BY (1) FINDING THE WARRANTLESS SEIZURE OF APPELLEE'S ELECTRONIC DEVICES WAS JUSTIFIED BY PROBABLE CAUSE, AND (2) NOT RULING ON LAW ENFORCEMENT'S RELIANCE ON ACTUAL AND APPARENT AUTHORITY?

II.

DID THE LOWER COURT ERR IN RULING THAT LAW ENFORCEMENT COULD NOT RELY ON ACTUAL OR APPARENT AUTHORITY AND BY HOLDING THE DELAY IN SECURING A SEARCH AUTHORIZATION WAS UNREASONABLE, THEREBY SETTING ASIDE APPELLEE'S CONVICTIONS?

III.

DID THE LOWER COURT ERR IN FAILING TO FIND THAT APPELLEE WAIVED OBJECTION TO THE DURATION OF THE SEIZURE, WHEN APPELLEE NEVER OBJECTED AT TRIAL TO THE DURATION OF THE SEIZURE, AND MIL. R. EVID. 311 STATES THAT OBJECTIONS NOT MADE AT TRIAL ARE WAIVED?

IV.

DID THE LOWER COURT ERR IN FAILING TO FIRST DETERMINE WHETHER MS. HARBORTH WAS A GOVERNMENT ACTOR, AND IF SO, DID MS. HARBORTH'S ACTIONS CONSTITUTE GOVERNMENT ACTION, THUS IMPLICATING

FOURTH AMENDMENT PROTECTION, WHEN SHE SEIZED APPELLEE'S OTHER DEVICES AND PROVIDED THEM TO HPD AND NCIS?

V.

HAVING FOUND A REASONABLE PROBABILITY THAT A MOTION TO SUPPRESS THE RESULTS OF THE SEIZURE AND SEARCH OF APPELLEE'S IPHONE XS WOULD HAVE BEEN MERITORIOUS, DID THE NMCCA ERR IN NOT FINDING PREJUDICE FROM THE DEFENSE COUNSEL NOT MOVING TO SUPPRESS THIS EVIDENCE?

VI.

WAS THE TRIAL DEFENSE COUNSEL INEFFECTIVE BY NOT SEEKING SUPPRESSION OF ALL EVIDENCE DERIVED FROM THE UNLAWFUL SEIZURE OF CHIEF HARBORTH'S PROPERTY?

STATEMENT OF STATUTORY JURISDICTION

The judgment entered into the record includes a sentence of a bad-conduct discharge. Accordingly, the lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction under Article 67(a)(2) and (a)(3), UCMJ.[2]

[1] 10 U.S.C. § 866(b)(3) (2022).
[2] 10 U.S.C. § 867(a)(2), (a)(3) (2021).

STATEMENT OF THE CASE

A panel of officer and enlisted members sitting as a general court-martial convicted Chief Harborth, contrary to his pleas, of three specifications of indecent visual recording and one specification of producing child pornography in violation of Articles 120c and 134, UCMJ. The members sentenced him to eighteen months' confinement and a bad-conduct discharge. The Convening Authority took no action on the findings or the sentence, which the Military Judge entered into judgment on June 29, 2022.[3]

On December 21, 2023, the lower court:

- Set aside the finding of guilt as to Charge I, Specification 3 (indecent visual recording), and dismissed it with prejudice;
- Affirmed the findings of guilt as to Charge I, Specification 2 (indecent visual recording);
- Set aside the findings of guilt as to Charge I, Specification 1 (indecent visual recording), and Charge II, Specification 3 (production of child pornography).[4]

[3] Convening Authority Action (Jun. 16, 2022); Entry of Judgment (Jun. 29, 2022).
[4] *United States v. Harborth*, No. 202200157, slip op. at 36 (N-M. Ct. Crim. App. Dec. 21, 2023).

The lower court further set aside the sentence and authorized a rehearing.[5] On January 29, 2024, the lower court denied Chief Harborth's motion for reconsideration of its ruling affirming the findings of guilt as to Charge I, Specification 2.[6]

The Judge Advocate General certified this case for this Court to answer the first five issues presented above.[7] On April 18, 2024, Chief Harborth timely petitioned this Court to review the sixth issue, which this Court granted.[8]

STATEMENT OF FACTS

A. Chief Harborth did not activate the in-home security system that recorded the videos forming the basis for all the charged offenses.

In November 2015, Chief Harborth married Ms. Harborth, who moved with her minor daughter, C.V., into an off-base residence with him in 2016.[9] Crime in the new neighborhood was common, and the previous owner of the residence had installed a Vivint Smart Home Security System (hereinafter "Vivint security system"), the interior cameras of which remained in place when the Harborth family moved in.[10]

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[5] *Id*.
[6] N-M. Ct. Crim. App. Order Den. Appellant's Mot. to Recons., Jan. 29, 2024.
[7] Certificate for Review, USCA Dkt. No. 24-0124/NA, Mar. 29, 2024.
[8] Order Granting Review, USCA Dkt. No. 24-0124/NA and 24-0125/NA, Jul. 18, 2024.
[9] J.A. at 592-93.
[10] J.A. at 650, 734-35.

On August 15, 2016, Ms. Harborth—not Chief Harborth—signed an agreement with Vivint to activate the security system's cameras, one of which was located in C.V.'s bedroom.[11] After a break-in in March 2018, Chief Harborth moved a security camera from C.V.'s bedroom to the garage for better security coverage, replacing the bedroom camera in May 2018.[12] During this time, Ms. Harborth remained the home's point of contact with Vivint until at least July 2, 2018.[13]

B. Suspecting him of infidelity, Chief Harborth's wife took his phone, discovered nude photos of C.V. on it, and showed them to the authorities, who seized the phone.

By May 2019, Chief Harborth's marriage to Ms. Harborth had soured, and she wanted a divorce.[14] Ms. Harborth believed that Chief Harborth was unfaithful and that he kept pictures of and was messaging other women on his iPhone XS.[15] Ms. Harborth did not, however, have shared ownership of the phone, which was passcode-protected.[16]

On May 11, 2019, as he was driving Ms. Harborth and C.V., Ms. Harborth launched accusations of infidelity toward Chief Harborth and demanded to see his

[11] J.A. at 650, 713-15, 1528.
[12] J.A. at 486.
[13] J.A. at 1219.
[14] J.A. at 1491.
[15] J.A. at 595, 1491.
[16] J.A. at 361, 679-80.

phone.[17] When he refused, C.V., sitting in the back seat, reached around the driver's seat, grabbed Chief Harborth's iPhone XS from his hand, and gave it to Ms. Harborth.[18] Ms. Harborth then pressured him into providing the phone's passcode.[19]

When they got home, Ms. Harborth told Chief Harborth to leave before they even entered the house.[20] He agreed to leave, but first wanted to retrieve his personal property, including his phone.[21] Ms. Harborth refused to allow him to get any of his personal property or return his phone because she wanted to find evidence of his infidelity.[22] She then went with C.V. and his phone inside the house and locked Chief Harborth outside.[23]

Ms. Harborth then rifled through Chief Harborth's iPhone XS. When she discovered a picture of C.V.'s bikini-clad buttocks,[24] she called the Honolulu Police Department (HPD) to report him as a "pedophile."[25] Before HPD arrived, she found other still-framed, topless images of C.V., apparently taken by the Vivint

[17] J.A. at 595-96; 1491.
[18] J.A. at 595, 679, 1492.
[19] J.A. at 596, 679.
[20] J.A. at 1492.
[21] *Id.*
[22] J.A. at 681, 1492.
[23] J.A. at 1492.
[24] J.A. at 541, 1358, 1492-93.
[25] J.A. at 1493.

security system.[26] This discovery prompted Ms. Harborth to punch Chief Harborth as he again attempted to enter the house, and then she grabbed a hammer to hit Chief Harborth with if he attempted to enter their home again.[27]

When HPD arrived to find Chief Harborth locked out of his house, Ms. Harborth approached the officers with his phone and showed them the images she had found on it.[28] The police seized the phone without a warrant and then arrested Chief Harborth.[29] Honolulu Police Department never subsequently sought a warrant to support its seizure of the phone.

C. Ms. Harborth tried to give Chief Harborth's other devices to HPD, but the officers declined because they lacked probable cause to seize them.

The same day HPD seized Chief Harborth's iPhone XS and arrested him, Ms. Harborth requested that the officers also seize his iPads and another iPhone.[30] When presenting them to HPD, she could not unlock these other passcode-protected devices, which, like the iPhone XS, belonged exclusively to Chief Harborth.[31] The HPD officers declined to seize the items because "there was no

[26] J.A. at 599.
[27] J.A. at 684, 1493.
[28] J.A. at 729-30, 741-42, 1349.
[29] J.A. at 742, 1351.
[30] J.A. at 742-43, 1351.
[31] J.A. at 558, 626, 1351.

probable cause that [Chief Harborth's other devices] had content relevant to this particular case."[32]

D. Ms. Harborth then accessed Chief Harborth's other devices and e-mails without his permission and gave them to a different HPD officer, who seized them without a warrant.

After the HPD officers left, Ms. Harborth continued rifling through Chief Harborth's passcode-protected devices without his permission.[33] On a guess, she used the passcode for his iPhone XS to unlock one of his iPads.[34] She then manipulated the iPad's settings to connect the device to an iCloud e-mail account, which contained e-mails from the Vivint security system (hereinafter "the Vivint e-mails").[35] She later testified that links in the Vivint e-mails led to videos of C.V. masturbating in front of a mirror in her bedroom produced by the Vivint security system between July 27, 2017, and May 2019.[36] However, the Government did not obtain or admit any such videos or offer any evidence at trial concerning their contents aside from Ms. Harborth's testimony.

On May 13, 2019, Ms. Harborth drove to the HPD station and presented Chief Harborth's iPhone 6S, iPad 4, and iPad 2 to another officer who had not been

[32] J.A. at 743.
[33] J.A. at 626-27, 699-701.
[34] J.A. at 626-27, 699, 701.
[35] J.A. at 627, 701.
[36] J.A. at 638-39.

present at Chief Harborth's house on May 11, 2019.[37] What Ms. Harborth said to this HPD officer when she presented Chief Harborth's property is not in the record; however, both she and the Government disavowed that she had any shared property interest in these passcode-protected devices.[38] The officer seized the devices, and HPD never subsequently sought a warrant to support their seizure.[39]

E. NCIS took over the case and seized more of Chief Harborth's digital devices without a warrant or seizure authorization.

On May 14, 2019, NCIS took over the case from HPD.[40] The first NCIS supervisory special agent responsible for the investigation instructed two NCIS agents to "hit this one hard" and offered to provide "more people to help" if the detailed agents were overwhelmed.[41] The NCIS agents met Ms. Harborth the following day at the Harborth residence. They seized several of Chief Harborth's other electronic devices, including his Apple iPhone 6, without a warrant or search authorization.[42] When they seized the iPhone 6, the NCIS agents knew Ms. Harborth did not enjoy shared ownership of it and did not know what, if any, evidence it contained.[43]

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[37] J.A. at 1356, 1363.
[38] J.A. at 394-96, 399, 402, 433 (the Trial Counsel conceded that "there is no dispute that the devices belonged to [Chief Harborth]").
[39] J.A. at 1356.
[40] J.A. at 1449.
[41] J.A. at 1450.
[42] J.A. at 391, 1213-17, 1449.
[43] J.A. at 394-96, 399, 402.

NCIS also seized the Vivint security system control panel from the Harborth residence, with Ms. Harborth's consent.[44] NCIS recovered 700 videos from the control panel generated by the security system from May 10-12, 2019.[45] Eighteen of these videos were of C.V. in various stages of undress, twelve of which the security system generated after May 11, 2019.[46] However, the control panel's data did not indicate whether anyone had viewed the videos.[47]

On May 24, 2019, NCIS met Ms. Harborth at the HPD station and took custody of Chief Harborth's electronic devices that HPD had previously seized on May 11 and 13, 2019.[48] NCIS did not have a warrant and did not intend to obtain one for any of Chief Harborth's personal property.[49] At the time it took custody of Chief Harborth's devices, NCIS was aware of two relevant factors: (1) Ms. Harborth harbored animosity towards Chief Harborth; and (2) Ms. Harborth had disclaimed ownership of any of the devices seized by law enforcement.[50]

[44] J.A. at 405-06.
[45] J.A. at 1048-49, 1537-38.
[46] J.A. at 1045, 1070.
[47] J.A. at 1072.
[48] J.A. at 401-02, 1211.
[49] J.A. at 359-60.
[50] J.A. at 392-96, 402.

F. After Chief Harborth declined to consent to the search of his devices, NCIS held them for two and a half more months before obtaining a command authorization for search and seizure (CASS).

On May 29, 2019, Chief Harborth declined to give NCIS his consent to search his seized property.[51] NCIS did not return any of his seized property to him. On May 31, 2019, NCIS detailed a new lead agent to investigate the case.[52] The new lead agent believed "a first step" in her investigation would be to get a CASS for Chief Harborth's electronics.[53] However, she did not draft the CASS until over two months later and did not meet with the Commander to get the CASS issued until August 13, 2019.[54] In other words, NCIS did not obtain a CASS to search any of Chief Harborth's devices until 95 days after law enforcement seized his iPhone XS, 93 days after law enforcement seized his iPad 4, and 91 days after NCIS seized his iPhone 6.

The NCIS lead agent explained that the delay in obtaining a CASS until at least June 23, 2019, was because NCIS was unsure "[i]f there was probable cause to actually have [Chief Harborth's] devices or if they should be returned" to him.[55] Then, on June 24, 2019, the NCIS lead agent met with Ms. Harborth to go "item by

[51] J.A. at 1399.
[52] J.A. at 1448.
[53] J.A. at 329.
[54] J.A. at 1368, 1447.
[55] J.A. at 363.

item" to develop probable cause for the seized property.[56] In her eventual application for the CASS nearly two months later, the NCIS agent's affidavit does not cite any information obtained after June 2019.[57]

The material information Ms. Harborth provided to NCIS in her interview on June 24, 2019, had principally been known to HPD since May 11, 2019.[58] The record is silent as to why NCIS could not perform this "item by item" review of the property seized from Chief Harborth on any of the other five previous occasions it had contact with Ms. Harborth before June 24th.[59]

G. Chief Harborth timely moved to suppress evidence obtained from his devices on grounds of unlawful seizure. The Military Judge denied the motion.

Chief Harborth made a timely motion to suppress evidence derived from the "unconstitutional seizures of the accused's other iPhones and iPads, including the devices themselves, all data and information contained within the devices, all data and information extracted from the devices, and all reports derived from the search of the devices."[60] He objected to NCIS's interference with his possessory interest in all his seized property.[61] He also argued that NCIS's actions in seizing his

[56] J.A. at 364.
[57] J.A. at 1456-61.
[58] *Compare* J.A. at 1450-51 *with* J.A. at 1456-62.
[59] J.A. at 1448-49.
[60] J.A. at 1314.
[61] J.A. at 1328.

property at the HPD police station and then moving it onto a military installation (months before obtaining a CASS to search it on that installation) constituted an unlawful seizure.[62] The Military Judge denied the motion.[63]

Summary of Argument

A seizure, even if lawful to begin with, can become unlawful due to an unreasonable delay in obtaining a warrant or CASS. Here, law enforcement seized Chief Harborth's digital devices without probable cause, carried them into another jurisdiction (a military installation), and held them there for over three months before obtaining a CASS. As no circumstances existed justifying these unreasonable seizures, they were unlawful and required suppression of any evidence obtained thereby. The constitutional error of not suppressing this evidence was not harmless beyond a reasonable doubt, as the evidence was the *res gestae* of the charged offenses. As such, any failure by the trial defense counsel to object to this issue rendered their assistance constitutionally ineffective.

[62] *Id*.
[63] J.A. at 1471.

ARGUMENT

I.

THE MILITARY JUDGE ERRED BY FINDING THE WARRANTLESS SEIZURE OF CHIEF HARBORTH'S PROPERTY (OTHER THAN THE IPHONE XS) WAS JUSTIFIED BY PROBABLE CAUSE.

Standard of Review

This Court reviews a Military Judge's ruling on a motion to suppress for an abuse of discretion.[64] Findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*.[65] "A ruling based on an erroneous view of the law constitutes an abuse of discretion."[66] It is also an abuse of discretion if the Military Judge: (1) "predicates his ruling on findings of fact that are not supported by the evidence"; (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."[67]

Discussion

"The Fourth Amendment protects the people against unreasonable searches and seizures and provides that warrants shall not be issued absent probable

[64] *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016).
[65] *Id*.
[66] *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005).
[67] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

cause."[68] Without exigent circumstances or other recognized exceptions, "a seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."[69]

A. NCIS did not have probable cause to seize Chief Harborth's electronic devices (other than his iPhone XS).

1. The Military Judge's erroneous view of the law influenced his finding that law enforcement had probable cause to seize all of Chief Harborth's Apple devices.

The Military Judge ruled that "[t]he seizure of [Chief Harborth's] other Apple devices by HPD and NCIS were supported by probable cause."[70] "Probable cause" to seize property means a "fair probability that evidence of a crime will be found" in the property.[71] Conversely, "reasonable suspicion" to briefly seize property exists where there is an "articulable suspicion, premised on objective facts, that the [property] contains contraband or evidence of a crime."[72]

Here, the Military Judge erroneously used the reasonable suspicion standard to find NCIS seized Chief Harborth's electronic devices (other than his iPhone XS) based on probable cause. Specifically, he found it was "reasonable for law

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[68] *Hoffmann*, 75 M.J. at 123 (citing U.S. Const. amend. IV).
[69] *United States v. Place*, 462 U.S. 696, 701 (1983).
[70] J.A. at 1469.
[71] *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017).
[72] *Place*, 462 U.S. at 702.

enforcement to seize [Chief Harborth's other Apple devices] with networking capabilities similar to those of the iPhone XS" because they "may" have evidence of criminal conduct.[73]

At best, this reasoning articulates that law enforcement had a reasonable suspicion, premised on objective facts, that Chief Harborth's other Apple devices contained evidence of a crime. It does not articulate that there was a "fair probability that evidence of a crime [would] be found" on the devices, particularly when the Military Judge had already all but rejected the existence of probable cause to seize the devices by (correctly) asserting that law enforcement had no "determinative" knowledge that any evidence of a crime would be found on them.[74]

In *United States v. Nieto*, this Court ruled the seizure and search of the appellant's laptop lacked probable cause because there was no "particularized nexus," such as data transfers, between his cell phone (where there was evidence of a crime) and his laptop.[75] Of particular concern to this Court in *Nieto* was that the search authorization was premised on law enforcement's generalized assumptions that people "often times store . . . their images and videos on larger storage devices

[73] J.A. at 1470.
[74] *Id*.
[75] *Nieto*, 76 M.J. at 107-08.

such as a computer . . . ."[76] Contrary to the Government's argument, here, the Military Judge used the same flawed logic as *Nieto* in basing his probable cause finding on a generalized assumption that the seized devices all had the same "networking capabilities," and that Chief Harborth was actually employing those capabilities on those devices.[77]

Thus, the Military Judge's subsequent conclusion, applying an incorrect legal standard, that NCIS had probable cause to seize all of Chief Harborth's devices is erroneous.[78]

2. The Military Judge's finding of fact that HPD seized Chief Harborth's iPhone 4S, iPad 4, and iPad 2 on May 11, 2019, is clearly erroneous.

In his written ruling, the Military Judge found that on May 11, 2019, Ms. Harborth provided Chief Harborth's iPhone 4S, iPad 4, and iPad 2 to the HPD officer responding to her 911 call.[79] This factual finding is clearly erroneous. In fact, the responding HPD officer testified explicitly just the opposite: that he did *not* seize any of these devices from Ms. Harborth because "there was no probable cause that the devices had content relevant to [Chief Harborth's] case."[80] Rather, the HPD records clearly reflect that it was not until two days after HPD arrested

[76] *Id.* at 105, 108.
[77] *See id.*; Appellee/Cross-Appellant Br. at 21; J.A. at 1470.
[78] J.A. at 1470.
[79] J.A. at 1467.
[80] J.A. at 743.

Chief Harborth, on May 13, 2019, that Ms. Harborth presented these additional devices (without Chief Harborth's knowledge or permission) to HPD.[81]

3. The Military Judge failed to consider important facts when he erroneously found HPD and NCIS had probable cause to seize all of Chief Harborth's digital devices.

In reaching his conclusion, the Military Judge failed to consider the following important facts as to whether NCIS and HPD had probable cause to seize Chief Harborth's Apple devices:[82]

1. The HPD officers admitted they did not have probable cause to seize Chief Harborth's iPhone 4S, iPad 4, and iPad 2.[83]

2. The NCIS agent admitted that he seized the iPhone 6 only because "there *might* [be] something relevant on there."[84]

3. The NCIS lead agent did not know "[i]f there was probable cause" for the items NCIS had already seized in May until she interviewed Ms. Harborth *over a month later* on June 24th.[85]

The Military Judge's failure to consider these important facts contributed to his erroneous conclusion on this mixed question of law and fact. As the lower court identified, "probable cause is an objective inquiry based on the facts known to the

[81] J.A. at 1356, 1363.
[82] As discussed above in Section I.A., this conclusion is erroneous because HPD and NCIS merely had a reasonable suspicion to seize every Apple product other than the iPhone XS.
[83] J.A. at 743.
[84] J.A. at 397 (emphasis added) (the agent is agreeing with trial defense counsel's leading question).
[85] J.A. at 363-64.

officer at the time of the arrest," and neither NCIS nor HPD believed probable cause existed to seize Chief Harborth's devices (other than the iPhone XS) at the time of his arrest or the seizures.[86] Thus, the Military Judge abused his discretion.

B. Chief Harborth agrees with the Government that the Military Judge erred by relying on inevitable discovery.

Chief Harborth agrees with the Government that the Military Judge erred by relying on inevitable discovery.[87] However, as discussed below in Section II, Chief Harborth disagrees with the Government's claim that Ms. Harborth possessed actual or apparent authority to give NCIS the electronic devices such that the seizures were beyond the Fourth Amendment's scope. Therefore, as the Government otherwise concedes, the Military Judge erred in failing to articulate a valid exception to the warrant requirement for any of the devices with the exception of the iPhone XS.[88]

[86] J.A. at 13 (internal citation omitted).
[87] Appellee/Cross-Appellant Br. at 20-24.
[88] Appellee/Cross-Appellant Br. at 19.

II.

THE LOWER COURT NEITHER ERRED IN RULING THAT MS. HARBORTH DID NOT HAVE ACTUAL OR APPARENT AUTHORITY TO CONSENT TO THE SEIZURE OF CHIEF HARBORTH'S DEVICES NOR IN RULING THAT THE DELAY IN SECURING A SEARCH AUTHORIZATION WAS UNREASONABLE.

Standard of Review

This Court reviews a Military Judge's ruling on a motion to suppress for an abuse of discretion.[89] When a Military Judge does not rule on a legal issue, this Court reviews the Court of Criminal Appeals' conclusions of law de novo.[90]

Discussion

A. Ms. Harborth did not have actual or apparent authority to consent to law enforcement seizing Chief Harborth's property.

A consensual seizure's validity is predicated upon a "*voluntary* tender of property."[91] Here, C.V. and Ms. Harborth physically ripped Chief Harborth's iPhone XS from his hands, locked him out of his house to prevent him from retrieving his other devices, and then absconded with those devices to law enforcement without his permission. These facts amount to anything but a "voluntary" tender of Chief Harborth's property.

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[89] *Hoffmann*, 75 M.J. at 124.
[90] *United States v. Perkins*, 78 M.J. 381, 387 n.11 (C.A.A.F. 2019).
[91] *United States v. Stabile*, 633 F.3d 219, 235 (3d Cir. 2011) (emphasis original).

1. At trial, the Government conceded that the seized devices belonged to Chief Harborth.

At trial, the Government conceded all the property Ms. Harborth gave to law enforcement belonged to Chief Harborth.[92] The Trial Counsel said, "There is no dispute that the devices belonged to [Chief Harborth]."[93] However, the Trial Counsel then argued that because Chief Harborth told Ms. Harborth the password to his iPhone XS, this provided her actual authority to later consent to the seizure of all of his devices.[94]

This argument fails for several reasons. First, Chief Harborth rescinded whatever authority he may have relinquished over his devices to Ms. Harborth when he demanded that she let him get his property (which she refused to do).[95] The law is clear, a person may limit, and thus rescind, a third-party's authority over their property.[96] Second, passwords protect privacy interests, not possessory interests, and the Fourth Amendment protects possessory interests even where no privacy interests are implicated.[97] Third, Ms. Harborth repeatedly disclaimed any

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[92] J.A. at 443.
[93] *Id*.
[94] J.A. at 443-46.
[95] J.A. at 681, 1492; *see United States v. Rader*, 65 M.J. 30, 34 (C.A.A.F. 2007) (holding that, within the context of common authority to consent to a search, courts should consider whether the appellant "manifested an intention to restrict third-party access" to the computer).
[96] *United States v. Black*, 82 M.J. 447, 452 (C.A.A.F 2022) (citing *Rader*, 65 M.J. at 34).
[97] *Soldal v. Cook County*, 506 U.S. 56 (1992).

shared ownership interest in the seized devices.[98] Nor did Ms. Harborth claim any shared use of the seized devices.[99]

2. The Government advances an erroneous argument on appeal that Ms. Harborth has actual authority to consent to the Government seizing Chief Harborth's property because she co-owned their home.

On appeal, the Government argues that, under *United States v. Weston*, Ms. Harborth had actual authority to consent to the seizure of Chief Harborth's devices because she co-owned the home in which she found them.[100] This argument fails because it does not consider *Weston*'s admonishment against relying on common authority for all items within a home if those items "reasonably appear[] to be within the exclusive domain of the third party" as the items were here.[101] Indeed, Ms. Harborth repeatedly disclaimed any shared ownership interest in the seized devices.[102] And the Government concedes the devices collected by Ms. Harborth "belong[ed]" to Chief Harborth.[103] Therefore, Ms. Harborth's co-ownership of the home does change that Chief Harborth's devices both reasonably appeared to be, and in fact were, within his exclusive domain.

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[98] *E.g.*, J.A. at 361, 394-95, 399, 402.
[99] J.A. at 399, 402.
[100] Appellee/Cross-Appellant Br. at 28.
[101] *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009).
[102] *E.g.*, J.A. at 361, 394-95, 399, 402. The Trial Counsel conceded that "there is no dispute the devices belonged to [Chief Harborth]." J.A. at 443.
[103] Appellee/Cross-Appellant Br. at 7.

The Government's citations to *United States v. Stabile*, *United States v. Thomas,* and *United States v. Clutter* are all similarly inapt.[104] In *Stabile,* police arrived at the defendant's house to question the defendant about counterfeiting checks. A woman in the home consented to the search of the home and seizure of computer hard drives therein where she both mutually used the devices and they were located in common areas of the home.[105] Here, Ms. Harborth did not mutually use Chief Harborth's iPhone XS, iPad 4, or iPhone 6.[106] Moreover, they were recovered from his "personal belongings," not a common area.[107]

Similarly, in *Thomas*, the appellant's wife told the police she saw child pornography on their home computer, which she had joint access to and control over for most purposes.[108] Moreover, appellant never attempted to restrict his wife's access to the computer.[109] Under these circumstances, the Eleventh Circuit found she had the authority to consent to the computer's seizure. Here, Ms. Harborth did not have joint access to or control over Chief Harborth's seized devices, *and* he attempted to restrict her access to them by demanding he be allowed to retrieve them (to which she refused by locking him out of the house).

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[104] Appellee/Cross-Appellant Br. at 27-31.
[105] *Stabile*, 633 F.3d at 231, 233.
[106] J.A. at 361, 394-95, 399, 402.
[107] J.A. at 204 (Government's statement of fact to the lower court).
[108] *United States v. Thomas*, 818 F.3d 1230, 1241 (11th Cir. 2016).
[109] *Id.*

Finally, in *Clutter*, the Eighth Circuit held that a warrantless seizure of computer storage devices with the consent of the non-defendant homeowner was constitutionally valid based on the totality of the circumstances.[110] The Court based its determination on three factors: (1) the defendant was detained in jail on the day the computers were seized with the consent of his father, who was in actual possession of the computers at the time of the seizure, thus there was no Fourth Amendment "seizure;" (2) the officers had probable cause to believe the computers contained evidence of child pornography offenses; and (3) the seizure was only temporary while officers obtained a warrant to search the computers.[111] Here, Chief Harborth was briefly detained on May 11, 2019, but not otherwise in jail,[112] NCIS did not have probable cause for the iPad 4 and iPhone 6's seizures,[113] and—as the Government concedes—the seizure's length without a CASS weighs in favor of Chief Harborth.[114]

3. Ms. Harborth did not have apparent authority over Chief Harborth's seized iPhone XS, iPad 4, or iPhone 6.

Apparent authority to consent to a seizure only exists where an officer *reasonably* believes the third party possesses common authority over the

[110] *United States v. Clutter*, 674 F.3d 980 (8th Cir. 2012).
[111] *Id.* at 985.
[112] J.A. at 1354.
[113] J.A. at 363-65.
[114] Appellee/Cross-Appellant Br. at 35.

property.[115] Where, as here, law enforcement knows one spouse has disclaimed any ownership over her spouse's property and that there is acrimony in the marriage, then the officer cannot reasonably believe the spouse possesses common authority over that property such that she can consent to its seizure.[116] The lower court reached that very conclusion in *United States v. Taylor*, as did this Court in *United States v. Clow*.[117] Therefore, this Court should decline the Government's invitation to ignore those holdings and instead find Ms. Harborth did not have apparent authority over Chief Harborth's property.[118]

B. The lower court did not err by finding the Government violated Chief Harborth's Fourth Amendment rights when NCIS unreasonably delayed obtaining a CASS for his seized property.

The Fourth Amendment's prohibition against unreasonable seizures protects individuals' possessory interests in their property.[119] The Supreme Court "has frequently approved warrantless seizures of property, on the basis of probable cause, *for the time necessary to secure a warrant* . . . ."[120] Thus, "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner

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[115] *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).
[116] J.A. at 393-400.
[117] *United States v. Clow*, 26 M.J. 176, 188 n.14 (C.M.A. 1988); *United States v. Taylor*, No. 201900242, 2020 CCA LEXIS 137 (N-M. Ct. Crim. App. Apr. 30, 2020) (unpub.).
[118] Appellee/Cross-Appellant Br. at 31-32.
[119] U.S. Const. amend. IV; *Segura v. United States*, 468 U.S. 796, 798 (1984) (plurality opinion).
[120] *Segura*, 468 U.S. at 798, 806 (emphasis added).

of execution unreasonably infringes possessory interests . . . ."[121] Accordingly, while the Fourth Amendment permits the probable cause seizure of property without a warrant, it requires law enforcement to follow up by diligently seeking a warrant to search the property's contents.[122]

As this Court has stated, the Fourth Amendment protects servicemembers' possessory interests by prohibiting unreasonably long seizures of personal property.[123] Law enforcement is therefore required to diligently pursue a CASS "for the obvious reason that a longer seizure is a greater infringement on possession than a short one."[124] Consequently, "even a seizure based on probable cause is unconstitutional if police act with unreasonable delay in securing a [warrant or CASS]."[125]

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[121] *United States v. Jacobsen*, 466 U.S. 109, 124 (1984); *Segura*, 468 U.S. at 812.
[122] *Illinois v. McArthur*, 531 U.S. 326, 331-33 (2001).
[123] *United States v. Gurczynski*, 76 M.J. 381, 387 (C.A.A.F. 2017) (citing *United States v. Cote*, 72 M.J. 41, 44 n.6 (C.A.A.F. 2013)).
[124] *United States v. Smith*, 967 F.3d 198, 209 (2d Cir. 2020) (citing *United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012)).
[125] *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998) (finding that in some circumstances even eleven days delay between seizure and securing a warrant might well constitute a constitutionally unreasonable delay); *see Gurczynski*, 76 M.J. at 387 ("[T]he government nevertheless remains bound by the Fourth Amendment to the extent that all seizures must be reasonable in duration."). *See also United States v. Respress*, 9 F.3d 483, 488 (6th Cir. 1993) ("[E]ven with the existence of probable cause to effect a seizure, the duration of the seizure pending the issuance of a search warrant must still be reasonable."); *Jacobsen*, 466 U.S. at 121 (stating that where officers have probable cause to believe container contains contraband, it "may be seized, at least *temporarily*, without a warrant") (emphasis added); *Texas v. Brown*, 460 U.S. 730, 750 (1983) (Stevens, J., concurring) (stating

Evidence obtained through a seizure that becomes illegal is inadmissible at a court-martial if the exclusion of the evidence results in appreciable deterrence of future unlawful seizures and the benefits of such deterrence outweigh the costs to the justice system.[126] Here, the Military Judge should have excluded the evidence obtained from the unlawful seizure of the devices; his failure to do so was an abuse of discretion.

1. The Military Judge incorrectly believed a Fourth Amendment analysis is only "triggered" by a search and not by a seizure.

As this Court squarely held in *United States v. Wallace*, "the search and the seizure necessitate separate analyses under the Fourth Amendment."[127] This distinction matters because a seizure affects a person's possessory interests, whereas a search affects a person's privacy interests.[128] Thus, a governmental seizure (i.e., interference with possessory interests) of certain property and a subsequent governmental search of that property each trigger a separate Fourth Amendment analysis.

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an "item may be seized *temporarily*" if there is probable cause to believe it contains evidence that may "vanish during the time it would take to obtain a warrant") (emphasis added); *Smith*, 967 F.3d at 209.

[126] Mil. R. Evid. 311(a)-(b).

[127] *United States v. Wallace*, 66 M.J. 5, 8 (C.A.A.F. 2008) (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989)).

[128] *Jacobsen*, 466 U.S. at 113.

Here, Chief Harborth moved to suppress evidence derived from the seizure of his Apple devices under the theory of both an unlawful search *and* an unlawful seizure.[129] The Military Judge's assertion in his summary of law that the "trigger for a Fourth Amendment analysis *is a search* by a U.S. government official . . ." was an incorrect application of the law.[130] And it led to an erroneous conclusion.

2. The Military Judge erroneously believed seizures based on probable cause are not subject to the Fourth Amendment's protections.

One of the Fourth Amendment's central purposes is to interpose, *ex ante*, "the deliberate, impartial judgment" of a commander, Military Judge, or magistrate "to assess the weight and credibility of the information" used as the basis for a probable cause seizure.[131] Yet the Military Judge concluded as a matter of law that Chief Harborth's iPhone XS seizure was not subject to a Fourth Amendment analysis because HPD (and later NCIS) seized it based on probable cause.[132] This conclusion leads to the absurd result of permitting law enforcement to indefinitely seize evidence without an impartial and independent review of its claimed probable cause basis for doing so. This erroneous view of the law was an abuse of discretion.

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[129] J.A. at 1314.
[130] J.A. at 1464 (emphasis added).
[131] *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963) (discussing arrest warrants).
[132] J.A. at 1468.

3. The Military Judge erroneously conflated Fourth Amendment privacy interests with Fourth Amendment possessory interests.

The Military Judge also applied an incorrect legal principle when he concluded that "[e]ven if the seizure of the iPhone XS was subject to a Fourth Amendment analysis, [Chief Harborth] would not prevail" because Chief Harborth's "expectation of privacy in his iPhone XS was not objectively reasonable."[133] This conclusion erroneously conflates Fourth Amendment privacy and possessory interests. As discussed above, this Court has found these interests are distinct and require separate analysis.[134] Indeed, consideration of Fourth Amendment possessory interest protections is particularly acute under the circumstances of this case, where NCIS's failure to seek a CASS to search Chief Harborth's property for *95 days* was unreasonable, and consequently "actionable under the Fourth Amendment."[135] The Military Judge's failure to use the correct legal principle in resolving this issue was an abuse of discretion.

[133] J.A. at 1468-69.
[134] *Wallace*, 66 M.J. at 8.
[135] *Burgard*, 675 F.3d at 1032 (citing Phillip B. Griffith, *Thinking Outside of the 'Detained' Box: A Guide to Temporary Seizures of Property Under the Fourth Amendment*, ARMY LAWYER, Dec. 2009, at 11, 13).

4. A warrantless seizure becomes unreasonable, and thus unconstitutional, when the delay in obtaining the warrant/CASS is longer than reasonably necessary while acting with due diligence.[136]

In assessing the constitutionality of the delay in obtaining a warrant/CASS to search previously seized property, courts examine the length of the delay and balance the nature of the encroachment upon personal possessory interests against the Government's interest justifying the seizure.[137] Multiple U.S. Circuit Courts of Appeals applying this balancing test to extended warrantless seizures have found that delaying even a few weeks—let alone a few months—is unreasonable.[138]

In *United States v. Smith*, the Second Circuit concluded that "a month-long delay [in obtaining a warrant] *well exceeds what is ordinarily reasonable.*"[139] There, state police discovered Smith unconscious and smelling of alcohol while in the driver's seat of his car on the side of a road.[140] As the officer looked in the car

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[136] *McArthur*, 531 U.S. at 331-32; *see United States v. Van Leeuwen*, 397 U.S. 249, 252-53 (1970) (holding that the facts of this case require finding a 29-hour delay between seizure and the service of the warrant was not "unreasonable" within the meaning of the Fourth Amendment). *See also Place*, 462 U.S. at 709-10 (holding 90-minute detention of luggage unreasonable based on nature of interference with person's travels and lack of diligence of police).

[137] *Place*, 462 U.S. at 703, 709.

[138] *Smith*, 967 F.3d at 206-07 (finding any delay over a month was presumptively unreasonable); *United States v. Pratt*, 915 F.3d 266, 269-71 (4th Cir. 2019) (thirty-one days of delay in obtaining a warrant was a violation of the Fourth Amendment); *United States v. Mitchell*, 565 F.3d 1347, 1351-53 (11th Cir. 2009) (finding evidence seized without a warrant for twenty-one days violated the Fourth Amendment).

[139] *Smith*, 967 F.3d at 207 (emphasis added).

[140] *Id.* at 202.

for identifying information, the officer saw a smart tablet with an image on the screen that appeared to be child pornography.[141] Discovering that Smith was a registered sex offender after running his information, the police seized the tablet for further possible evaluation based on probable cause that it contained evidence of a crime.[142] However, when Smith declined to consent to the search of the seized tablet the next day, the case detective waited thirty-one days to secure a warrant to search the tablet because he was working on other cases.[143] The Second Circuit concluded the detective's workload and the absence of any other extenuating reasons made a month-long delay between seizure and securing a warrant unreasonably long, in violation of Smith's Fourth Amendment right.[144]

Similarly, in *United States v. Pratt*, the Fourth Circuit held a 31-day delay in obtaining a warrant after a seizure was unreasonable and in violation of the Fourth Amendment.[145] There, Federal Bureau of Investigation (FBI) agents investigated Pratt for running a prostitution ring that included juveniles from North and South Carolina.[146] The FBI agents seized Pratt's phone without a warrant, and he declined to consent to the seizure.[147] The agents then spent the next thirty-one days

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[141] *Id*.
[142] *Id*. at 202-03.
[143] *Id*. at 204.
[144] *Id*. at 211.
[145] *Pratt*, 915 F.3d at 272.
[146] *Id*. at 269.
[147] *Id*. at 270.

determining whether to seek a warrant from North or South Carolina to search the phone, which the court found was an unreasonable delay.[148]

In *United States v. Mitchell*, the Eleventh Circuit found a seizure violated the Fourth Amendment when there was no compelling justification for a *twenty-one-day* delay in obtaining a warrant.[149] There, Immigration and Customs Enforcement (ICE) agents developed evidence that Mitchell purchased child pornography, including his admission that he likely had child pornography on his computer.[150] While Mitchell consented to the seizure of his computer's hard drive, the lead agent then left for a two-week training course three days later and did not obtain a search warrant until twenty-one days after seizing the hard drive, which the court found was an unreasonable delay.[151]

C. NCIS's delay of *over 90 days* in obtaining a CASS for Chief Harborth's seized devices was unreasonable under the circumstances and thus violated his Fourth Amendment right against unreasonable seizures.

1. Chief Harborth had a substantial possessory interest in his seized digital devices.

As the Second Circuit has explained, a "fundamental distinction between one's ordinary personal effects and one's personal electronic devices" has "persuaded the Supreme Court to accord broader constitutional protection when

[148] *Id*. at 272-73.
[149] *Mitchell*, 565 F.3d at 1352-53.
[150] *Id.* at 1349-51.
[151] *Id*.

the police seize a person's 'smart' cell phone."[152] Indeed, the Supreme Court has found smart devices to be "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[153] Therefore, the seizure of Chief Harborth's electronic devices implicates heightened "possessory concerns than the . . . seizure of a person's ordinary personal effects."[154]

Moreover, Chief Harborth never forfeited his significant possessory interest in his seized property. Instead, C.V. grabbed his iPhone XS from his hands before it was presented to HPD without his permission.[155] And Ms. Harborth took his other devices from the home he had been locked out of and handed them over to HPD without his permission.[156] NCIS then took custody of all his seized devices from HPD, knowing: (1) they had been taken without his permission; (2) seized

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[152] *Smith*, 967 F.3d at 207.
[153] *Riley v. California*, 573 U.S. 373, 385 (2014). *See also Mitchell*, 565 F.3d at 1531 (finding smart devices "are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form"); *Smith*, 967 F.3d at 207 (finding "[t]he sheer volume of data that may be stored on an electronic device like a Nextbook (or similar tablet computer devices like an Apple iPad) raises a significant likelihood that much of the data on the device that has been seized will be deeply personal and have nothing to do with the investigation of criminal activity")
[154] *Smith*, 967 F.3d at 208.
[155] J.A. at 1492.
[156] J.A. at 1356, 1363.

without a warrant; (3) that Ms. Harborth both harbored animosity towards Chief Harborth; and (4) Ms. Harborth had disclaimed ownership of any of the devices.[157]

NCIS then disregarded any indication of Chief Harborth's assertion of possessory interests in the seized property. First, he tried to retrieve his personal effects from his home and was locked out by Ms. Harborth.[158] Next, on May 29, 2019, he refused to give NCIS his consent to search any of his seized property, including the property Ms. Harborth had taken without his knowledge or consent.[159] The NCIS agent requesting his consent never informed him of his right to demand the property's return.[160] All this, considered in the context of his other demands for access to his property, must be considered a constructive assertion of his rights to the seized property.[161] Therefore, Chief Harborth's possessory interests in his seized devices remained substantial.

The Government attempts to conflate Chief Harborth's possessory interest in the seized devices with the data within those devices by claiming he could have

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[157] J.A. at 393-403, 406-07, 443, 1211; *see Taylor*, 2020 CCA LEXIS 137, at *42-43 (finding that where NCIS has substantial information showing a spouse's animosity toward an accused and where she disclaims ownership of the property, NCIS agents cannot reasonably believe that spouse has authority to consent to the property's seizure).
[158] J.A. at 1492.
[159] J.A. at 1399.
[160] J.A. at 1401.
[161] J.A. at 1492.

accessed the data on the iCloud.[162] This argument fails on its face because the possessory interest in the devices themselves exists independent of the ability to access the information they contain. Moreover, Ms. Harborth took *all* of Chief Harborth's devices and gave them to law enforcement, undermining his ability to retrieve data from the iCloud.[163]

Additionally, the Government's citation to *Riley v. California* to support this argument is inapt.[164] In *Riley*, the Supreme Court unanimously held that police officers generally cannot, without a warrant, search digital information on the cell phones they seize incident to arrest.[165] While caveating that officers can examine phones' physical aspects to ensure that they cannot be used as weapons, the Court held that since "data on the phone can endanger no one," "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board."[166] Thus, while focused principally on the right to privacy as opposed to possession, *Riley* nevertheless implicitly rejects the Government's argument that Chief Harborth's possessory interests were somehow diminished because he could still access the data on the iCloud. To the contrary, Chief Harborth's interest in

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[162] Appellee/Cross-Appellant Br. at 37-39.
[163] *See* J.A. at 1211-17.
[164] Appellee/Cross-Appellant Br. at 37 (citing *Riley v. California*, 573 U.S. 373, 397 (2014)).
[165] *Riley*, 573 U.S. at 386.
[166] *Id*. at 387-88.

using the seized devices for everyday tasks such as sending/receiving text messages, making phone calls, accessing the internet, using a maps application for navigation, let alone accessing whatever other data that existed only on his seized devices and not on the iCloud, remained strong.

Indeed, the Government's own flawed logic ultimately supports Chief Harborth's position. The Government argues that "if, as here, the owner could quickly and easily access that same information through the cloud, . . . then his possessory interest in that information has not been affected at all" because the phones and tablets "can be replaced very easily, *albeit at some expense*."[167] In other words, the Government's position is that Fourth Amendment possessory interests vary depending on the cost/ease of replacing the property in question. This absurd position—in which constitutional rights depend on how affordable the seized property is (and thus how wealthy its owner is)—is not the law. And even if it were, given the ubiquity and vitality smartphones now bring to everyday life (above and beyond accessing data in the "Cloud"), the cost of replacing iPhones and other devices worth hundreds of dollars at his own expense demonstrates what a "serious interference" to Chief Harborth's possessory interests the Government's warrantless and unreasonable seizure of his devices was.[168]

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[167] Appellee/Cross-Appellant Br. at 39 (emphasis added).
[168] *United States v. Babcock*, 924 F.3d 1180, 1191 (11th Cir. 2019).

2. The Government's interest in Chief Harborth's Apple devices does not permit their seizure for three months without a CASS.

The difference between reasonable suspicion and probable cause (discussed above in Section I.A.1.) is relevant to the analysis because "a key factor" in analyzing whether the duration of a seizure was reasonable is law enforcement's basis for the seizure.[169] Specifically, "[a]ll else being equal, the Fourth Amendment will tolerate greater delays [in obtaining a CASS] after probable-cause seizures."[170] The Government's interest in seizing property with probable cause may last for days or even weeks.[171] But its interest in seizing property based on a reasonable suspicion usually only lasts for a few hours or perhaps days.[172]

While the HPD officers had probable cause to believe Chief Harborth's iPhone XS contained evidence of a crime, NCIS did *not* have probable cause to seize Chief Harborth's iPhone 6 or iPad 4.[173] Instead, NCIS seized these items, at

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[169] *Burgard*, 675 F.3d at 1033.
[170] *Smith*, 967 F.3d at 209 (quoting *Burgard*, 675 F.3d at 1033).
[171] *Burgard*, 675 F.3d at 1033 (*comparing McArthur*, 531 U.S. at 331 (two-hour delay after probable-cause seizure of house was reasonable) *with Place*, 462 U.S. at 709 (90-minute delay after reasonable suspicion seizure of suitcase was unreasonable)); *Smith*, 967 F.3d at 209. *See also Van Leeuwen*, 397 U.S. at 252-53 (holding that law enforcement's probable cause basis for a 29-hour delay between seizure and the service of the warrant was not "unreasonable" within the meaning of the Fourth Amendment).
[172] *Id*.
[173] J.A. at 362-64.

most, because of a reasonable suspicion that they contained evidence of a crime.[174] Consequently, seizing the iPhone 6 and iPad 4 without a CASS for *over three months* "exceeded the bounds" of a permissible reasonable-suspicion seizure.[175] Indeed, delaying until June 24, 2019, to develop probable cause to justify the seizure of the iPhone 6 and iPad 4—items NCIS had in its possession since at least May 24—was in and of itself unreasonable and in violation of Chief Harborth's Fourth Amendment rights.[176]

Even probable cause to seize Chief Harborth's iPhone XS (or the iPhone 6 and iPad 4 if this Court finds NCIS did indeed have probable cause to seize them) did not justify taking *over three months* to obtain a CASS in this case—a delay more than *three times* as long as the Second Circuit has determined to be presumptively unreasonable.[177] This three-month-long, nonconsensual seizure of Chief Harborth's property significantly interfered with his property rights, which is "an important factor" for this Court to weigh.[178]

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[174] *See* J.A. 396-97. The NCIS agent agrees that he seized Chief Harborth's iPhone 6 because "sometimes" people connect iPhones to the iCloud so there "might" be evidence on the iPhone 6. *See also supra* Section I.A.I.
[175] *Place*, 462 U.S. at 709 (90-minute delay after reasonable suspicion seizure of suitcase was unreasonable).
[176] J.A. at 362-64.
[177] *Smith*, 967 F.3d at 207.
[178] *See Place*, 462 U.S. at 709 (holding the brevity of an invasion of an individual's Fourth Amendment interest is an important factor in determining whether a seizure is so minimally intrusive as to be justifiable on reasonable suspicion).

3. There are no circumstances justifying the delay of more than three months in obtaining a CASS.

Nor does reviewing NCIS's actions between May 13 and August 13, 2019, assuage the obvious concern that taking three months to obtain a CASS, in this case, was patently unreasonable. Instead of diligently seeking a CASS, NCIS spent most of May 13 through August 13, 2019, talking about the evidence and updating interested parties rather than attempting to search for any evidence on Chief Harborth's seized Apple devices.[179] As the Fourth Circuit held in *Pratt*, law enforcement must do more than talk after a warrantless seizure of property.[180]

Here, every material fact to NCIS's probable cause determination was made known to law enforcement in May 2019; consequently, NCIS should have taken action to secure the CASS by the end of May.[181] Specifically, by May 16, 2019, NCIS knew HPD saw topless photographs of C.V. on Chief Harborth's iPhone XS that appeared to have been taken by the Vivint security system,[182] and NCIS observed videos of C.V. naked on the Vivint security system.[183] Thus, it was

[179] J.A. at 1447-50.
[180] *Pratt*, 915 F.3d. at 272-73. Finding that law enforcement's continued discussion about a case is not a persuasive justification for delay in obtaining a warrant.
[181] *Compare* J.A. at 1377-78 (NCIS Report of Investigation (interim) dated 31 May 2019) *and* J.A. at 1345-46 (NCIS summary of interview with Ms. Harborth dated May 16, 2019) *with* J.A. at 1456-60 (NCIS Probable Cause statement requesting a CASS).
[182] J.A. at 1345.
[183] J.A. at 405-06.

unreasonable for NCIS to wait until August 13, 2019, to request a CASS for Chief Harborth's iPhone XS.

After moving so slowly to pursue a CASS through most of June, NCIS then essentially stopped pursuing any new information at all in this regard after June 24, 2019.[184] Indeed, the June 24th interview of Ms. Harborth is the last investigative step NCIS referenced in its petition to obtain a CASS *seven weeks later*.[185] In other words, from June 24th onward, NCIS did not even pretend to have learned any new information in support of its August 13, 2019, request for a CASS.

In reality, instead of pursuing the CASS (or directing another agent to do so), from the last week of June through the first two weeks of August, the NCIS lead agent went on leave and TDY.[186] This is precisely the sort of delay the Eleventh Circuit found unreasonable in *Mitchell*, where the lead ICE agent's departure for a two-week training course caused an impermissible twenty-one-day delay in obtaining a warrant for the seized device.[187] Here, the NCIS lead agent's failure to get a CASS within the twenty-one-day period between the June 24th interview and her July 15th departure for TDY violated Chief Harborth's Fourth Amendment rights. So, too, did the additional twenty-nine days (four weeks) that

[184] *See* J.A. at 1447-50.
[185] J.A. at 1456-60.
[186] *See* J.A. at 1447-50.
[187] *Mitchell*, 565 F.3d at 1351-53.

passed after July 15th as NCIS impermissibly idled, failing to obtain a CASS until August 13th for evidence that was all seized by May 24th (over *eleven weeks* earlier).

Nor did NCIS lack the resources to quickly pursue a CASS in May 2019. The supervisory agent had offered "more people to help" with the investigation at its inception and was prepared to "hit this one hard."[188] Yet in addition to sending her TDY, NCIS permitted the lead agent to take two separate blocks of leave during the investigation: the first before she was detailed as the lead agent on this case,[189] and the second from July 22-26, 2019.[190] Certainly, NCIS would have prevented the lead case agent from taking two blocks of leave in less than two months had the investigation team been overwhelmed—as opposed to simply dilatory—which distinguishes this case from the Government's cited case of *United States v. Vallimont*.[191]

D. The exclusionary rule requires suppression in this case.

The Supreme Court has held that "[e]vidence obtained as a direct result of an unconstitutional . . . seizure is plainly subject to exclusion."[192] The exclusionary

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[188] J.A. at 1450.
[189] J.A. at 354.
[190] J.A. at 1447.
[191] Appellee/Cross-Appellant's Br. at 37 (citing *United States v. Vallimont*, 378 Fed. Appx. 972, 976 (11th Cir. 2010)).
[192] *Segura*, 468 U.S. at 804.

rule operates as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[193] This rule, which has been incorporated into M.R.E. 311(a)(3), requires that evidence obtained in violation of the Fourth Amendment be excluded whenever doing so "results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." As the Supreme Court has explained, "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[194]

Here, as the lower court identified, "[b]ecause the law enforcement officers rightly disclaimed probable cause, and the Military Judge could only speculate as to what may have been on Appellant's other electronic devices at the time they were seized, this Court ordinarily applies the exclusionary rule."[195] Worse still, the lower court noted that this "dragnet" seizure of Chief Harborth's electronic devices "occurred two years after [this Court's decision in *United States v. Nieto*] condemned the practice of seizing all of a suspect's electronic devices because he

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[193] *United States v. Leon*, 468 U.S. 897, 906 (1984) (internal citation and quotation marks omitted); *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) ("The exclusionary rule applies only where it result[s] in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence must outweigh the costs") (internal citations and quotation marks omitted)(alterations in original).
[194] *Herring v. United States*, 555 U.S. 135, 144 (2009).
[195] J.A. at 14 (citing *Nieto*, 76 M.J. at 106).

was suspected of committing a crime with his smart phone."[196] As such, excluding evidence obtained from the unlawful seizures in this case is warranted because it would significantly deter future unlawful seizures involving the gross and systemic negligence by law enforcement in timely obtaining a warrant/CASS for seized property that occurred here. Thus, the deterrent value of exclusion is strong and outweighs the resulting costs.

1. NCIS failed to diligently obtain a CASS due to systemic error.

Nothing in the record reveals NCIS believed its investigating agents were not meeting the expectation to "hit this [investigation] hard."[197] Between May 11 and August 13, 2019, the lead NCIS investigators repeatedly updated two supervisory special agents on the status of the investigation.[198] The involvement of multiple supervisors means the delay in obtaining a CASS was not an isolated act of negligence. Instead, it was a systemic, institutional failure to understand the obligation to diligently pursue a CASS.

This systemic failure is most apparent after Chief Harborth refused NCIS's request that he consent to the search of his seized property. While this refusal was a constructive assertion of his continued possessory rights in the seized property, NCIS simply disregarded this fact and allowed the investigation to slog along for

[196] J.A. at 20-21 (citing *Nieto*, 76 M.J. at 108 n.5).
[197] J.A. at 1450.
[198] J.A. at 1448-50.

another seventy-seven days without obtaining a CASS. The only explanation for such a brazenly dilatory approach to servicemembers' constitutionally-protected possessory interests in seized property is that the NCIS agents were either unaware of the need to diligently pursue search authorizations in these circumstances, or simply did not care. Either way, this institutionally-condoned foot-dragging warrants significant deterrence by this Court.

Indeed, in this case, NCIS permitted its agent to *stop working* on the investigation for weeks without first securing a CASS to search property that NCIS seized without Chief Harborth's permission, without his consent, and without a warrant. As in *Mitchell*, another participating agent could have written the affidavit to obtain the warrant in the lead agent's absence.[199] The fact that NCIS allowed the lead agent to go TDY and on leave indicates NCIS's satisfaction with the investigation's progress.

The fact that NCIS allowed this investigation to idle to such a degree in the pursuit of constitutionally required authority to search property that had been seized without a warrant is a remarkable indication of NCIS's systemic failure to understand its Fourth Amendment obligation. Therefore, exclusion is necessary to

[199] *Mitchell*, 565 F.3d at 1352.

deter NCIS agents from such a dilatory approach and induce them to respect servicemembers' Fourth Amendment rights.[200]

2. The NCIS lead agents were grossly negligent in failing to obtain a CASS within a reasonable time after the seizure of Chief Harborth's property.

The NCIS agents' failure in their obligation here contrasts painfully with their prompt and regular updates to other interested parties whom they believed they were "supposed to update."[201] Specifically, between May 11, 2019, and August 13, 2019—the same time period they should have been timely pursuing a CASS—the NCIS agents updated, notified, or otherwise reviewed the investigation with: the Command four times, the Command SJA four times, the RLSO three times, FAP six times, VLC one time, and Ms. Harborth six times.[202]

This stark contrast between NCIS's efforts to keep other interested parties informed on its investigation and its utterly dilatory approach to obtaining a CASS for the seized property reveals a shocking disregard for its responsibilities under the Fourth Amendment. Waiting *over five weeks* until June 24, 2019, to develop probable cause for a CASS for devices seized on May 11 and 15, 2019, (by re-interviewing a material witness available since day one) was, at the very least,

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[200] *See Leon*, 468 U.S. at 917-19 (holding that the exclusionary rule should only be applied when the exclusion of evidence obtained unlawfully would alter the behavior of individual law enforcement officers or the policies of their departments so that they exercise a greater degree of care toward the rights of an accused).
[201] J.A. at 367.
[202] J.A. at 1447-49.

negligent. Plodding along *seven more weeks* until August 13, 2019, to seek a CASS for those same devices—without developing a shred of additional evidence for the agent's affidavit in support of the CASS—was inexcusable, grossly negligent, and should be deterred from recurring.

III.

CHIEF HARBORTH DID NOT WAIVE THE ISSUE OF THE GOVERNMENT'S UNCONSTITUTIONAL SEIZURE OF HIS PROPERTY.

Standard of Review

This Court reviews whether an accused has waived an issue *de novo*.[203]

Discussion

The lower court found that, far from being waived, "[Chief Harborth's] challenge to the length of the unlawful seizure in this case 'is simply an extension of his probable cause challenge, which he has pressed all along.'"[204] While Chief Harborth does not disagree with this assessment, the case against waiver on this Record is actually far easier than even the lower court found.

M.R.E. 311(d)(2)(A) requires a "particularized objection" to avoid waiver on a motion to suppress, and the Defense's pretrial suppression motion contained one: plainly including unconstitutional seizure as a basis for suppression.[205]

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[203] *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020).
[204] J.A. at 12 (quoting *Griffith*, 867 F.3d at 1277).
[205] J.A. at 1314.

Specifically, the motion states, "All evidence related to and derived from the government's seizure and searches of *the accused's Apple devices* must be suppressed because it constitutes 'fruit of the poisonous tree' resulting from the *unreasonable and unlawful seizures . . . of the same devices . . . .*"[206] The Defense further objected to the Navy's authority to interfere with Chief Harborth's possessory interests in the seized devices by moving them from off base to on base as a means of giving the on-base commander jurisdiction to authorize the eventual search of the seized device's contents.[207] Thus, although the law does not require the defense to specifically invoke "talismanic words" at the trial level,[208] in this case that is precisely what the defense suppression motion did.

Further, there is a presumption against waiver where, as here, constitutional rights are at issue.[209] In applying this presumption, this Court has held that even a "subtle . . . theory [that] was inherent to the defense argument" raised on appeal is not waived where "the defense's arguments as a whole demonstrate" the preservation of that theory.[210] The D.C. Circuit has likewise held that an accused preserves a theory of suppression on appeal if it is "a species of the same legal

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[206] J.A. at 1323 (emphasis added).
[207] J.A. at 1328.
[208] *Blackburn*, 80 M.J. at 209-10.
[209] *Id.* at 209.
[210] *Id*. at 210.

theory" raised before the trial court.[211] And this Court has found that subtle theories "inherent to the defense argument" are preserved where "the defense's arguments as a whole" include a showing of the argument raised on appeal.[212]

Here, in the context of its suppression motion, the Defense's assertions to the Military Judge during the suppression hearing oral argument were far more than "subtle" in fairly raising the unlawful seizure issue. Regarding the iPhone 6s and two iPads, the Military Judge asked the Defense whether the "primary crux of [the defense's] argument" is about "the seizure of those items as opposed to the search."[213] The Defense responded, "[t]he Constitution requires first and foremost that the law enforcement have probable cause to *seize*. Consent is merely an exception to that general rule," and that "[t]here is a myriad of ways that I think the law enforcement could have gotten there in this case . . . *but they didn't do that* and here we are."[214] The Defense next argued that NCIS's lack of movement toward obtaining a warrant or CASS had resulted in an unconstitutional seizure of the devices that the inevitable discovery doctrine could not cure: "the fact that they say they weren't pursuing [a warrant for] any additional investigative steps to actually get to probable cause . . . is fatal to that point."[215] The Defense then

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[211] *United States v. Griffith*, 867 F.3d 1265, 1277-78 (D.C. Cir. 2017).
[212] *Blackburn*, 80 M.J. at 210.
[213] J.A. at 433.
[214] J.A. at 434 (emphasis added).
[215] J.A. at 440-41.

emphasized as "extremely important" the fact that "[t]he interview with Mrs. Harborth occurred on 29 June; *a month and a half after these seizures occurred*," arguing that NCIS's delayed acquisition of information from Ms. Harborth "cannot be used to justify the . . . knowledge of the law enforcement officers at the time [of the seizures themselves]."[216]

As the Government asserts with respect to certified issue IV, "[t]he Record is fully developed on the issue."[217] The two NCIS agents who seized and sought the CASS for the devices both testified about their rationale for seizure and the chronology of investigative steps from the NCIS case file is in the Record.[218] The Defense argued that the *seizures* were unconstitutional *ab initio* and highlighted the duration of the warrantless seizures in arguing the inapplicability of either the inevitable discovery doctrine or the consent exception due to the delay.[219] Thus, the theory that the three-month delay in obtaining a CASS constituted an unreasonable seizure in violation of the Fourth Amendment was both far from "subtle," "was inherent to the defense argument,"[220] and "a species of the same legal theory."[221]

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[216] J.A. at 447.
[217] *See* Appellee/Cross-Appellant Br. at 52.
[218] *See supra* Section II.B.
[219] J.A. at 447.
[220] *See Blackburn*, 80 M.J. at 210.
[221] *See Griffith*, 867 F.3d at 1277-78.

In light of these written and oral arguments by the Defense concerning the unlawful seizure of Chief Harborth's property, particularly when considered with the presumption against waiver for constitutional issues, this Court should find Appellant preserved this issue at trial.

IV.

THE LOWER COURT DID NOT ERR IN FAILING TO FIRST DETERMINE WHETHER MS. HARBORTH WAS A GOVERNMENT ACTOR.

Standard of Review

Chief Harborth agrees with the Government that "whether a lower court applied the correct standard is a question of law that is reviewed de novo."[222] "Whether an appellant has waived an issue is a legal question that this Court reviews de novo."[223] For this certified issue, the Government is the Appellant.[224]

[222] Appellee/Cross-Appellant Br. at 51 (citing *United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005)).
[223] *United States v. Cunningham*, 83 M.J. 367, 374 (C.A.A.F. 2023).
[224] *See* Appellee/Cross-Appellant Br. at 1.

Discussion

A. The Government Waived this Issue.

This certified issue is being argued before this court for the first time on appeal. Therefore, as an initial matter, this Court should decline to consider the Government's untimely assertions, which were not presented to the lower court.[225]

B. While Chief Harborth agrees Ms. Harborth was not a government actor, that is not the dispositive conclusion in this case.

While it is settled that the Fourth Amendment only applies to governmental action,[226] this Court has also settled that "[t]here are two essential limits to [the government actor] doctrine."[227] "First, the government cannot conduct or participate in the predicate private search."[228] "There is no bright line test as to when the government involvement *goes too far*, rather, courts have relied on the particular facts of particular searches to make this determination,"[229] "The second limitation . . . pertains to the scope of any subsequent Government search. The Government *may not exceed the scope of the search by the private party*, including

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[225] *United States v. Muwwakkil*, 74 M.J. 187, 191-92 (C.A.A.F. 2015) (declining to entertain the government's untimely argument that it failed to raise with the CCA until its motion for reconsideration); *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (refusing to entertain the government's belated contentions not raised in the lower courts).
[226] Mil. R. Evid. 311(a); *Jacobsen*, 466 U.S. at 113; *United States v. Wicks*, 73 M.J. 93, 100 (C.A.A.F. 2014).
[227] *Wicks*, 73 M.J. at 100.
[228] *Id.*
[229] *Id.* (emphasis added).

expansion of the search into a general search."[230] "Applying this to modern computerized devices like cell phones, the scope of the private search can be measured by what the private actor actually viewed as opposed to what the private actor had access to view."[231]

Here, while Chief Harborth agrees that Ms. Harborth was not acting as a government actor when she handed over his exclusive electronic devices to law enforcement, the government's subsequent search violated the second limitation. The only videos in evidence that Ms. Harborth *actually* viewed before handing over his devices were the few pictures she saw on Chief Harborth's iPhone XS.[232] Therefore, all other evidence obtained during NCIS's subsequent search and seizure, which exceeded the scope of Ms. Harborth's private search, was both subject to and in violation of the Fourth Amendment's protections.[233]

Regarding the first limitation to the government actor doctrine quoted above, if "the government cannot conduct or participate in the predicate private search,"[234] then by logical extension, it is no longer a private *seizure* if the Government participates in the predicate private seizure. Thus, once law enforcement decided

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[230] *Id.* (citing *Jacobsen*, 466 U.S. at 115, 117-18).
[231] *Id.* (emphasis in original).
[232] The latter of which NCIS only learned about after waiting a month and a half to interview Ms. Harborth, an unreasonable and unconstitutional delay in and of itself.
[233] *Wicks*, 73 M.J. at 100; *see supra* Sections I and II.
[234] *Wicks*, 73 M.J. at 100.

against returning the devices, it became a government seizure and—especially after three months—law enforcement had "go[ne] too far."[235] For the same reasons argued in Sections I and II above, any aspects of the search and seizure that *might* have been lawful became unreasonable and unconstitutional because of NCIS's unjustifiable delay in both developing probable cause and seeking a CASS.

This is also why the Government's heavy reliance on *Coolidge v. New Hampshire*[236] is misplaced.[237] *Coolidge* involved a police investigation of a whodunit gunshot murder where Coolidge's wife, ostensibly acting as her accused husband's agent, voluntarily turned over some of his guns and the clothes he was wearing on the night of the murder to clear his name.[238] Moreover, Coolidge had himself, and in his wife's presence, already voluntarily presented the guns and "other items" to police to aid their investigation.[239]

In this case, by contrast: (1) law enforcement knew Ms. Harborth's motive was to incriminate, not exonerate, her husband; (2) Chief Harborth never voluntarily presented any of his property to law enforcement; and (3) most importantly, unlike the guns and clothing with obvious evidentiary value to a murder investigation, the digital devices that Ms. Harborth turned over had no

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[235] *Id.*
[236] 403 U.S. 443 (1971).
[237] Appellee/Cross-Appellant Br. at 53-57.
[238] *Coolidge v. New Hampshire*, 403 U.S. 443, 445-46, 489 (1971).
[239] *Id*. at 445-46.

evidentiary value absent law enforcement's further searching of them for any data they might contain (which, beyond what Ms. Harborth had actually viewed, violated the second limitation to the government actor doctrine).

Further, the strength of the possessory interests at issue are widely disparate. As this Court has held, "[t]he problem with applying 'container' metaphors is that modern computer technologies, such as cell phones and laptops, present challenges well beyond computer disks, storage lockers, and boxes."[240] Since possessory interests in a modern cell phone go far beyond comparison to even a container, any comparison to guns and a single outfit of clothing teeters on absurdity. Finally, *Coolidge* was decided in 1971, well before the Supreme Court developed its case law regarding how an initially lawful seizure can become unlawful based on duration in its 1983 case *United States v. Place*.[241]

[240] *Wicks*, 73 M.J. at 102.
[241] *See generally Place*, 462 U.S. 696 (not citing to any case law pre-1971 except for *Terry v. Ohio*, 392 U.S. 1 (1968) and *Marron v. United States*, 275 U.S. 192, 196 (1927)).

V.

THE DEFENSE COUNSEL WAS INEFFECTIVE BY NOT PROPERLY SEEKING SUPPRESSION OF ALL EVIDENCE DERIVED FROM THE UNLAWFUL SEIZURE OF CHIEF HARBORTH'S PROPERTY.[242]

Standard of Review

This Court reviews ineffective assistance of counsel claims *de novo*.[243]

Discussion

The Sixth Amendment of the Constitution guarantees the right to effective assistance of counsel to a military accused at a court-martial.[244] To prevail on an ineffective assistance claim, Chief Harborth bears the burden of proving: (1) that the performance of defense counsel was deficient, and (2) that the error prejudiced Chief Harborth.[245]

Regarding the first prong, strategic or tactical decisions by Defense Counsel that assume risk or forgo potential benefits do not amount to deficient performance if those decisions are objectively reasonable.[246] Concerning the second prong, Chief Harborth "must demonstrate a reasonable probability that, but for [trial

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[242] Because certified issue V and the sole granted issue are so intertwined, both will briefed as a single issue for the sake of efficiency.
[243] *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021).
[244] *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987).
[245] *Id*. at 188 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).
[246] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *Strickland*, 466 U.S. at 694).

defense] counsel's deficient performance the result of the proceeding would have been different."[247] "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellate must show that there is a reasonable probability that such a motion would have been meritorious," which is synonymous with "successful."[248]

A. If this Court finds waiver with respect to the unreasonable seizure of any of Chief Harborth's property, the Defense Counsel's performance was deficient in failing to preserve the issue.

As discussed above, a warrantless seizure of private property, even if lawful at its inception, can become unlawful if there is an unreasonable delay in obtaining a warrant or CASS to search the seized property, which is precisely what happened in this case. Should this Court conclude that the Defense Counsel failed to preserve any aspect of this issue, then the Defense Counsel's performance was deficient. Just as it is reasonable to expect a Military Judge to recognize the different Fourth Amendment rights implicated by unlawful searches and unlawful seizures, it is reasonable to expect a defense counsel to recognize that the lengthy delay between the warrantless seizure of Chief Harborth's devices and the obtaining of a CASS to search them was a violation of those rights.

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[247] *Id*.

[248] *United States v. Jameson*, 65 M.J. 160, 163-64 (C.A.A.F. 2007) (internal quotation marks and citation omitted).

As the lower court's opinion reasoned, there is a reasonable probability that such a motion would have been meritorious. It found that NCIS's significant delay in seeking a CASS to search Chief Harborth's property, which had been seized without a warrant, transported to, and held within another jurisdiction, effected an unreasonable seizure under the Fourth Amendment.[249]

However, after acknowledging the same argument would have been successful in getting the evidence from the iPhone XS suppressed, the lower court erred in finding the Defense Counsel were not ineffective in failing to make the argument. The lower court reasoned that "abandoning weaker arguments [which the Court had just found would have been meritorious] to develop those more likely to succeed is a tactical gambit and not deficient performance."[250] But if "weaker" arguments would nevertheless have been meritorious, defense counsel cannot abandon them as a tactical decision without deficiently representing an accused. Indeed, failing "to make a motion . . . that . . . would have been meritorious," which is synonymous with "successful," is the very definition of deficient performance.[251]

Moreover, if this Court agrees with the lower court that Chief Harborth waived iPhone XS's unconstitutional seizure, but preserved the issue for all his

[249] J.A. at 22.
[250] J.A. at 22.
[251] *Jameson*, 65 M.J. at 163-64.

other devices, then that waiver was ineffective assistance of counsel. Far from being "tactical," pursuing a successful suppression issue only for some evidence, where there was "tremendous upside and virtually no downside" to pursuing the same objection to other evidence, achieves no reasonable strategic objective.[252] Rather, it constitutes deficient performance.

B. There is a reasonable probability that the results in the trial would have been different had the evidence from the unlawfully seized property been suppressed.

The lower court admirably identifies how, but for Defense Counsel's deficient performance concerning Chief Harborth's iPhone 6s and iPad 4, Chief Harborth's court-martial results would have been different. Yet contrary to the lower court's conclusion, that same rationale applies equally to the Defense Counsel's deficient performance regarding his failure to suppress the iPhone XS.

First, the suppression of Chief Harborth's unconstitutionally seized property would have also excluded witness testimony to prove that property's contents.[253] Otherwise, the deterrent purpose of the exclusionary rule would become meaningless. Thus, the Government's reliance on witness testimony to prove the

[252] *See United States v. Palik*, 84 M.J. 284, 291 (C.A.A.F. 2024).
[253] *See* Mil. R. Evid. 1002; *see also* Mil. R. Evid 1003-1007 (providing relevant exceptions to Mil. R. Evid. 1002).

contents of suppressed evidence is misplaced and should be disregarded by this Court.[254]

Second, the remaining evidence for Charge I, Specification 2, absent *any* evidence about the existence of the iPhone XS images and *any derivative evidence*, paints a different picture from what the Government urges this Court to adopt. Indeed, none of the remaining evidence could prove the essential element of Specification 2 of Charge I: that Chief Harborth knowingly recorded any indecent images of C.V. The Vivint security system, which the prior owner had installed, was activated by Ms. Harborth (including its interior cameras), and she had joint access to the panel. Further, the control panel's data did not indicate whether Chief Harborth had viewed the videos. Thus, the iPhone XS evidence was essential to the Government's case that Chief Harborth, rather than Ms. Harborth, created the videos.

Third, the Government gives too much weight to Chief Harborth's statements.[255] His statement that he should be arrested was not specific to any offense and was made as law enforcement arrived to a domestic dispute. Similarly, his statement about masturbation and the accompanying video of that moment in the garage is not a crime and could be in response to anything.

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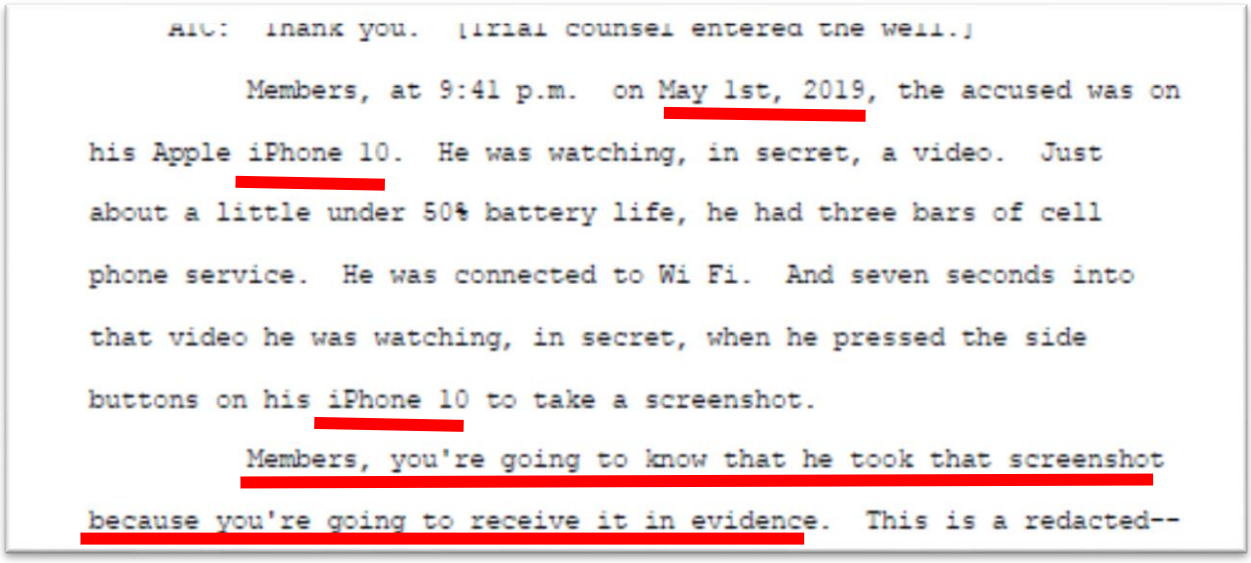
[254] Appellee/Cross-Appellant Br. at 60.
[255] Appellee/Cross-Appellant Br. at 60.

Fourth, the Government's attempt to shift importance away from the iPhone XS on appeal betrays the central importance it assigned to it at trial. Indeed, the Trial Counsel recognized the iPhone XS—what he referred to as the "iPhone 10"—as strategically important to the Government's case in proving Specification 2 of Charge I from the outset of his opening statement:[256]



ATC: Thank you. [Trial counsel entered the well.]

Members, at 9:41 p.m. on May 1st, 2019, the accused was on his Apple iPhone 10. He was watching, in secret, a video. Just about a little under 50% battery life, he had three bars of cell phone service. He was connected to Wi Fi. And seven seconds into that video he was watching, in secret, when he pressed the side buttons on his iPhone 10 to take a screenshot.

Members, you're going to know that he took that screenshot because you're going to receive it in evidence. This is a redacted--

The Trial Counsel then repeatedly punctuated the Government's opening statement, closing argument, and rebuttal with references to the unlawfully seized iPhone XS evidence, underlining its critical role in framing Charge I, Specification 2.[257] The Trial Counsel's prominent references to the iPhone XS evidence should

[256] J.A. at 456 (emphasis added).
[257] J.A. at 456-57, 463, 465, 1110-11, 1115-16, 1119-20, 1205-06.

alone lead this Court to scrutinize the lower court's conclusion that there is not a reasonable probability of a different verdict absent the excludable evidence.[258]

Fifth, the Government introduced a forensic examiner's testimony that she extracted a "jharborth22@hotmail.com" Apple ID from the iPhone XS.[259] The examiner further testified that "jharborth22@gmail.com" was linked to the Vivint application found on that phone.[260] The Government later argued to the members this evidence is proof that Chief Harborth knowingly made the indecent recordings.[261] The suppression of evidence that the Government strategically used to establish possession, knowledge, and intent creates a reasonable probability of a different verdict for Specification 2 of Charge I.

Finally, the Vivint control panel's videos from May 2019 are the only recordings lawfully introduced into evidence. However, the members acquitted Chief Harborth of producing and possessing child pornography in 2019.[262] With

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[258] *See United States v. Long*, 64 M.J. 57, 66 (C.A.A.F. 2006) ("Trial counsel obviously felt that the [unlawfully admitted evidence was] very important to his case . . . Accordingly, we cannot conclude that the erroneous admission of the [evidence] was harmless beyond a reasonable doubt."); *see also United States v. Simmons*, 59 M.J. 485, 491 (C.A.A.F. 2004) (finding Government did not meet its burden of demonstrating that the erroneously admitted evidence was harmless error where it referenced the illegally seized evidence "in the beginning, middle and end of his closing argument." *Id.*).
[259] J.A. at 855.
[260] J.A. at 871.
[261] J.A. at 1116.
[262] J.A. at 311-13, 1207.

the iPhone XS evidence suppressed, it is reasonable to conclude the members would have also acquitted him for making indecent recordings in 2019 as well. Therefore, it is reasonably probable that suppressing the evidence obtained from the iPhone XS would have resulted in Chief Harborth being found not guilty of Specification 2 of Charge I.

CONCLUSION

Chief Harborth respectfully requests that this Honorable Court set aside the remaining findings of guilt. In the alternative, Chief Harborth respectfully requests that this case be remanded to the lower court to address the Assignments of Error that it initially declined to address, having otherwise ordered relief to Chief Harborth.

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on September 3, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

This Brief complies with the type-volume limitations of Rule 24(c) because it contains 13,504 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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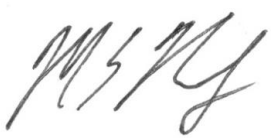

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