IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KENNETH P. ARMOUR II,
Senior Airman (E-4),
United States Air Force,
Appellant.

Crim. App. Misc. Dkt. No. 2025-10

USCA Dkt. No. __-____/AF

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant

Filed on February 2, 2026

INDEX

TABLE OF AUTHORITIES i
ERROR ASSIGNED FOR REVIEW 1
STATEMENT OF STATUTORY JURISDICTION 1
STATEMENT OF THE CASE 1
STATEMENT OF FACTS 4
A. Investigation & Searches 4
B. First Motion to Suppress 7
C. The March 2025 Reseizure of Appellant's Devices 8
D. The Second Motion to Suppress 9
E. The Denial of Reconsideration 10
ARGUMENT 12
This Court should affirm the military judge's suppression ruling because information gained from multiple unlawful searches affected law enforcement agents' decision to seek a search authorization and the search authority's decision to grant it. 12
Standard of Review 12
Law and Analysis 13
A. The Chariot Drove Home: The Military Judge Arrived at the Right Result 14
B. Appellant's Alternative Ground for Relief was Within the Scope of the AFCCA's 10 U.S.C. § 862 Review 20
CONCLUSION 22
APPENDIX A: Air Force Court of Criminal Appeals Decision 1a
APPENDIX B: United States' Appeal Under Article 62, UCMJ 15a
APPENDIX C: Answer to United States' Appeal Under Article 62, UCMJ 58a
APPENDIX D: United States' Reply Brief 85a

TABLE OF AUTHORITIES

Cases

Dandridge v. Williams,
397 U.S. 471 (1970) 11, 20

Murray v. United States,
487 U.S. 533 (1988) 10, 17, 19

Robertson v. State,
829 So. 2d 901 (Fla. 2002) 14

United States v. Am. Ry. Exp. Co.,
265 U.S. 425 (1924) 12

United States v. Carista,
76 M.J. 511 (A. Ct. Crim. App. 2017) 14

United States v. Carter,
54 M.J. 414 (C.A.A.F. 2001) 15

United States v. Dairo,
75 M.J. 867 (A. Ct. Crim. App. 2016) 21

United States v. Finch,
79 M.J. 389 (C.A.A.F. 2020) 13

United States v. Floyd,
82 M.J. 821 (N.M. Ct. Crim. App. 2022) 21

United States v. Guinn,
81 M.J. 195 (C.A.A.F. 2021) 12

United States v. Johnson,
76 M.J. 673 (A.F. Ct. Crim. App. 2017) 21

United States v. Kosek,
41 M.J. 60 (C.A.A.F. 1994) 20, 21

United States v. Leon,
468 U.S. 897 (1984) 15

United States v. Lincoln,
42 M.J. 315 (C.A.A.F. 1995) 11, 20, 21

United States v. Riley,
55 M.J. 185 (C.A.A.F. 2001) 21

United States v. Robinson,
58 M.J. 429 (C.A.A.F. 2003) 14

United States v. Salazar,
44 M.J. 464 (C.A.A.F. 1996) 17

United States v. Shields,
83 M.J. 226 (C.A.A.F. 2023) 13, 22

United States v. Steen,
81 M.J. 261 (C.A.A.F. 2021) 11

United States v. Wicks,
73 M.J. 93 (C.A.A.F. 2014) 15

Statutes

10 U.S.C. § 862 .... 1, 14, 20

10 U.S.C. § 867 1

Rules and Regulations

Mil. R. Evid. 311 15

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. **KENNETH P. ARMOUR II,** Senior Airman (E-4), United States Air Force, *Appellant*	**SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW** Crim. App. Misc. Dkt. No. 2025-10 USCA Dkt. No. __-____/AF Filed February 2, 2026

ERROR ASSIGNED FOR REVIEW

Whether this Court should affirm the military judge's suppression ruling because information gained from multiple unlawful searches affected law enforcement agents' decision to seek a search authorization and the search authority's decision to grant it.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 62(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(b). This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018) (as amended by § 542(c) of the William M. Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021 and § 539A(c) of the NDAA for Fiscal Year 2022).

STATEMENT OF THE CASE

This case arises out of an interlocutory appeal under Article 62, UCMJ, 10 U.S.C. § 862, in a pending court-martial.

On May 15, 2024, the Department of the Air Force's Office of Special Trial Counsel preferred one charge and one specification of conspiracy to distribute child pornography in violation of Article 81, UCMJ, 10 U.S.C. § 881; and one charge and one specification of possessing child pornography, one specification of viewing child pornography, one specification of receiving child pornography, and one specification of distributing child pornography, all in violation of Article 134, UCMJ, 10 U.S.C. § 934. Record of Trial, vol. 1, DD Form 458, *Charge Sheet* (May 15, 2024).

On August 14, 2024, the Office of Special Trial Counsel preferred an additional charge and one specification of conspiracy to distribute child pornography in violation of Article 81, UCMJ, 10 U.S.C. § 881. Record of Trial, vol. 1, DD Form 458, *Charge Sheet* (Aug. 14, 2024). On August 14, 2024, the Office of Special Trial Counsel referred all charges and specifications to a general court-martial. Record of Trial, vol. 1, DD Form 458, *Charge Sheet* (May 15, 2024); Record of Trial, vol. 1, DD Form 458, *Charge Sheet* (Aug. 14, 2024).

On November 11, 2024, trial defense counsel filed a motion to suppress the fruits of multiple searches conducted in Appellant's case. *See* Appellate Exs. IV, VI; Trial Tr. 15-118. On December 3, 2024, the court-martial began and the military judge received evidence and argument related to the defense motion to suppress. Trial Tr. 15-117. On February 24, 2025, the military judge suppressed the fruits of

multiple searches, finding that law enforcement agents' affidavits in support of the search warrants and authorizations were written with reckless disregard for the truth and that no exception saved the searches. Appellate Ex. IX at 14-20.

After an unsuccessful motion for reconsideration, the Government moved for a continuance, which trial defense counsel opposed. Appellate Exs. X-XV. The continuance was granted, during which time the Government executed a new search authorization for Appellant's devices on March 24, 2025 [hereinafter, the "March 2025" search]. Appellate Ex. XVI at 77-90 (Atch. 8).

On April 9, 2025, trial defense counsel submitted a motion to suppress the fruits of the March 2025 search authorization. Appellate Ex. XVI. On July 9, 2025, the military judge granted the defense motion, suppressing the fruits of the new search because the March 2025 search was not genuinely independent of law enforcement's previous unlawful searches. Appellate Exs. XVIII, XXI.

On August 22, 2025, the Government notified the AFCCA that it intended to appeal the military judge's ruling on the defense's second motion to suppress. Record of Trial, vol. 1, Memorandum, AF/JAJG, Record of Trial – Article 62 Appeal – SrA Kenneth P. Armour (Aug. 22, 2025).

On December 5, 2025, the AFCCA vacated the "military judge's ruling on the validity of the 24 March 2025 search," finding that the military judge abused his discretion when applying the independent source doctrine. App. at 13a.

STATEMENT OF FACTS

A. Investigation & Searches

On August 1, 2021, the National Center for Missing & Exploited Children (NCMEC) published a CyberTipline Report that reported multiple instances of video and image files being uploaded from a Kik Messenger (Kik) account.[1] Appellate Ex. IV at 43-55 (Atch. 3). Those *uploads* were associated with an internet protocol (IP) address in Atlanta, Georgia. *Id.* at 45-52 (Atch. 3). *Logins* to the Kik account were associated with four IP addresses located in Atlanta, Georgia (United States); Toronto, Ontario (Canada); London, England (United Kingdom); and Columbia, South Carolina (United States). *Id.* at 45, 51-52.

In January 2022, a civilian investigator, Inv. KF, finally acted on the NCMEC report. Appellate VI at 11-17 (Atch. 1). Inv. KF, without investigation or recorded research, assumed that all but one of the IP addresses from the NCMEC report were associated with proxy servers or Virtual Private Networks (VPNs). Trial Tr. 49-50, 79-80, 84-85; Appellate Ex. IX at 6, ¶ 32; Appellate Ex. XVIII at 6-7, ¶ 36. Inv. KF guessed that the only IP address that could be traced to a physical location was 71.[**.*.***], the login associated with Columbia, South Carolina (United States), which was used by the username "aftermatter" to log into Kik. Trial Tr. 49-50, 79-

[1] Kik is a free, username-based messaging app (for iOS & Android) known for its anonymity, allowing users to chat via usernames, not phone numbers.

80, 84-85; Appellate Ex. IX at 6, ¶ 32; Appellate Ex. XVIII at 6-7, ¶ 36. Inv. KF did not subpoena any of the other internet service providers or conduct individual research on the other internet service providers associated with Atlanta, Georgia (United States); Toronto, Ontario (Canada); or London, England (United Kingdom). *See* Trial Tr. 43-45, 49-50, 79-80.

On January 11, 2022, Inv. KF applied for and was granted a search warrant of Charter Communications, the internet service provider for the IP address located in Columbia, South Carolina (United States)—the first search in this case. Appellate VI at 11-17 (Atch. 1). The return of that warrant revealed the name "BB"[2] associated with the internet service account and BB's residential address. *Id.* at 15-16.

On January 26, 2022, Inv. KF then applied for and was granted a search warrant of BB's residential address—the second search in this case—which was executed on January 28, 2022. Appellate Ex. IV at 57-63 (Atch. 4). During that search, law enforcement found "USPS packages disclosing [Appellant's] name and address" matching BB's address. *Id.* at 85, ¶ 3.e. (Atch. 7); *see id.* at 92, ¶ 3.e (Atch. 8).

On January 27, 2022, the Air Force Office of Special Investigations (AFOSI) applied for and was granted a search authorization for BB's person and devices on his person—the third search in this case—to be executed concurrently with the

[2] This is a pseudonym used to protect the privacy of individuals involved in the case.

search of his residence. *Id.* at 74-79 (Atch. 6). This search revealed nothing relevant to Appellant's case.

On February 10, 2022, AFOSI applied for and was granted two search authorizations for Appellant's person and deployed residence, and devices therein—the fourth and fifth searches in this case. *Id.* at 81-93 (Atchs. 7-8). An Apple iPad and iPhone XR were seized during these searches. *Id.* at 31, ¶¶ 2-11, 2-12 (Atch. 1).

On July 25, 2023, AFOSI applied for and was granted a search authorization for BB's devices that were seized during the January 28, 2022, search—the sixth search in this case. *Id.* at 115-27 (Atch. 13). This search revealed nothing relevant to Appellant's case.

On December 20, 2023, the DoD Cyber Crime Center (DC3) prepared a report for AFOSI, outlining their analysis of the devices seized from BB and Appellant. *Id.* at 135-46 (Atch. 15). DC3's report formed the basis for the charges against Appellant. *Id.*

On August 9, 2024, AFOSI applied for and was granted a warrant pursuant to 18 U.S.C. § 2703 through an Article 30a, UCMJ, 10 U.S.C. § 830a, proceeding—the seventh search in this case. *Id.* at 168-191 (Atchs. 22-23).[3] This search warrant was for Yahoo! Inc. for the email address associated with the Kik account, identified

[3] However, the first application for a warrant through Article 30a, UCMJ, 10 U.S.C. § 830a, was denied on July 19, 2024. Appellate Ex. VI at 52-53 (Atch. 5).

in the August 1, 2021, NCMEC report. *Compare id.* at 186-191 (Atch. 23), *with id.* at 45 (Atch. 3).

The fruits of the first (Charter Communications for internet subscriber information), second (BB's residence), fourth (Appellant's person), fifth (Appellant's deployed residence), and seventh (Yahoo! Inc. warrant return) searches constituted the entirety of the Government's evidence for the Charges and Specifications.

B. First Motion to Suppress

During pretrial motions practice, Appellant's trial defense counsel moved to suppress items seized during five of the seven searches in this case. Appellate Ex. IV at 1 (challenging searches four, five, and seven); Appellate Ex. VI at 4-6, ¶¶ 18-29 (challenging searches one, two, four, five, and seven); Trial Tr. 114-16 (trial defense counsel confirming challenge to searches one, two, four, five, and seven during motions argument).

On February 24, 2025, the military judge suppressed the fruits of searches four, five, and seven, finding that law enforcement's affidavits were written with reckless disregard for the truth and that no exception saved the searches. Appellate Ex. IX at 14-20, ¶¶ 71-88. The military judge did not mention or otherwise reference trial defense counsel's challenge to searches one or two; however, the military judge did find that Inv. KF "recklessly disregarded the truth" "in her 11 January 2022

Spectrum/Charter affidavit, and 26 January 2022 affidavit for the search of [BB's and Appellant's alleged residence]." Appellate Ex. IX at 17, ¶ 79.

C. The March 2025 Reseizure of Appellant's Devices

After the military judge's ruling suppressing the fruits of searches four, five, and seven, the Government attempted to cure the faulty search authorizations. On March 24, 2025, AFOSI applied for and was granted a search authorization for the devices seized from Appellant's person and deployed residence—resulting in the eighth search in this case: the March 2025 search. Appellate Ex. XVI at 77-90 (Atch. 8). The supporting affidavit for the March 2025 search authorization included the following information from the first and second searches:

> l. Accordingly, on or about 10 January 2022, [Inv. KF] applied for and was issued a search warrant to be executed on Charter Communications, Inc. (Charter), which operates under the brand name Spectrum, for "[s]ubscriber and any related information associated with the listed IP addresses registered to Spectrum to include but not limited to: subscriber information, physical address, device information, billing information, contact information, or any other related data associated with the use of the listed IP address(es): 71.[**.*.***]."
>
> m. The subscriber record returned by Charter in response to the search warrant provided the following information, in relevant part: . . . Subscriber Name: [BB] . . . Service Address: [BB's and Appellant's alleged address].
>
> . . . .
>
> p. Based on the information returned in response to the warrant executed on Charter, on or about 26 January 2022, [Inv. KF] applied for and was issued a search warrant related to the residence located at [BB's address]
>
> . . . .

> r. [which] assisted investigators in confirming [Appellant] shared the residence with [BB] during the time period relevant to the NCMEC CyberTipline Report, in part due to the observation that United States Postal Service packages displayed [Appellant]'s name and the address. A search of the South Carolina Department of Motor Vehicles also verified [Appellant] to be a resident of the address.
>
> . . . .
>
> t. Because [Appellant] shared a residence at [BB's address] with [BB] during the time period of the CSAM uploads described in the NCMEC CyberTipline Report, there is reason to believe he had access to the residential Internet connection . . . associated with the Kik User ID . . . login event on 06-30-2021.

Appellate Ex. XVI at 87-88, ¶ 16.l.-m., p., r., t. (Atch. 8).

D. The Second Motion to Suppress

On April 9, 2025, trial defense counsel moved to suppress the March 2025 search. Appellate Ex. XVI. Trial defense counsel moved to suppress the March 2025 search because (1) the search authority was without a substantial basis for probable cause; and (2) the March 2025 search is not independent of previous unlawful searches because (i) law enforcement were prompted to conduct the March 2025 search by previous unlawful conduct and (ii) the search authority relied upon unlawful searches to find probable cause (i.e., the first and second searches by Inv. KF). *Id.* at 17-23, ¶¶ 90-108. Additionally, trial defense counsel again moved for searches one and two to be suppressed. *Id.* at 18, ¶¶ 95-96.

On July 9, 2025, the military judge suppressed the March 2025 search because it was not independent of law enforcement's previous unlawful conduct. Ap-

pellate Ex. XVIII at 18. The military judge held, "[W]here the Government expressly relies on its own unlawful seizure to support probable cause and defeat staleness for a later reseizure, that later reseizure as both a practical and prudential matter was not genuinely independent of the earlier one." *Id.* at 18, ¶ 74. The military judge did find that the search authority had a substantial basis for probable cause. *Id.* at 14, ¶ 62. The military judge did not mention or otherwise reference trial defense counsel's challenge to searches one or two but did reference its fruits, finding that "based on a search of [BB's] residence, and publicly available DMV records, it was determined that [Appellant] shared the searched residence with [BB] at some point prior to the search." *Id.*

E. The Denial of Reconsideration

On July 31, 2025, the military judge denied the Government's motion for reconsideration. Appellate Ex. XX (relying on *Murray v. United States*, 487 U.S. 533 (1988)). In his ruling, the military judge again did not mention or otherwise reference trial defense counsel's challenge to searches one or two but did add that "[i]t remains true that *on seven separate occasions*, law enforcement asserted false information, made with reckless disregarded [sic] for the truth, concerning the actual nexus between the upload of child pornography and the residence shared by the Accused." *Id.* at 4, ¶ 12 (emphasis added).

On August 22, 2025, the Government filed Appellant's case with the AFCCA pursuant to Article 62, UCMJ, 10 U.S.C. § 862, appealing the military judge's ruling suppressing the fruits of the March 2025 search. Record of Trial, vol. 1, Memorandum, AF/JAJG, Record of Trial – Article 62 Appeal – SrA Kenneth P. Armour (Aug. 22, 2025). Appellant opposed the Government's request, arguing the military judge did not abuse his discretion. App. at 58a-83a (Appellee Ans. Brief). Appellant also raised another "ground in support of [the military judge's] judgment," and argued that the March 2025 search authorization must be suppressed because it relied on information gathered from other unlawful searches: the first and second searches. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995) ("When the Government appeals an adverse ruling, the defense may assert additional or alternate grounds for affirming the ruling."); *United States v. Steen*, 81 M.J. 261, 270-71 (C.A.A.F. 2021) (Maggs, J., dissenting) (discussing "cross-appeal doctrine") (it is "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it")

(quoting *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924)); App. at 78a-81a (Appellee Ans. Brief), 90a-92a (Government Reply).

On 5 December 2025, the AFCCA granted the Government's appeal and vacated the military judge's ruling. App. at 13a. The AFCCA did not discuss—or even mention—Appellant's additional or alternative grounds for affirming the military judge's ruling. App. at 1a-13a.

ARGUMENT

This Court should affirm the military judge's suppression ruling because information gained from multiple unlawful searches affected law enforcement agents' decision to seek a search authorization and the search authority's decision to grant it.

Standard of Review

A military judge's ruling suppressing evidence from a search is reviewed for an abuse of discretion. *United States v. Shields*, 83 M.J. 226, 230 (C.A.A.F. 2023). "An abuse of discretion occurs when a military judge's 'findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.'" *Id.* (quoting *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020)).

Law and Analysis

The AFCCA committed legal error because it (1) found the military judge abused his discretion and (2) failed to rule for Appellant (then Appellee) based on the meritorious alternative basis he identified under *Dandridge*. At the AFCCA, Appellant argued that even if the AFCCA found that *United States v. Murray* only required a two-part test, the March 2025 search authorization still fails that test. App. at 78a-81a. Despite the AFCCA finding that *United States v. Murray* only required a two-part test, it failed to determine whether the military judge's ruling was otherwise "correct in law and [ ] appropriate" in accordance with Appellant's *Dandridge* challenge, which was legal error. *Cf.*, *United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (finding legal error by the CCA for failure to review appellant's *Grostefon* issue). Furthermore, the military judge's "decision on the issue at hand [was not] outside the range of choices reasonably arising from the applicable facts and the law." *Shields*, 83 M.J. at 230. Under the law, Appellant's alternative grounds for relief clearly demanded the military judge be affirmed; however, AFCCA failed to do so. Therefore, this Court should reverse the AFCCA and, piercing that court's ruling to directly review the trial-level ruling, affirm the military judge's ruling. *Shields*, 83 M.J. at 230.

<u>A. The Chariot Drove Home: The Military Judge Arrived at the Right Result</u>

The military judge properly suppressed the fruits of the March 2025 search, even if using an alternate legal basis. An appellate court may affirm a trial court that reaches the right result but for the wrong reason so long as there is any basis which would support the judgment in the record. *See, e.g.*, *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("This long-standing principle of appellate law, sometimes referred to as the 'tipsy coachman' doctrine,[4] allows an appellate court to affirm a trial court that 'reaches the right result but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'") (citation omitted); *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) ("the military judge's error was harmless, because the military judge reached the correct result, albeit for the wrong reason"); *United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017) (summarizing longstanding history of the right result, wrong reason principle).

The military judge, according to the AFCCA, abused his discretion because he was influenced by "an erroneous view of the law," i.e., used the wrong reason. App. at 2a, 12a. However, even using the AFCCA's "right reason" it extracted from

[4] *See* Oliver Goldsmith, Retaliation, 45-48 (1774) ("The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honour, yet fearing to roam, The coachman was tipsy, the chariot drove home.")

Murray, the military judge still arrived at the right result because the March 2025 search was tainted by other unlawful searches, rendering its fruits inadmissible.

The military judge found that in all seven searches, including Inv. KF's two that pre-dated the February 10, 2022, searches (the first and second searches), "law enforcement asserted false information, made with reckless disregard[ ] for the truth, concerning the actual nexus between the upload of child pornography and the residence shared by the Accused." Appellate Ex. XX at 4, ¶ 12; *see* Appellate Ex. IX at 17, ¶ 79. Although the military judge did not explicitly rule on the lawfulness of Inv. KF's pre-February 10, 2022, searches, the military judge did make all the necessary findings of fact and law to render them unlawful. *See* Appellate Ex. XVIII at 13-14, ¶¶ 60, 62 (explaining the search authority's reliance on Inv. KF's pre-February 10, 2022, searches); Appellate Ex. IX at 17, ¶ 79 (finding that Inv. KF acted with reckless disregard for the truth in her pre-February 10, 2022, search affidavits). The good faith exception does not apply when a false or reckless affidavit supports a search authorization. *United States v. Carter*, 54 M.J. 414, 419 (C.A.A.F. 2001) (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)); *see* Mil. R. Evid. 311(c)(3), (d)(4)(B); Appellate Ex. XVIII at 13, ¶ 60. Furthermore, the military judge found the benefits of deterring unreasonable law enforcement conduct outweigh the costs of suppression in this case. Appellate Ex. IX at 16-19, ¶¶ 78-83; *see* *United States v. Wicks*, 73 M.J. 93, 104 (C.A.A.F. 2014); Mil. R. Evid. 311(a)(3).

Therefore, both of Inv. KF's pre-February 10, 2022, searches were unlawful and under *Murray*, their fruits cannot be used in support of a subsequent search.

On appeal, the AFCCA found that *Murray* held the following:

> The United States Supreme Court in *Murray* set forth a two-part test to determine whether evidence initially obtained unlawfully has later been independently obtained through an untainted source. The Government must show that no information gained from the unlawful search affected either (1) "the law enforcement officers' decision to seek a warrant;" or (2) "the magistrate's decision to grant it."

App. at 9a (citations omitted).

Information from the first and second searches was unlawfully obtained and influenced law enforcement's decision to seek a search authorization and the search authority's decision to grant it. That unlawfully obtained information was included in the March 2025 search affidavit, in violation of *Murray*'s two-part test as set out in AFCCA's opinion. Appellate Ex. XVI at 87, ¶ 16.l.-n. (Atch. 8) ("[O]n or about 10 January 2022, Inv. KF applied for and was issued a search warrant to be executed on Charter Communications, Inc. (Charter)," the first search, which "provided the following information:" Appellant's alleged address); Appellate Ex. XVI at 88, ¶ 16.p.-r. (Atch. 8) ("Based on the information returned in response to the warrant executed on Charter [(the first search)], on or about January 26, 2022, [law enforcement] applied for and was issued a search warrant related to the residence," the second search, which contained a package with Appellant's name on it). Appellant,

even while deployed, had a reasonable expectation of privacy in the shared residence and therefore had standing to challenge the first and second search. *United States v. Salazar*, 44 M.J. 464, 467 (C.A.A.F. 1996) (holding that deployed servicemembers maintain a reasonable expectation of privacy in their private residence while deployed).

The fruits of the March 2025 search must be suppressed because the first part of the *Murray* test is met. Law enforcement's "decision to seek the warrant was prompted by what they had seen during the initial entry" in the unlawful first and second searches. *Murray*, 487 U.S. at 542. Law enforcement only sought authorization to search Appellant's person and deployed residence *because* of what they found during the other two unlawful searches of his internet service provider (first search, revealing a residential address) and primary residence (second search, revealing a package with Appellant's name on it). In fact, the *only* alleged connection from the NCMEC report to Appellant was the return from those two unlawful searches. *See* Appellate Ex. IX at 17, ¶ 79 (military judge finding that AFOSI relied upon Inv. KF's false affidavits in conducting the searches of Appellant and his deployed residence); Appellate Ex. XVIII at 13-14, ¶¶ 60, 62 (military judge outlining the evidence's nexus to Appellant). Law enforcement *had to* rely on those unlawful searches to establish probable cause to search Appellant and his residence. Therefore, law enforcement agents' decision to seek the search authorization was

prompted by what they discovered during the initial unlawful searches (the first and second searches), and the March 2025 search was not derived from an independent, lawful source.

The March 2025 search also must be suppressed because the second part of the *Murray* test is met. Law enforcement likewise presented information obtained from those first two unlawful searches to the military search authority, which affected the military search authority's decision to issue the search authorization. Appellate Ex. XVI at 87-88, ¶ 16.l.-m., p., r., t. (Atch. 8). Without the nexus to Appellant found during the search of the shared residence, there was no probable cause to search Appellant or his deployed residence.

Law enforcement agents had no independent source for the information gathered from the warrant to Charter Communications for subscriber data, nor from their search of BB's and Appellant's alleged residence. Law enforcement agents tried to obtain an independent source for this information in March 2025 by contacting Charter Communications, who said that "the records at issue no longer exist within their systems," but could speculate that the original warrant return was accurate. *Id.* at 87, ¶ 16.o (Atch. 8). The Government still has no independent source for the subscriber data linking the IP address with Appellant's alleged residence. Law enforcement agents also interviewed BB, Appellant's alleged roommate, who said that they began living together in July 2020, but provided no information about how

long they lived together, or if there were any gaps in Appellant's residence. Appellate Ex. XVII at 14, ¶ 2-46. However, even this limited information from the interview with BB was not included in the law enforcement agent's affidavit that provided the basis for the March 2025 search authorization. *See* Appellate Ex. XVI at 88, ¶ 16.r.-t. (Atch. 8). The Government still has no independent source for a nexus to Appellant during the time of the alleged misconduct as identified by the NCMEC report.

The military judge found that law enforcement agents acted with reckless disregard for the truth in all seven pre-March 2025 searches, including searches which returned the address of the residence associated with the IP address and Appellant's alleged association with that address. Appellate Ex. XX at 4, ¶ 12. If those recklessly false statements were excised from the warrant affidavits, probable cause would not have existed to search Appellant's deployed person and residence. *See* Appellate Ex. IX at 15, ¶ 74. Law enforcement agents and the search authority expressly relied upon the fruits of those unlawful searches to justify the March 2025 search. There is no exception that saves the January 2022 searches of Charter Communications and BB's and Appellant's alleged residence; therefore, they were unlawful and their fruits must be suppressed. The Government did not provide an independent source for information gained from those searches in the March 2025 affidavit. Therefore, under the two-part test extrapolated from *Murray*, which the

AFCCA adopted, the fruits of the March 2025 search must also be suppressed and the military judge's ruling affirmed.

B. Appellant's Alternative Ground for Relief was Within the Scope of the AFCCA's 10 U.S.C. § 862 Review

Ruling on Appellant's alternative ground for relief was within the AFCCA's scope of review because the military judge's rulings were not "ambiguous or incomplete," nor was it "impossible to determine from the record whether the military judge had ruled on key predicate issues or even what he had ruled." *United States v. Kosek*, 41 M.J. 60, 64 (C.A.A.F. 1994); *Lincoln*, 42 M.J. at 321; *see Dandridge*, 397 U.S. at 475-76 n.6 ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").

In *Kosek*, the CAAF reviewed a case before it under Article 62, UCMJ, where the military judge suppressed the fruits of a search. *Kosek*, 41 M.J. at 61. There, at the trial level, the military judge did not make findings of fact or law on an issue-predicate to the issue on appeal under Article 62, UCMJ. *Id.* at 63. "[T]he military judge's findings of fact and conclusions of law [on the predicate issue were] incomplete and ambiguous." *Id.* at 62. Nonetheless, the Air Force Court of Military Review made "rulings of law on issues either not decided by the military judge or on which the military judge's rulings were ambiguous or incomplete." *Id.* at 64. The CAAF found error in the lower court's action on the Article 62 appeal because the

"findings of fact and conclusions of law [on the predicate issue were] incomplete and ambiguous," and "the case [was] remanded to the military judge for further proceedings." *Id.* at 62.

In *Lincoln*, the CAAF reviewed a case before it under Article 62, UCMJ, where the military judge suppressed a pretrial confession. *Lincoln*, 42 M.J. at 316. At trial, the military judge made no findings of fact or law about whether appellant's interrogation was custodial. *Id.* at 320. On appeal, the Navy-Marine Corps Court of Military Review ruled that the interrogation was not custodial. *Id.* Petty Officer Lincoln appealed to this Court, asserting that "the Court of Military Review erred by ruling on issues not decided by the military judge." *Id.* Distinguishing itself from *Kosek*, the Court in *Lincoln* held that an intermediate appellate court may rule on issues not decided by the military judge where the record has clear and unambiguous findings of fact required for a conclusion of law. *Id.* at 321. The *Lincoln* standard remains good law. *See United States v. Riley*, 55 M.J. 185, 189 (C.A.A.F. 2001); *United States v. Floyd*, 82 M.J. 821, 828 (N.M. Ct. Crim. App. 2022); *United States v. Johnson*, 76 M.J. 673, 680 (A.F. Ct. Crim. App. 2017); *United States v. Dairo*, 75 M.J. 867, 870 (A. Ct. Crim. App. 2016).

Here, Appellant properly raised an alternative ground for relief under *Dandridge* on an issue predicated on complete and unambiguous findings of fact required for a conclusion of law. *See supra* Part A. The AFCCA failed to determine

whether the military judge's ruling was otherwise "correct in law and [ ] appropriate," which was legal error. *Cf.*, *Guinn*, 81 M.J. at 204. Appellant's alternative grounds for relief clearly demanded the military judge be affirmed; therefore, this Court should reverse the AFCCA and, piercing that court's ruling to directly review the trial-level ruling, affirm the military judge's ruling. *Shields*, 83 M.J. at 230.

CONCLUSION

Appellant requests that this Court grant review and affirm the military judge's ruling suppressing the fruits of the March 2025 search.

Respectfully submitted,

JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant

APPENDIX A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Misc. Dkt. No. 2025-10

UNITED STATES
Appellant

v.

Kenneth P. ARMOUR II
Senior Airman (E-4), U.S. Air Force, *Appellee*

Appeal by the United States Pursuant to Article 62, UCMJ

Decided 5 December 2025

Military Judge: Nathan R. Allred (Article 30a, UCMJ, proceedings); Ryan D. Brunson (arraignment and pretrial motions).

GCM convened at: Shaw Air Force Base, South Carolina.

For Appellant: Colonel Matthew D. Talcott, USAF; Major Kate E. Lee, USAF; Mary Ellen Payne, Esquire.

For Appellee: Captain John M. Fredericks, USAF.

Before DOUGLAS, MASON, and KUBLER, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Senior Judge DOUGLAS and Judge KUBLER joined.

PUBLISHED OPINION OF THE COURT

MASON, Judge:

This case arises out of an interlocutory appeal under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862,[1] in a pending court-martial.

The military judge granted Appellee's motion to suppress "searches and seizures of [his] person, deployed residence, electronic devices, email transmissions and any fruits of such searches." The Government moved for reconsideration arguing that the military judge incorrectly concluded that the independent source doctrine was inapplicable to this case and that he incorrectly applied the exclusionary rule to the evidence in question. The military judge denied the reconsideration motion. The Government appealed the ruling of the military judge with regards to the application of the independent source and the exclusionary rule.

We need not address the military judge's application of the exclusionary rule because we find that the military judge held an erroneous view of the law in his application of the independent source doctrine to the facts of this case. Hence, his suppression of the evidence was an abuse of discretion.

I. BACKGROUND

A. Initial Discovery and Investigation[2]

On 1 August 2021, an Internet application reported to the National Center for Missing and Exploited Children (NCMEC) that a certain account had uploaded 15 media files depicting apparent child sexual abuse material and shared "apparent child pornography." The report referenced multiple Internet protocol (IP) addresses with the use of that account. Some of the IP addresses associated with this account were utilized to transmit "apparent child pornography." NCMEC eventually forwarded this report to Investigator KF at the Sumter County Sheriff's Office (SCSO), South Carolina. Investigator KF applied for and received a search warrant for subscriber information associated with one of the IP addresses. Only one of the multiple IP addresses associated with the account could be traced to a physical address. This IP address was not one of the IP addresses referenced in the report as transmitting "apparent child

---

[1] References to Article 62, UCMJ, are to the *Manual for Courts-Martial, United States* (2024 ed.); all other references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The Government does not challenge the facts found by the military judge. Therefore, the facts set forth below represent a consolidation of the relevant factual findings from the military judge's multiple rulings on this issue.

pornography." The locations for the remaining IP addresses were "masked" due to use of virtual private networks.

1. Search of BB's Home (28 January 2022)

The warrant return indicated that the subscriber was BB at a certain physical address in Dalzell, South Carolina (BB's home). At some point between 25 August 2021 and 25 January 2022, Investigator KF determined that BB was a member of the United States Air Force. She then notified the Office of Special Investigations (OSI) at Shaw Air Force Base, South Carolina, and OSI agents opened a parallel investigation.

On 27 January 2022, OSI Special Agent EP spoke with Investigator KF about the county's investigation. The next day Investigator KF applied for a warrant to search BB's residence. In that warrant application, she only referred to the IP address that led them to the physical address, but was not reported by NCMEC as having uploaded, transmitted, or downloaded any child sexual abuse material. According to the NCMEC report, this IP address was associated to a "suspect login" of the Internet application account, but was not an IP address associated with any of the nine suspected transmissions of suspected child sexual abuse material. The other IP addresses were not linked to physical addresses. The search warrant was issued.

On 28 January 2022, OSI and SCSO executed the search pursuant to the warrant on BB's home. Several electronic devices were seized. During the search, law enforcement noticed postal packages labeled with Appellee's name at the address of BB's home. On an unknown later date, but prior to 10 February 2022, law enforcement conducted a search of the South Carolina Department of Motor Vehicles (DMV) database and verified that both BB and Appellee were residents of BB's home. They were also able to confirm that at the time of conducting that database review, Appellee was deployed to an overseas location.

2. Search of Appellee's Person and Deployed Residence (10 February 2022)

On 10 February 2022, Special Agent AG requested search authorization to search Appellee's person and deployed residence. In support of this request, Special Agent AG's affidavit contained essentially the same substantive information as did the request for a warrant to search BB's home. In his affidavit he stated that he spoke with Investigator KF "who provided . . . [that] the IP address [associated with BB's home] was the reported IP address used when uploading [suspected child sexual abuse material] files" and that "Investigator [KF] reviewed 14 media files which were uploaded via application [ ] via [the] IP address [for BB's home]." However, Special Agent AG's affidavit did not mention the other IP addresses referenced in the NCMEC report that were

actually utilized for the uploads of the suspected child sexual abuse material. The affidavit did not, despite having confirmed that Appellee resided at BB's home, reference that Appellee was confirmed to be living at the residence or note a date on which Appellee had deployed to an overseas location. The search authorizations for Appellee's person and deployed residence were granted.

During the search of Appellee's person, OSI seized one Apple iPhone. During the search of Appellee's deployed residence, OSI seized one Apple iPad, one Asus laptop, one HP laptop, and one Micro SD card. As SCSO still had jurisdiction to investigate the case, OSI turned over the seized items to SCSO.

3. Search of a Yahoo Account (12 August 2024)

On 19 June 2023, SCSO notified OSI that SCSO's application for a warrant to search the seized devices was denied by a state magistrate judge in South Carolina. The following day, OSI was notified by South Carolina authorities that they were no longer moving forward with prosecuting BB or Appellee.

On 7 August 2023, Special Agent TO submitted a request to the Defense Computer Forensics Laboratory (DCFL) to analyze the items seized from BB's home, and Appellee's person and deployed residence. As a result of the search, DCFL analysts uncovered, in relevant part, evidence of child sexual abuse material possession, viewing, receiving, and distribution on the iPhone and iPad seized from Appellant's person and deployed residence.

On 6 May 2024, OSI agents prepared an affidavit to support a search authorization pursuant to Article 30a, UCMJ, 10 U.S.C. § 830a, for the content of emails in a particular Yahoo account. Initially, the application was denied. Subsequently, Special Agent TO amended the application and wrote, "the NCMEC CyberTipline report placed the device uploading [the suspected child sexual abuse material] at [BB's home] based on the IP address [for BB's home] on nine difference [sic] instances between 13 June [2021] and 31 July 2021." On 12 August 2024, the warrant application was approved by the detailed military judge.

B. Referral of Charges and Pretrial Motion Practice

On 15 May 2024, the Government preferred one charge and one specification of conspiracy to distribute child pornography, and one charge and one specification each of possessing, viewing, receiving, and distributing child pornography. One additional charge and one specification of conspiracy to distribute child pornography were preferred against Appellee on 14 August 2024, and then all charges and specifications were referred to trial by general court-martial on 14 August 2024. All the charges and specifications were served on Appellee on 15 August 2024.

On 11 November 2024, Appellee moved to suppress the evidence recovered as a result of the searches of his person and deployed residence, including the electronic devices, email transmissions, and any fruits of the searches. After reviewing the filings, taking testimony, and hearing argument of counsel, the military judge granted the motion to suppress. The military judge found that specific statements in the 10 February 2022 affidavit regarding the IP address utilized to upload the child sexual abuse material were false or "at best recklessly misleading." He found that Appellee met his burden showing that the statements were made falsely or with a reckless disregard for the truth. He then found that the Government failed to meet their burden to show that if the false information was set aside, the remainder of the information established probable cause. He concluded that the searches were not otherwise lawful, that inevitable discovery or good faith exceptions were not applicable, and that the exclusionary rule should be applied to this evidence.

For the same reasons, the military judge found that the search of the Yahoo account for email content pursuant to the 12 August 2024 warrant was also unlawful and applied the exclusionary rule.

On 27 February 2025, the Government moved for reconsideration of the grant of the motion to suppress. On 6 March 2025, the military judge denied the motion for reconsideration emphasizing that the information submitted to the search authorities did not present probable cause with the false information excised. The Government subsequently moved for a continuance of the trial. Over defense objection, the military judge granted the continuance.

C. New Search Authorization for Appellee's Items (24 March 2025)

Following the grant of the continuance, on 10 March 2025, trial counsel began collaborating with agents from the OSI detachment at Shaw Air Force Base to prepare a new affidavit for search authorization for the previously seized items. All of the items remained in government custody from the time they were seized. After some back and forth regarding what language Special Agent TS could attest to, a new affidavit was finalized and signed on 24 March 2025. In the affidavit, Special Agent TS references Investigator KF's previous search warrants for the subscriber information and for BB's home as well as the results of those warrants. In this new affidavit, the connection of Appellee to BB's home was based on the fact that investigators saw a package at the home with Appellee's name and BB's home address on the label as well as the search of the South Carolina DMV database, without reference to the dates Appellee lived at the home.

That same day, 24 March 2025, Special Agent TS and trial counsel requested search authorization from the base operations group commander, Colonel MT. During the meeting, Colonel MT asked several questions. One of

those questions was why was he being asked to authorize a search this long after the initial seizure. He was told that there was an issue with the first search authorization due to the use of the words "login" and "upload" being incorrectly used interchangeably. He asked Special Agent TS and trial counsel if there was any reason why he should not sign the requested search authorization. Assistant trial counsel stated that the affidavit was "well-laid out, and made sense," gave verbal and non-verbal affirmations to Colonel MT during his assessment of the affidavit (*i.e.*, head nods and statements of agreement to Colonel MT's verbal analysis of the affidavit). Colonel MT granted the request for search authorization permitting search of the items seized from Appellee's person and deployed residence on 10 February 2022. From these items, DCFL analysts uncovered, in relevant part, evidence of child sexual abuse material possession, viewing, receiving, and distribution on the iPhone and iPad seized from Appellant's person and deployed residence.

D. Additional Motion Practice

On 9 April 2025, Appellee's trial defense counsel moved to suppress the search resulting from the 24 March 2025 search authorization. The Government filed their response on 16 April 2025. Neither party requested a hearing on the motion. On 9 July 2025, the military judge issued his ruling granting the motion to suppress.

In his ruling the military judge concluded that the 24 March 2025 affidavit from Special Agent TS did "not contain the offending information, but instead accurately and matter-of-factly establishes a nexus between the NCMEC report that launched this investigation and the ultimate seizure of [Appellee]'s devices." He summarized the "nexal chain" as follows:

> A NCMEC Cyber Tipline reported uploads of child pornography from the [account named] [ ] on numerous occasions between June and July of 2021 as well as a number of logins to that same account; the [Internet application] account was accessed via a residential IP address close in time to the reported upload; that IP address was determined based on a warrant for [the Internet service provider] subscriber information to be associated with the residence shared by [BB] and [Appellee] in Dalzell, South Carolina; a search of that home and review of the South Carolina DMV records revealed [Appellee] to be a resident of the home.

The first reason for Appellee's challenge to this search was that there was not a sufficient basis for Colonel MT to find probable cause. Affording the appropriate deference to Colonel MT's decision as the search authority who authorized the search, the military judge found that "the information that *was* presented established a substantial basis for a finding of probable cause."

The military judge next analyzed whether the independent source doctrine applied to this search considering the 10 February 2022 search was found to be unlawful. The military judge determined that the circumstances in this case did not indicate that the 24 March 2025 search was genuinely independent of the prior, tainted search. He again applied the exclusionary rule and granted Appellee's motion to suppress.

II. Discussion

A. Jurisdiction and Standard of Review

The Government asserts that this court has jurisdiction to hear this appeal under Article 62(a)(1), UCMJ; Appellee does not contest this assertion. In accordance with Article 62, UCMJ, the court has jurisdiction to hear this appeal in that the Government may appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." 10 U.S.C. § 862(a)(1)(B).

When the Government appeals a ruling under Article 62, UCMJ, "this court reviews the military judge's decision 'directly and reviews the evidence in the light most favorable to the party which prevailed at trial.'" *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)). Because this issue is before us pursuant to a government appeal, we "may act only with respect to matters of law." 10 U.S.C. § 862(a). We are limited to determining whether the military judge's factual findings are clearly erroneous or unsupported by the record. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

A military judge's ruling suppressing evidence from a search is reviewed for an abuse of discretion. *United States v. Brinkman-Coronel*, 85 M.J. 431, 438 (C.A.A.F. 25 May 2025) (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. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)). "The military judge's findings of fact are reviewed under a clearly erroneous standard and conclusions of law, de novo." *White*, 69 M.J. at 239 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). "An abuse of discretion occurs when a military judge's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Shields*, 83 M.J. 226, 230 (C.A.A.F. 2023) (internal quotation marks and citations omitted).

B. Admissibility of Suppressed Evidence

1. Law

A search authorization, whether for a physical location or for an electronic device, must adhere to the standards of the Fourth Amendment of the Constitution. The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This insistence on particularity is a defining aspect of search and seizure law.

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987). "The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999).

Probable cause relies on a "common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband will be found in a particular place." *United States v. Leedy*, 65 M.J. 208, 213 (2007) (quoting *Illinois v. Gates*, 462, U.S. 213, 238 (1983)) (additional citations omitted).

When reviewing an authority's grant of search authorization, a court considers whether the authority had a "substantial basis" for concluding that probable cause existed. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017) (citation omitted). "A substantial basis exists when based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location." *Id.* (internal quotation marks and citations omitted). Courts grant substantial deference to an authority's determination of probable cause. *Id.*

"Searches conducted pursuant to a warrant or authorization based on probable cause are presumptively reasonable, whereas warrantless searches are presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions." *United States v. Lutcza*, 76 M.J. 698, 701 (A.F. Ct. Crim. App. 2017) (citing *United States v. Hoffmann*, 75 M.J. 120, 123–24 (C.A.A.F. 2016)).

"The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search." *Murray v. United States*, 487 U.S. 533, 536 (1988) (citations omitted). This rule also prohibits the introduction of evidence "up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint.'" *Id.* at 537 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)) (additional citation omitted).

"Almost simultaneously with our development of the exclusionary rule, in the first quarter of [the 20th] century, we also announced what has come to be known as the 'independent source' doctrine." *Id.*

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Id. (alterations and omission in original) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

The ultimate question when determining whether the independent source doctrine will permit the admission of evidence originally unlawfully seized is whether the subsequent search "was in fact a genuinely independent source of the evidence" in question. *United States v. Budd*, 549 F.3d 1140, 1147 (7th Cir. 2008) (citing *Murray*, 487 U.S. at 542).

The United States Supreme Court in *Murray* set forth a two-part test to determine whether evidence initially obtained unlawfully has later been independently obtained through an untainted source. 487 U.S. at 539–40, 542. The Government must show that no information gained from the unlawful search affected either (1) "the law enforcement officers' decision to seek a warrant;" or (2) "the magistrate's decision to grant it." *United States v. Saelee*, 51 F.4th 327, 335 (9th Cir. 2022) (quoting *Murray*, 487 U.S. at 539–40). "Affect" means "affect in a *substantive* manner." *United States v. Herrold*, 962 F.2d 1131, 1141 (3d Cir. 1992); *see also United States v. Jenkins*, 396 F.3d 751, 758 (6th Cir. 2005) ("All courts of appeals to have considered the matter, however, have interpreted *Murray* to mean that, in these situations, for evidence to be inadmissible . . . the tainted information presented to the judge must affect the judge's decision in a *substantive*, meaningful way." (citations omitted)). The Government is not required to make a showing that a magistrate's decision was

"entirely independent of the information discovered during the illegal [search]." *Herrold*, 962 F.2d at 1142. Rather, the Government is required "to establish that a *neutral* justice would have issued a warrant based on the untainted information in the affidavit which the police had acquired prior to their [illegal search]." *Id.*

"To determine whether the warrant was independent of the illegal [search], one must ask whether it would have been sought even if what actually happened had not occurred . . . ." *Murray*, 487 U.S. at 542 n.3. Where "it is clear that the police were motivated by circumstances independent of their initial [illegal search] to seek a warrant," the decision to seek the warrant is not "affected" by information gained from the illegal search. *Id.; see also Saelee*, 51 F.4th at 335 (holding that suppression is unwarranted where evidence initially the consequence of an unlawful search is later obtained independently from activities untainted by the initial illegality ensuring the police will be placed "in the same, not a worse, position that they would have been in if no police error or misconduct had occurred").

"[A]n independent 're-seizure' can cure an earlier illegal seizure in the same way a valid later search can cure an earlier illegal one." *United States v. Grosenheider*, 200 F.3d 321, 329 (5th Cir. 2000) (citing *Murray*, 487 U.S. at 542).

There is no constitutional right to destroy evidence. Such a "concept defies both logic and common sense." *Segura v. United States*, 468 U.S. 796, 817 (1984) (citing *Nardone*, 308 U.S. at 341).

"[A]lways under the Fourth Amendment, the standard is reasonableness." *Shields*, 83 M.J. at 232 (internal quotation marks and citations omitted).

2. Analysis

We are called upon to review the military judge's determination that a search conducted pursuant to a granted search authorization, and therefore presumptively reasonable, was in fact unlawful.

The initial searches conducted of Appellee's person and his deployed residence were conducted pursuant to a search authorization. The military judge determined that these searches were unlawful due to deficiencies in the affidavit. The pertinent matter before us is whether the subsequent search pursuant to a later-granted search authorization was genuinely independent of the initial search. We hold that it was genuinely independent. Thus, a correct application of the independent source doctrine results in the evidence in dispute being admissible.

To make this determination, we apply the Supreme Court's two-part test as set forth in their *Murray* decision. 487 U.S. at 539–40, 542; *see also Saelee*,

51 F.4th at 335 (citation omitted). As we do so, we acknowledge that though there appears to be, as the military judge noted, a dearth of military case law on this issue, every Federal Circuit Court of Appeals has applied the *Murray* test. *See, e.g., Saelee*, 51 F.4th at 335–38; *United States v. Green*, 9 F.4th 682, 693 (8th Cir. 2021); *United States v. Amador*, 752 F. App'x 541, 548–49 (10th Cir. 2018); *United States v. Mulholland*, 702 F. App'x 7, at *10 (2d Cir. 2017) (order); *United States v. Barron-Soto*, 820 F.3d 409, 415 (11th Cir. 2016); *United States v. Budd*, 549 F.3d 1140, 1147 (7th Cir. 2008); *United States v. Jenkins*, 396 F.3d 751, 757–59 (6th Cir. 2005); *United States v. Dessesaure*, 429 F.3d 359, 365 (1st Cir. 2005); *United States v. Grosenheider*, 200 F.3d 321, 327–30 (5th Cir. 2000); *United States v. Walton*, 56 F.3d 551, 553–54 (4th Cir. 1995); *United States v. Herrold*, 962 F.2d 1131, 1139–40 (3d Cir. 1992); *United States v. Halliman*, 923 F.2d 873, 880 (D.C. Cir. 1991).

The first part of the test focuses on whether information gained from the unlawful search affected the law enforcement officer's decision to seek a warrant. *Saelee*, 51 F.4th at 335. In nearly all of the above-mentioned cases, law enforcement's seeking of a warrant followed a warrantless search, entry, or arrest. In those cases, it is much more difficult to determine whether they would have sought a warrant. In fact, many of those cases have required remand for additional factual findings to determine the issue. Here, that question is not difficult to answer. In this case, law enforcement was from the beginning seeking search authorization for Appellee's person and deployed residence and a warrant for the online communications. At the time they originally sought those items, they had not seen the evidence comprised within. Therefore, we can easily conclude that law enforcement's decision to seek search authorization and a warrant were not affected in any substantive or meaningful way by their obtaining of the items unlawfully initially.

The military judge's own conclusions in his ruling on the defense motion to suppress the search authorization of 24 March 2025 also support this conclusion. He found, "[i]t was not the *information gathered* during the initial illegal search that 'prompted' Special Agent [TS] to seek the instant search authorization. Instead, the desire to seek a new search authorization was prompted by, or premised upon, information already known as of February 2022." Hence, the first part of the *Murray* test is met.

The second part of the test focuses on whether information gained from the unlawful search affected the magistrate's decision to grant the search authorization or warrant request. *Saelee*, 51 F.4th at 335. Again, the military judge answered this question by finding that there was a substantial basis for Colonel MT to conclude that "probable cause existed to reseize and search [Appellee]'s previously seized devices." The military judge further found that the 24 March 2025 affidavit from Special Agent TS did "not contain the offending

information, but instead accurately and matter-of-factly establishes a nexus between the NCMEC report that launched this investigation and the ultimate seizure of [Appellee]'s devices."

As the 24 March 2025 affidavit did not contain any of the incorrect information referenced in the first affidavit or information gained from the unlawful search, and that it provided a substantial basis for the magistrate's conclusion that probable cause existed, the Government has established that a neutral magistrate would have issued the search authorization based on the untainted information in the affidavit which the police had acquired prior to their illegal search. *Herrold*, 962 F.2d at 1142. Hence, the second part of the two-part *Murray* test has been met.

The military judge's analysis of the appropriateness of applying the independent source doctrine should have ended after he made these findings. *Murray*, 487 U.S. at 539. However, it did not. The military judge proceeded to focus on the fact that the items seized remained in government custody from the time of the initial search and seizure that he deemed unlawful. Based on that fact, he speculated that but for the unlawful initial search, the items *could have* gone "stale" undercutting probable cause. This was not the correct legal analysis.

The military judge's rationale would prevent the Government from rectifying a defective warrant when evidence originally seized remains in the Government's possession. It appears that the military judge believed that government possession of previously seized items prevents any second warrant from being independent. He implies that a second warrant cannot be independent because he opines the insertion of potential staleness—which does not exist in this case—must be considered for the second search to be independent. In such a legal universe, where an initially defective warrant led to a seizure of evidence, the warrant could never be reissued because the intervening time between the initial seizure and the reissued warrant *could have* made the evidence stale. This is an erroneous view of the law. In fact, the military judge did not cite and we are unaware of legal authority supporting a proposition that evidence should be suppressed based upon "potential staleness."[3]

The military judge's overarching implication is that for the independent source doctrine to apply, the investigators in this case would have had to return the items seized, specifically, the iPhone and iPad to Appellee shortly after

---

[3] We are unsurprised to find that a *potential* staleness doctrine does not exist in the law. Moreover, we are quite skeptical that such a concept could provide a legal basis for suppression of evidence where there was *no potential for staleness* as the devices were, as the military judge recognized, "frozen" in government custody, pending the litigation in this case.

they seized them and well before they knew the military judge would invalidate the initial search. This impossibility would let a fictional staleness potential play out. This was impossible since the Government believed the evidence supported the search and seizure until they received the military judge's ruling. Even if they could have known this, they could not return the evidence prior to re-seizing the items. Neither the law nor common sense permits, let alone requires, this step or these steps. After having initially seized and searched these items, agents became aware that the items contained child sexual abuse material. Clearly, it would have been unlawful for them to just simply hand the items back to Appellee. *See* Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901. Moreover, Appellee was not entitled to the destruction of evidence. *Segura*, 468 U.S. at 817. The question then focuses on, as all Fourth Amendment searches do, what is reasonable for government officials to have done in this circumstance? *Shields*, 83 M.J. at 232. Here, it was entirely reasonable for investigators to keep the items secured while they sought search authorization before further searching of the items took place. The Government took steps to obtain an independent search authority immediately after the military judge ruled the 10 February 2022 search was invalid. This prompt action also makes the second search eminently reasonable.

In this light, the military judge's focus on potential staleness was misplaced. The *Murray* test was the correct legal test here. The military judge's own findings support the conclusion that the independent source doctrine applies, and this evidence is admissible. Accordingly, the military judge abused his discretion by demonstrating an erroneous view of the law and suppressing the evidence.

III. CONCLUSION

The appeal of the United States under Article 62, UCMJ, is **GRANTED**. The military judge's ruling on the validity of the 24 March 2025 search and resultant suppression of the searches and seizures of Appellee's person, deployed residence, electronic devices, email transmissions and any fruits of such searches, is **VACATED**.

The record is **RETURNED** to The Judge Advocate General of the Air Force for remand to the Chief Trial Judge, Air Force Trial Judiciary, for action consistent with this opinion.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' APPEAL**
Appellant,	)	**UNDER ARTICLE 62, UCMJ**
	)	
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4)	)	
KENNETH P. ARMOUR II,	)	Misc. Dkt. No. 2025-10
United States Air Force,	)	
Appellee.	)	11 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

INDEX OF BRIEF

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ISSUE PRESENTED 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

STATEMENT OF STATUTORY JURISDICTION 15

ARGUMENT 16

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BECAUSE HIS DETERMINATION THAT THE INDEPENDENT SOURCE DOCTRINE DID NOT APPLY WAS BASED ON AN ERRONEOUS VIEW OF THE LAW; BY EXTENSION, HIS APPLICATION OF THE EXCLUSIONARY RULE WAS AN ABUSE OF DISCRETION.

Standard of Review 16

Law 16

Analysis 21

A. The military judge's determination that the March 2025 search authorization cannot be an independent source of the evidence is based on an erroneous view of the law 22

1. *The military judge erred by concluding that the March 2025 search authorization was not an independent source of evidence, despite finding that it was neither prompted by nor supported by information obtained from the illegal search* 22

2. *The military judge erred by treating evidence seized via the 2025 seizure as a "product of illegal activity" simply because the evidence had been preserved in OSI's custody* 25

3. *Given the "dearth" of controlling military case law, the military judge erred by dismissing the significance of prevailing federal practice* 30

B. The military judge's conclusion that the deterrent value of excluding evidence would not outweigh the costs to the justice system was clearly unreasonable 32

CONCLUSION 36

CERTIFICATE OF FILING AND SERVICE 37

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. CONST. amend. IV 16

UNITED STATES SUPREME COURT

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 30, 31

Birchfield v. North Dakota,
579 U.S. 438 (2016) 25

Herring v. United States,
555 U.S. 135 (2009) .... *passim*

Murray v. United States,
487 U.S. 533 (1988) .... *passim*

Nix v. Williams,
467 U.S. 431 (1984) 18, 24, 25, 30

Pa. Bd. of Prob. & Parole v. Scott,
524 U.S. 357 (1998) 17

Segura v. United States,
468 U.S. 796 (1984) .... *passim*

Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920) 17

United States v. Calandra,
414 U.S. 338 (1974) 16, 17

United States v. Ceccolini,
435 U.S. 268 (1978) 33

United States v. Leon,
468 U.S. 897 (1984) 16, 17, 33, 34

United States v. Payner,
447 U.S. 727 (1980) 17, 35

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Camanga,
38 M.J. 249 (C.M.A. 1993) 29

United States v. Hoffmann,
75 M.J. 120 (C.A.A.F. 2016) 25

United States v. Khamsouk,
57 M.J. 282 (C.A.A.F. 2002) 35

United States v. Lattin,
83 M.J. 192 (C.A.A.F. 2023) 32, 34

United States v. Lopez,
35 M.J. 35 (C.M.A. 1992) 31

United States v. Mitchell,
76 M.J. 413 (C.A.A.F. 2017) 16

United States v. Nivens,
21 C.M.A. 420 (C.M.A. 1972) 30

United States v. Pyron,
83 M.J. 59 (C.A.A.F. 2023) 16

United States v. Rivera,
54 M.J. 489 (C.A.A.F. 2001) 28

United States v. Shields,
83 M.J. 226 (C.A.A.F. 2023) 16, 24

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Lutcza,
76 M.J. 698 (A.F. Ct. Crim. App. 2017) 30, 31

FEDERAL COURTS

Doe v. United States,
896 F. Supp. 2d 1184 (S.D. Fla. 2012) 19

United States v. Alexander,
54 F.4th 162 (3d Cir. 2022) 19, 26

United States v. Bah,
794 F.3d 617 (6th Cir. 2015) 18, 26

United States v. Bell,
925 F.3d 362 (7th Cir. 2019) 18

United States v. Brooks,
715 F.3d 1069 (8th Cir. 2013) 18, 26

United States v. Budd,
549 F.3d 1140 (7th Cir. 2008) .... *passim*

United States v. Dessesaure,
429 F.3d 359 (1st Cir. 2005) 19, 25-26

United States v. Eldarir,
681 F. Supp. 3d 43 (E.D.N.Y. 2023) 18, 26

United States v. Grosenheider,
200 F.3d 321 (5th Cir. 2000) .... *passim*

United States v. Hanhardt,
155 F. Supp. 2d 840 (N.D. Ill. 2001) .... *passim*

United States v. Herrold,
962 F.2d 1131 (3d Cir. 1992) 19

United States v. Johnson,
994 F.2d 980 (2d Cir. 1993) 19

United States v. Lewis,
81 F.4th 640 (6th Cir. 2023) .... *passim*

United States v. Lewis, No. 3:21-cr-00021-GFVT,
2024 U.S. Dist. LEXIS 105148 (E.D. Ky. June 13, 2024) 18

United States v. Mulholland,
702 F. App'x 7 (2d Cir. 2017) 18

United States v. Romero,
585 F.2d 391 (9th Cir. 1978) 19, 20, 24, 29

United States v. Rose,
914 F. Supp. 2d 15 (D. Mass. 2012) 19, 26

United States v. Saelee,
51 F.4th 327 (9th Cir. 2022) .... *passim*

United States v. Vilar,
530 F. Supp. 2d 616 (S.D.N.Y. 2008) 19

United States v. Williams,
656 F. App'x 751 (6th Cir. 2016) 33

STATUTES

10 U.S.C. 862 15-16

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant,*	))	**UNITED STATES' APPEAL UNDER ARTICLE 62, UCMJ**
v.	)))	Before Panel No. 3
Senior Airman (E-4) **KENNETH P. ARMOUR II,**	))	Misc. Dkt. No. 2025-10
United States Air Force *Appellee.*	))	11 September 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

INTRODUCTION

Before obtaining any search authorization in this case, Air Force Office of Special Investigations (OSI) agents had enough evidence to support probable cause to search and seize Appellee's electronic devices for evidence of child pornography. The military judge found as much. Yet, because the military judge found that the agents made a reckless mistake describing their probable cause when applying for their first search authorization, he concluded that their second search based on a proper description of probable cause was still invalid. The military judge's hangup was that the seized evidence remained in OSI custody while the agents obtained a second search authorization properly reciting the probable cause they always had. This case presents the question of whether the independent source doctrine can save evidence initially seized pursuant an invalid search authorization, if that evidence remains in law enforcement custody while agents obtain a second, untainted search authorization. The military judge in this case thinks not. But the answer, according to the law, is "yes."

In February 2022, law enforcement seized Appellee's devices pursuant to a search authorization and discovered evidence of child sexual abuse material (CSAM). After this

evidence was suppressed by the military judge due to misstatements in the affidavit supporting the search authorization, law enforcement re-accomplished the affidavit—using the same underlying information known to them back in 2022—and obtained a new search authorization in March 2025 for the evidence already in its custody. Despite finding that this new search authorization was supported by probable cause and neither prompted nor supported by information learned from the invalidated February 2022 search, the military judge nevertheless suppressed the evidence as a "product of illegal government activity" because it had been preserved in law enforcement custody. This determination is contrary to Supreme Court precedent, federal practice, and public interest, and is therefore an abuse of discretion.

The fact that law enforcement maintained secure custody of devices containing horrific child sexual abuse material during the interval between obtaining the first and second search authorizations is not a basis for concluding that the evidence is tainted. Law enforcement's safekeeping of evidence is not illegal government activity. The underlying implication of the military judge's ruling to the contrary—that evidence which has been safeguarded from alteration or destruction can never be lawfully re-seized based on an "independent source" of information—has already been rejected by federal courts across the nation. United States v. Grosenheider, 200 F.3d 321, 329 (5th Cir. 2000); United States v. Budd, 549 F.3d 1140, 1148 (7th Cir. 2008). Because, in the words of the Supreme Court, "[t]he essence of [this proposition] is that there is some 'constitutional right' to destroy evidence. *This concept defies both logic and common sense*." Segura v. United States, 468 U.S. 796, 816 (1984) (emphasis added).

Considering the military judge's misunderstanding of the law, this Court should find that he abused his discretion by suppressing evidence from Appellee's devices, vacate his ruling, and remand the case to trial for further proceedings.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY EXCLUDING EVIDENCE ON THE GROUNDS THAT THE INDEPENDENT SOURCE DOCTRINE COULD NOT APPLY TO THE SECOND SEARCH AND SEIZURE.

STATEMENT OF CASE

On 15 May 2024, the Office of Special Trial Counsel referred the following charges and specifications against Appellee to a general court-martial: one charge and one specification of conspiracy to distribute child pornography, in violation of Article 81, UCMJ; one charge and four specifications of possessing, viewing, receiving, and distributing child pornography, in violation of Article 134, UCMJ; and one additional charge and specification of conspiracy to distribute child pornography, in violation of Article 81, UCMJ. (*Charge Sheets*, ROT, Vol. 1.)

On 11 November 2024, the defense filed a motion to suppress evidence of child pornography offenses from Appellee's devices, to which the United States responded on 25 November 2024. (App. Ex. IV, V.) The defense filed a supplemental brief on 2 December 2025. (App. Ex. VI.) On 3 December 2024, the court-martial convened for arraignment and a bifurcated motions hearing, during which the military judge received evidence related to the defense motion. (R. at 15-118.) On 24 February 2025, the military judge granted the defense motion and suppressed the evidence on the grounds that the affidavits supporting the search and seizure authorization were defective. (App. Ex. V, IX.) Following an unsuccessful motion for reconsideration, (*see* App. Ex. X, XI, XII), the United States moved for and was granted a continuance, (*see* App. Ex. XIII, XIV, XV), during which time it obtained a new search and seizure authorization for Appellee's devices. (App. Ex. XVI, Atch. 8.)

On 9 April 2025, the defense filed a second motion to suppress evidence from the second Appellee's devices, to which the United States responded on 16 April 2025. (App. Ex. XVI, XVII.) On 9 July 2025, the military judge again suppressed the evidence—this time on the grounds that although there was probable cause for the new search, the evidence was a product of the prior illegality because it had been preserved in law enforcement custody and therefore not derived from an independent source. (App. Ex. XVIII.) On 11 July 2025, the United States moved for reconsideration, which the military judge denied on 31 July 2025. (App. Ex. XX, XXI.) On 3 August 2025, the United States timely notified the military judge of its intent to appeal under Article 62, UCMJ, and docketed the record of trial with this Court on 22 August 2025. (*Notice of Appeal*, 3 August 2025.) Trial proceedings remain in recess pending this appeal.

STATEMENT OF FACTS

The Trail Leading to Appellee

On 1 August 2021, the National Center for Missing and Exploited Children (NCMEC) received a CyberTipline report from MediaLab/Kik that an account with the username "aftermatter"[1] had uploaded and/or shared on the Kik platform 15 media files depicting the children—all of whom appeared to be under the age of 10—being sexually abused. (App. Ex. IV, Atch. 3, 7, 8.) The report noted that the "aftermatter" account had logged into Kik from four different internet protocol (IP) addresses and uploaded apparent child pornography from three others. (Id.) The login and upload activity occurred in the following order:

[1] The account was also associated with the email address "aftermatters@yahoo.com" and the user ID "aftermatter_tex." (App. Ex. IV, Atch. 3.)

IP Address	Event	Date/Time	Internet Service Provider (ISP)
193.56.116.154	Upload	06-13-2021 05:27:52 UTC	QuadraNet
	Upload	06-13-2021 05:35:01 UTC	QuadraNet
	Upload	06-13-2021 06:18:47 UTC	QuadraNet
	Upload	06-13-2021 06:26:10 UTC	QuadraNet
193.56.116.18	Upload	06-21-2021 23:13:35 UTC	QuadraNet
	Upload	06-29-2021 03:15:25 UTC	QuadraNet
	Upload	06-29-2021 03:16:25 UTC	QuadraNet
	Upload	06-29-2021 03:16:43 UTC	QuadraNet
	Upload	06-29-2021 03:17:03 UTC	QuadraNet
	Upload	06-29-2021 03:47:40 UTC	QuadraNet
71.76.6.249	Login	06-30-2021 21:13:46 UTC	Spectrum
193.56.116.72	Upload	07-01-2021 04:06:22 UTC	QuadraNet
	Upload	07-01-2021 04:23:31 UTC	QuadraNet
	Upload	07-02-2021 06:00:46 UTC	QuadraNet
	Upload	07-02-2021 06:03:50 UTC	QuadraNet
185.192.69.188	Login	07-12-2021 03:03:48 UTC	Clouvider Limited
2.57.169.116	Login	07-11-2021 18:06:43 UTC	Netminders
193.56.116.145	Login	07-31-2021 16:10:01 UTC	QuadraNet

The CyberTipline report was eventually forwarded to Investigator (Inv.) KF at the Sumter County Sheriff's Office (SCSO), who attempted to trace the IP addresses to "determine whether they were a home physical address, a VPN, or a proxy server." (R. at 70-71.) Inv. KF determined that all but one of the IP addresses from the NCMEC report were associated with proxy servers, which are "used to hide and conceal physical IP addresses." (R. at 70-71; App. Ex. IV, Atch. 4.)

The only IP address that could be traced to a physical location was 71.76.6.249, which was used by "aftermatter" to log into Kik, but not to upload child pornography. This IP address

led Inv. KF to a residential internet connection serviced by Charter Spectrum. (Id.) Inv. KF, who understood this to mean that the user behind the suspect account "had to physically be in the house on the network" when they "used [the IP address] to log into the account," then obtained a warrant for the Charter Spectrum subscriber information. (R. at 71.) The information disclosed by Charter Spectrum revealed that the internet connection in question was registered to an airman named BB at 4 Beard Drive, Dalzell, South Carolina. (R. at 72-73.)

Using this information, Inv. KF applied for and was granted a warrant to search the residence at 4 Beard Drive and seize items such as computer systems, data storage devices, cell phones, internet modems, etc. (R. at 73-74; App. Ex. IV, Atch. 4.) While executing the search in January 2022, Inv. KF discovered postal mail addressed to Appellee. (R. at 27, 75.) After confirming that Appellee had previously resided at 4 Beard Drive as BB's roommate but was then deployed to Muwaffaq Salti Air Base (MSAB), Jordan, Inv. KF coordinated with the Office of Special Investigations (OSI) to effectuate a search and seizure at the deployed location. (App. Ex. IV, Atch. 7; R. at 27, 74-75.)

The February 2022 Search and Seizure of Appellee's Devices

On 10 February 2022, OSI at MSAB requested authorization to seize Appellee's devices from his person and deployed dorm room and search them for evidence of child pornography offenses. (App. Ex. IV, Atchs. 7, 8.) In the affidavits supporting the requests, OSI included, *inter alia*, the following information:

> The social media app Kik/Medialab reported apparent child pornography being uploaded to its platform. The IP address, 71.76.6.249, was the reported IP address used when ***uploading*** files. Investigator [KF] used an IP locator program and verified the IP address to be registered in Sumter County, and a Spectrum/Charter IP address. Investigator [KF] submitted a search warrant along with a non-disclosure agreement to Charter/Spectrum for any and all information related to IP address 71.76.6.249. The return came back

> with IP address 71.76.6.249 belonging to 4 Beard Dr, Dalzell, SC. Time of service for IP address 71.76.6.249 was active in the name of [BB], 79th Fighter Generation Squadron, SAFB, SC, at the time the alleged crime occurred at the residence. A search of the South Carolina Department of Motor Vehicle verified [Appellee] and [BB] to be verified residents of the address.
>
> …
>
> On 28 Jan 22, SCSO and [OSI] conducted a search of 4 Beard Dr, Dalzell, SC … Additional search of the residence disclosed USPS packages disclosing [Appellee's] name and address as being 4 Beard Dr, Dalzell, SC.

(Id.) (emphasis added).

After the search authorizations were granted, OSI agents seized various electronic devices from Appellee's person and deployed residences. (App. Ex. IV, Atch. 14.)

In July 2023, OSI assumed investigative responsibility and sent Appellee's devices to the Department of Defense Cyber Crime Center (DC3) for analysis. (App. Ex. IV, Atchs. 14, 15.) DC3's examination uncovered the following information from an Apple iPhone XR seized from Appellee's person and an iPad seized from his deployed dorm room:

a. 72 NCMEC hash set matches;

b. 385 picture files of "potential CSAM";

c. 67 video files containing "potential CSAM";

d. An Apple ID associated with the email address "kennyarmour@yahoo.com";[2]

e. A Snapchat account associated with the username "aftermatters";

f. A Venmo account associated the email address "aftermatters@yahoo.com";

g. Four (4) chat conversations within the MEGA application where potential CSAM was shared; and

[2] This Apple ID was associated with both the iPhone XR and the iPad. (App. Ex. IV, Atch. 15.)

h. Evidence that the Kik application had been installed on the iPhone XR between 11 August 2020 and 7 October 2021.

(App. Ex. IV, Atch. 15.)

Based on this evidence, Appellee was charged with possessing, viewing, receiving, and distributing child pornography, as well as conspiracy to distribute child pornography. (*Charge Sheet*, ROT, Vol. 1.)

The First Motion to Suppress

During pretrial motions practice, Appellee's trial defense counsel moved to suppress evidence from the February 2022 search and seizure of Appellee's devices. (App. Ex. IV, VI.) The defense alleged that OSI "knowingly and intentionally, or with reckless disregard for the truth, included a false statement or omitted a material fact" in the affidavits. (Id.) In support of that claim, the defense highlighted that the search affidavit erroneously stated that IP address 71.76.6.249 was "used when upload[ing] files," even though the NCMEC report only described the IP address as being associated with a login to Kik (not uploading files),

During a hearing on the motion, the OSI case agent testified that "[t]he affidavit reflected the information that was provided to [MSAB] OSI from Investigator [KF], specifically citing the information that she provided to OSI as a law enforcement officer." (R. at 27.) Inv. KF's testimony during the same hearing revealed that she inferred IP address 71.76.6.249 was the underlying physical internet connection that the "aftermatters" account was trying to hide through its use of virtual private networks (VPNs) and proxy servers.[3] (R. at 71-73, 80-84.) When asked why she described IP address 71.76.6.249—the only one that led back to a physical address—as being used to "upload" child pornography, Inv. KF noted that if someone wanted to

[3] Inv. KF testified that the ISPs for the other IP addresses were "VPNs and proxies," which are "encrypted," "untraceable," and a "dead end." (R. at 80.)

"hide or conceal their physical address," they could use a proxy server or VPN, and stated her belief that the one time "aftermatters" logged into Kik from 71.76.6.249, "they logged in without using the VPN or proxy server." (R. at 72-73.) In other words, Inv. KF surmised that IP address 71.76.6.249 was ultimately the address uploading the child pornography, but was being masked through use of a proxy server or VPN.

But unconvinced that it was proper for the law enforcement agents to state that IP address 71.76.6.249 itself had uploaded the suspect files, the military judge granted the defense motion to suppress "evidence derived from the 10 February 2022 seizure and subsequent searches of [Appellee]'s devices." (App. Ex. IX.) The military judge concluded that: (a) OSI, which had access to the NCMEC report, "demonstrated a reckless disregard for the truth[4] by relying on the unsupported assertion of Investigator [KF]"[5] in their 10 February 2022 affidavits; (b) the February 2022 affidavits did not establish probable cause if the "false assertion concerning IP address 71.76.6.249 [was] severed or set aside;" (c) the good faith exception did not apply; and (d) though "the costs of exclusion are clear, and the deterrent effect necessarily less certain," the exclusionary rule should apply. (App. Ex. IX, ¶¶ 71-83.) In articulating his balancing of appreciable deterrence with costs to the justice system, the military judge acknowledged that "the costs to the justice system of exclusion are indeed particularly high." (App. Ex. IX, ¶ 78.) In

[4] The United States did not agree that the statements were made with a "reckless disregard for the truth" and contested this determination in its motion for reconsideration. (*See* App. Ex. X, ¶¶ 65-71.) The United States maintains that position now, although it is not relevant to deciding the question presented in this appeal.

[5] Though the military judge deemed Inv. KF's assertions "unsupported," he ultimately concluded that she "did not … intentionally disregard the truth or intentionally omit otherwise material information" in her representations about IP address 71.76.6.249. (App. Ex. IX, ¶ 79.)

nevertheless concluding that application of the exclusionary rule was warranted, the military judge stated:

> While the Court has already noted the costs of exclusion here are very high, the appreciable deterrence is likely high as well. At the very least, exclusion would encourage greater care in carefully assessing the readily available evidence in the case rather than merely parroting misleading assertions of previous investigators. It would encourage the inclusion of materially relevant information even where that information may cut against or even defeat probable cause.

(App. Ex. IX, ¶ 83.)

After unsuccessfully moving for reconsideration of this ruling, (*see* App. Ex. X, XII), the United States requested and was granted a continuance so that it could obtain new search authorizations. (App. Ex. XIII, XV.)

The March 2025 Reseizure of Appellee's Devices

On 24 March 2025, OSI requested a search authorization for "electronic devices and storage media that [Appellee] possessed on his person and in his deployed residence…which were seized on or about 10 February 2022 and are presently stored in evidence at OSI Detachment 212, Shaw Air Force Base, SC." (App. Ex. XVI, Atch. 8.) The supporting affidavit from OSI provided: (a) background information about the internet, file-sharing, IP addresses, Kik, and VPNs; (b) an overview of the investigative steps taken prior to 10 February 2022; (c) a detailed and factually accurate recitation of why the "aftermatters" account's login event on IP address 71.76.6.249 gave OSI reason to believe that Appellee's devices might contain evidence of child pornography offenses; and (d) a statement that the devices were "in the same state as when they were seized" by virtue of being in military law enforcement's custody since February 2022. (Id.) The affidavit did not contain any information learned because of the 10 February 2022 search and seizure, which it noted had been invalidated due to the misstatements regarding

IP address 71.76.6.249. (Id.) A competent search authority determined there was probable cause and granted the authorization. (Id.)

The Second Motion to Suppress

On 9 April 2025, trial defense counsel again moved to suppress the evidence from Appellee's devices, alleging that there was no probable cause for the March 2025 search and seizure, which it described as "the fruits of Investigator [KF]'s unlawful searches." (App. Ex. XVI, ¶ 90.) In response, the United States emphasized that "[t]he new affidavit provides sufficient information known in January 2022 to far exceed the law bar of probable cause," and that the March 2025 search and seizure was therefore a "genuinely independent source" of the evidence at issue. (App. Ex. XVII, ¶¶ 57, 67.)

In a ruling dated 9 July 2025, the military judge granted the defense motion to suppress. (App. XVIII.) The military judge found that although the March 2025 search authorization "established a substantial basis for a finding of probable cause," the evidence was nevertheless inadmissible because the independent source doctrine did not apply. (Id.) In so finding, the military judge applied the two-prong test from Murray v. United States, 487 U.S. 533, 542 (1988), for determining whether a warrant is an independent source, which he described as follows:

> The first prong asks whether law enforcement's decision to seek the new warrant was prompted by *information gathered* during the prior illegal search. The second asks whether information obtained during the illegal search was *presented to the magistrate* that affected his or her decision to issue the warrant.

(App. Ex. XVIII, ¶ 62) (emphasis in original).

With respect to the first prong, the military judge found that the March 2025 search authorization was "prompted by, or premised upon, information already known as of February

2022," not information gathered during the initial search. (App. Ex. XVIII, ¶ 64.) With respect to the second prong, the military judge found that "the [search authority] was not *per se* presented in the probable cause affidavit with information obtained as a result of the unlawful searches and seizure of February 2022, or information learned from subsequent investigative steps." (App. Ex. XVIII, ¶ 65.)

Despite these findings, the military judge opined that the March 2025 search authorization was not a genuinely independent source of the evidence because it was "rooted in probable cause that likely only still exist[ed] because the Government possessed the Accused's devices in the preceding 37 months." (App. Ex. XVIII, ¶ 66.) In explaining this determination, the military judge stated:

> Undoubtedly, mere suspicion [Appellee] accessed a Kik account associated with child pornography offenses in June 2021 very likely would not have supported probable cause that evidence of child pornography offenses would exist on electronic devices in his possession nearly four years later in March 2025, *but for* those devices having been seized in February 2022 and since preserved in the same condition. After all, it is dubious whether someone would still possess and use the same electronic devices they possessed and used four years prior, whether they would still use the same applications or have those same applications on their devices, and whether they would still maintain the same accounts on any such applications.

(App. Ex. XVIII, ¶ 67.)

In the military judge's view, the February 2022 seizure "prevented the information in the August 2021 NCMEC report from becoming stale, thus confounding the question of whether the 25 March 2024 [seizure] could reasonably be deemed 'genuinely independent' of that prior seizure." (Id.) After observing that "[t]here appears to be a dearth of controlling or persuasive military and federal caselaw addressing this particular point," and that neither party had "address[ed] it squarely in their filings," (App. Ex. XVIII, ¶ 68), the military judge stated:

> Here, though the new search authorization may be a genuinely independent source of *the information* supporting probable cause for a new search and seizure, it cannot be a genuinely independent source of the tangible evidence, that is, the devices, which have been in the possession of government authorities since 10 February 2022.
>
> To the extent probable cause exists to search [Appellee]'s devices in 2025, it exists because of—not independent of—the unlawful search and seizure in February 2022.

(App. Ex. XVIII, ¶¶ 69-70.)

The military judge then went on to suggest that applying the independent source doctrine under these circumstances would "render meaningless the purposes of the exclusionary rule by allowing the Government to cure a defective warrant any time a competent search authority later agrees that probable cause existed at the time of the initial seizure, regardless of the Government's conduct in obtaining that initial authorization." (App. Ex. XVIII, ¶ 71.) Noting that the independent source doctrine was "meant to put 'the police in the same, not a worse position than they would have been if no police error or misconduct had occurred,'" the military judge opined that denying the defense motion "would indeed place the Government in a better position than it would have been in but for its own error…because the unlawful seizure essentially 'froze' in time whatever probable cause existed as of February 2022." (App. Ex. XVIII, ¶¶ 71, 73.)

In finding that exclusion was warranted, the military judge adopted his rationale from his ruling on the first defense motion to suppress: "The Court also finds no reason to disturb its prior conclusions concerning the balance of deterrence with societal costs in applying the exclusionary rule." (App. Ex. XVIII, ¶ 74.)

The Denial of Reconsideration

On 11 July 2025, the United States moved the military judge to reconsider his 9 July 2025 ruling. (App. Ex. XIX.) In urging the military judge to apply the independent source doctrine, the United States identified and discussed nine different federal circuit and district court cases demonstrating that the doctrine could be—and had been—applied to the re-seizure of evidence preserved by virtue of being under law enforcement control after an illegal search and/or seizure. (App. Ex. XIX, ¶¶ 24-28.) The United States pointed out that the military judge's ruling to the contrary was at odds with federal practice and "effectively suggests that evidence which has been safeguarded from alteration or destruction can never be cleanly re-seized," which "amounts to a suggestion that the Fourth Amendment requires criminal defendants be given an opportunity to tamper with evidence that was illegally seized." (App. Ex. XIX, ¶ 27.) The United States went on to argue that the military judge's focus on law enforcement's position in 2025, as opposed to 2022, was misplaced: "If courts focused on the purported 'benefit' enjoyed by the government when the independent source doctrine is applied, they would *always* find that the government is in a 'better' position—prevailing over a defense suppression motion is undeniably good for the Government." (App. Ex. XIX, ¶ 36.) The United States then reminded the military judge that "the Supreme Court has rejected the idea that the preservation of evidence that would not have occurred 'but for' a police illegality renders such evidence 'fruit of the poisonous tree.'" (App. Ex. XIX, ¶¶ 40-42) (citing Segura v. United States, 468 U.S. 796, 816 (1984)). Finally, the United States asked the military judge to reconsider his balancing of appreciable deterrence against the costs of exclusion, since the underlying facts established that "there was *always* probable cause to search [Appellee's] phone, even at the time of the initial seizure," which meant the 24 March 2025 search authorization put the United States

in the "same, not worse" position it would have been in without the misstatements in the February 2022 affidavits. (App. Ex. XIX, ¶¶ 41-49.)

In declining to reconsider, the military judge averred that even if his focus on staleness was misplaced, he "continue[d] to find it significant that the Government, in its 24 March 2025 probable cause affidavit, relies on its possession of the devices since February 2022 to support probable cause for the March 2025 search." (App. Ex. XXI, ¶ 9.) With respect to the federal cases identified by the United States, the military judge stated: "While the Court acknowledges the import of seemingly contrary rulings by federal courts, those opinions are persuasive authority, not binding on this Court." (Id.) The military judge then moved on to address his application of the balancing test, which he ultimately declined to reconsider. (App. Ex. XXI, ¶ 10-13.) After acknowledging (again) that "[a]ppreciable deterrence of law enforcement conduct, in the context of this case, is less certain," the military judge stated that his analysis had not changed because "[i]t remains true that on seven separate occasions, law enforcement asserted false information, made with reckless disregard[] for the truth, concerning the actual nexus between the upload of child pornography and the residence shared by the Accused." (App. Ex. XXI, ¶ 12.) The military judge concluded by reiterating his belief that the United States "still has not proved by a preponderance of the evidence that either that deterrence of future unlawful searches is not appreciable, or that such deterrence does not outweigh the costs of exclusion. (App. Ex. XXI, ¶ 13.) This appeal followed.

STATEMENT OF STATUTORY JURISDICTION

The military judge's rulings excluded "evidence that is substantial proof of a fact material in the proceeding"—specifically, direct evidence that Appellee knowingly and wrongfully possessed, viewed, received, distributed, and conspired to distribute child pornography. 10

U.S.C. 862(a)(1)(B). Without this evidence, the United States cannot proceed with Appellee's court-martial. For these reasons, this Court has jurisdiction under Article 62(a)(1)(B), UCMJ.

ARGUMENT

THE MILITARY JUDGE ABUSED HIS DISCRETION BECAUSE HIS DETERMINATION THAT THE INDEPENDENT SOURCE DOCTRINE DID NOT APPLY WAS BASED ON AN ERRONEOUS VIEW OF THE LAW; BY EXTENSION, HIS APPLICATION OF THE EXCLUSIONARY RULE WAS AN ABUSE OF DISCRETION.

Standard of Review

This Court reviews a military judge's decision to exclude evidence for an abuse of discretion. United States v. Pyron, 83 M.J. 59, 63 (C.A.A.F. 2023). A military judge abuses their discretion when "[their] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Shields, 83 M.J. 226, 230 (C.A.A.F. 2023). This standard applies to interlocutory appeals under Article 62, UCMJ. United States v. Mitchell, 76 M.J. 413, 417 (C.A.A.F. 2017).

Law

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Because the text of the amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," United States v. Leon, 468 U.S. 897, 906 (1984), the exclusionary rule exists as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348 (1974).

Its "broad deterrent purpose" notwithstanding, the exclusionary rule has "never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." Id. The fact that a Fourth Amendment violation occurred "does not necessarily mean that the exclusionary rule applies," Herring v. United States, 555 U.S. 135, 140 (2009), for "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." United States v. Payner, 447 U.S. 727, 734 (1980). Rather, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Calandra, 414 U.S. at 348. Thus, for application of the exclusionary rule to be warranted, "the benefits of deterrence must outweigh the costs," Herring, 555 U.S. at 141, of "interfer[ing] with the criminal justice system's truth-finding function." Leon, 468 U.S. at 907; Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364-65 (1998) ("The rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule.").

In striking this balance, the Supreme Court has recognized several exceptions to the exclusionary rule, such as the independent source doctrine, which provides that evidence obtained through an illegal search or seizure may still be admissible if law enforcement acquires it through an "independent source." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). A later, lawful seizure pursuant a warrant will be a "genuinely independent source" of the evidence at issue provided that: (a) law enforcement's decision to seek the warrant was *not* prompted by information obtained via an illegal search or seizure, and (b) no information obtained as a result of that illegality was presented to the magistrate or affected his decision to issue the warrant. Murray, 487 U.S. at 542. The doctrine recognizes that society's competing

interests in deterring police misconduct and facilitating the truth-seeking function of criminal courts "[a]re properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." Nix v. Williams, 467 U.S. 431, 443 (1984).

Thus, the independent source doctrine does not preclude law enforcement from seizing evidence already in its possession: "[R]eseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered." Murray, 487 U.S. at 542 (rejecting the idea that illegally seized items cannot be cleanly reseized without returning them to private control). While an independent source might be harder to establish when seized evidence is kept in the police's possession, "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one … there is no reason why the independent source doctrine should not apply." Id.

Under this framework, federal courts across the nation have applied the independent source doctrine to the search and seizure of physical evidence—such as computers,[6] cellphones,[7]

[6] *See, e.g.,* Grosenheider, 200 F.3d at 329; Budd, 549 F.3d at 1148; United States v. Mulholland, 702 F. App'x 7, 9 (2d Cir. 2017); United States v. Lewis, No. 3:21-cr-00021-GFVT, 2024 U.S. Dist. LEXIS 105148, at *5 (E.D. Ky. June 13, 2024).

[7] *See, e.g.,* United States v. Bah, 794 F.3d 617, 633 (6th Cir. 2015); United States v. Bell, 925 F.3d 362, 367 (7th Cir. 2019); United States v. Brooks, 715 F.3d 1069, 1074 (8th Cir. 2013); United States v. Eldarir, 681 F. Supp. 3d 43, 54 (E.D.N.Y. 2023).

documents,[8] firearms,[9] etc.[10]—that remained under law enforcement control after a Fourth Amendment violation. For example, where a police officer illegally seized a gun during a warrantless search of the defendant's home, the Third Circuit found that a subsequent warrant was an "independent source"—even though the affidavit included information learned through the initially illegality—because the probable cause determination was supported by independent information from a police informant. Herrold, 962 F.2d at 1141. Similarly, where a computer containing CSAM was illegally searched, seized, and maintained by a city police officer until a federal agent obtained a warrant and re-seized the devices from the officer, the Fifth Circuit found that the federal warrant was an "independent source" because the information supporting it was derived from sources other than the police officer. Grosenheider, 200 F.3d at 329; *see also* Budd, 549 F.3d at 1148 (warrant obtained over a month after police illegally seized computer containing CSAM was an independent source because information supporting warrant came from defendant's admissions, not the computer). In applying the independent source doctrine under these circumstances, the courts did not take issue with the fact that illegally seized evidence remained in police custody because the government did not exploit it to obtain its warrant. Id. ("There is no evidence that the government exploited the illegal seizure; the

[8] *See, e.g.,* United States v. Romero, 585 F.2d 391, 395 (9th Cir. 1978); United States v. Vilar, 530 F. Supp. 2d 616, 634 (S.D.N.Y. 2008); Doe v. United States, 896 F. Supp. 2d 1184, 1190 (S.D. Fla. 2012); United States v. Johnson, 994 F.2d 980, 982 (2d Cir. 1993)

[9] *See, e.g.,* United States v. Herrold, 962 F.2d 1131, 1142 (3d Cir. 1992); United States v. Saelee, 51 F.4th 327, 338 (9th Cir. 2022).

[10] *See, e.g.,* Murray, 487 U.S. at 542; United States v. Dessesaure, 429 F.3d 359 (1st Cir. 2005); United States v. Alexander, 54 F.4th 162, 167 (3d Cir. 2022); United States v. Hanhardt, 155 F. Supp. 2d 840, 852 (N.D. Ill. 2001); United States v. Rose, 914 F. Supp. 2d 15, 33 (D. Mass. 2012).

government did nothing more than place the unsearched computer into an evidence room and leave it there.").

Relatedly, courts have validated warrants for illegally seized evidence when most or all the information supporting probable cause was known to law enforcement "independent of and pre-dating" the initial illegality. Hanhardt, 155 F. Supp. 2d at 852 (warrant obtained to re-search briefcase two years after a warrantless search and seizure was an independent source because all the facts in the affidavit "were in existence prior to…the illegal search"); Saelee, 51 F.4th at 336 (warrant was an independent source of illegally seized packages, phone, and ammunition because "the application was nearly complete before any unlawful conduct occurred," and did not contain information learned from the illegalities that would have influenced magistrate's decision); Romero, 585 F.2d at 398 (federal warrant for documents illegally seized by state law enforcement was an independent source because it was "supported by affidavits which contained no significant information which was not available to the FBI prior to the issuance and execution of the [invalidated] state warrants").

That such evidence may have been preserved by virtue of being in law enforcement custody after an illegal search or seizure does not necessarily render it "fruit of the poisonous tree," such that the independent source doctrine could not be applied. *See* Segura v. United States, 468 U.S. 796, 815 (1984) (rejecting idea that evidence was tainted simply because illegal entry and securing of premises may have prevented its destruction). For example, one court has found the fact that electronic devices containing CSAM—originally seized in 2021 pursuant to a subsequently invalidated warrant[11]—remained in the government's custody for over two years

[11] The first warrant in Lewis was invalidated on appeal, on the grounds that the supporting affidavit contained "only one fact in support of the existence of probable cause," and the

was "inconsequential" and did not preclude finding that a newly-obtained warrant in 2023 was an independent source of the evidence, given that the updated affidavit "[did] not include any references to evidence or information obtained from the 2021 forensic examination …[or] any information secondarily derived from that search." Lewis, 2024 U.S. Dist. LEXIS 105148, at *11-12. The district court reached that conclusion because "[t]he Supreme Court in Murray determined that seized objects do not have to be returned to private control before they can be clearly reseized. Id. at *11. Indeed, the Supreme Court has also emphatically rejected the idea that evidence cannot have an independent source simply because law enforcement's control over it may have prevented its degradation: "The essence of [this proposition] is that there is some 'constitutional right' to destroy evidence. *This concept defies both logic and common sense*." Id. at 816 (emphasis added).

Analysis

By refusing to apply the independent source doctrine to the 2025 search and seizure because the evidentiary value of Appellee's devices was preserved by virtue of their being in OSI's custody, the military judge demonstrated an erroneous understanding of the law. The independent source doctrine can be (and has been) applied to validate the seizure of evidence already under law enforcement control, even if it came into law enforcement possession illegally. Grosenheider, 200 F.3d at 329; Budd, 549 F.3d at 1148; Saelee, 51 F.4th at 336; Hanhardt, 155 F. Supp. 2d at 844; *see also* Murray, 487 U.S. at 542 (frequently cited for proposition that illegally seized evidence does not need to be returned to private control to be lawfully re-seized). Even if the military judge did not err in this regard, his determination that

detective's "conclusory statement" that he believed the defendant had viewed child pornography. United States v. Lewis, 81 F.4th 640, 647 (6th Cir. 2023).

the exclusionary rule should apply was clearly unreasonable considering his repeated acknowledgment that the costs of exclusion were "high" and the deterrent effect "less certain"—an equivocal assessment that falls far short of what the Supreme Court requires: "[T]he benefits of deterrence *must* outweigh the costs." Herring, 555 U.S. at 141 (emphasis added). Accordingly, for the reasons set forth below, this Court should find that the military judge abused his discretion and reverse his rulings suppressing evidence from Appellee's iPhone XR and iPad.

A. The military judge's determination that the March 2025 search authorization cannot be an independent source of the evidence is based on an erroneous view of the law.

The military judge's error with respect to his application of the independent source doctrine was threefold: (1) he refused to apply the independent source doctrine despite finding that the 2025 search authorization met both prongs of the Murray test; (2) he concluded that the authorization was "the product of illegal activity" simply because the evidentiary value of the devices was preserved by virtue of being in law enforcement custody; and (3) he failed to recognize the significance of federal case law holding that illegally-seized evidence in police custody can still have an independent source. The resultant determination—that the independent source doctrine could not apply—is clear error and therefore an abuse of discretion.

1. ***The military judge erred by concluding that the March 2025 search authorization was not an independent source of evidence, despite finding that it was neither prompted by nor supported by information obtained from the illegal search.***

To start, the military judge's ruling is based on an erroneous application of controlling Supreme Court precedent on the matter, Murray, 487 U.S. at 542. Despite finding that March 2025 search authorization satisfied both prongs of the Murray test, since it (a) was not prompted by information from the 2022 search, and (b) the authorizing official was not presented with any

information obtained from the earlier search, the military judge concluded that it could not be an independent source of evidence. (App. Ex. XVIII, ¶¶ 64-66.)

This was not just erroneous, but arbitrary. There is *no* legal authority for the proposition that a warrant that satisfies both Murray prongs can "nevertheless" fail to be an independent source. (*See generally* App. Ex. XVIII, XXI.) While the military judge attempts to justify his decision by suggesting that "the two prongs of the Murray test are not applied in a vacuum," this is similarly unsupported by any authority, and therefore unpersuasive.

That the military judge arbitrarily applied the law is further evidenced by the fact that he had nothing but contrary authority in front of him. In its motion for reconsideration, the United States identified various federal circuit and district court cases—including Grosenheider, Budd, Saelee, Hanhardt, Herrold, Romero, and Lewis, discussed above—establishing that "[t]he 'independent source doctrine' can and has been applied to the reseizure of evidence that is preserved by virtue of being in law enforcement custody." (*See* App. Ex. XIX, ¶ 24.) The United States then pointed the military judge to cases demonstrating that "when the relevant information underlying probable cause was known prior to the illegal seizure, the 'independent source' doctrine can safely be applied." (App. Ex. XIX, ¶ 28) (citing Hanhardt, 155 F. Supp. 2d at 852; Lewis, 2024 U.S. Dist. LEXIS 105148, at *13; Saelee, 51 F.4th at 336). Neither the military judge nor Appellee's trial defense team (which did not respond to the motion for reconsideration) ever identified any authority that contradicted what the United States had found. (*See generally* App. Ex. XVIII, XX, XXI.)

Put differently, all the applicable law before the military judge pointed to a singular conclusion: when both prongs of the Murray test are met, the independent source doctrine applies, even if the police continuously possessed the evidence, such that the re-seizure would

not result in a physically independent origin. Considering this, the military judge's determination to the contrary falls "outside the range of choices reasonably arising from the applicable facts and the law," Shields, 83 M.J. at 230, and is an abuse of discretion.

Through this erroneous application of the independent source doctrine, the military judge put the United States in a *worse* position than they would have absent law enforcement error. *See* Nix, 467 U.S. at 443. The fact that the 2025 search authorization—which the military judge acknowledged was supported by probable cause—was prompted by "information already known as of February 2022" and did not include information obtained from the invalidated 2022 search and seizure, (App. Ex. XVIII, ¶¶ 64-65), demonstrates that law enforcement has *always* had probable cause to search and seize Appellee's devices—indeed, they had it even before they did so with the defective affidavit. *See* Hanhardt, 155 F. Supp. 2d at 852; Saelee, 51 F.4th at 336; Romero, 585 F.2d at 398.

In light of the above, treating the 2025 search authorization as an independent source would have restored law enforcement to the "the same, not a worse, position that they would have been in if no police error or misconduct had occurred" in 2022. Nix, 467 U.S. at 443. In reaching the opposite conclusion, the military judge opined that "the new search authorization simply cannot be divorced from the taint of the unlawful search and seizure, because the 24 March 2025 search authorization is rooted in probable cause that likely *only still exists* because the Government possessed the Accused's devices in the preceding 37 months." (App. Ex. XVIII, ¶ 66.) In other words, the military judge deemed the 2025 search and seizure invalid simply because Appellee's devices had been preserved in OSI's custody. This, as discussed further below, was error.

2. ***The military judge erred by treating evidence seized via the 2025 seizure as a "product of illegal activity" simply because the evidence had been preserved in OSI's custody.***

In concluding that the independent source doctrine could not apply, the military judge leaned heavily on the fact that (a) the evidentiary value of Appellees' devices might have dissipated "but for those devices have been seized in February 2022 and since preserved in the same condition," and (2) the affidavit's explicit reference to said preservation. (App. Ex. XVIII, ¶ 66-74.) This treatment of the March 2025 search and seizure as "fruit of the poisonous tree" reflects an erroneous understanding of the law, which has always made allowances for police preservation of evidence. *See* Segura, 468 U.S. 816 (declining to apply exclusionary rule simply because evidence was preserved by illegal actions of police, since there is no right to destroy evidence).

Consider, for example, the fact that the law excuses warrantless searches—which are "presumptively unreasonable," United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016)—when the police "fear the imminent destruction of evidence" and have "insufficient time to seek a warrant." Birchfield v. North Dakota, 579 U.S. 438, 456 (2016). This "exigent circumstances" exception recognizes that the government's interest in preserving evidence so that "juries [may] receive all probative evidence of a crime," Nix, 467 U.S. at 443, sometimes overcomes the individual's right to be free from what would ordinarily be an illegal search and seizure. In the same vein, the federal courts' application of the independent source doctrine reflects the law's understanding that under most circumstances, the incidental preservation of evidence through police custody of the same is not a standalone basis for applying the exclusionary rule.

Using the independent source doctrine, courts have affirmed the seizure (pursuant to a lawful warrant) of evidence from premises that were "frozen" by law enforcement due to concerns that evidence might be destroyed. *See, e.g.,* Dessesaure, 429 F.3d at 363 (police

officers illegally entered home for purpose of "freezing" it while waiting for a warrant); Alexander, 54 F.4th at 167 (police officers illegally entered and searched home to "prevent the destruction of evidence while search warrants were being obtained"); Rose, 914 F. Supp. 2d at 33 (police entered house without a warrant to "freeze the scene" and remained there until a warrant based on information independent of the illegal entry was issued).

Similarly, where law enforcement illegally searched cellphones, discovered incriminating evidence, and then took measures to preserve them while waiting for a search warrant, courts have nevertheless deemed the later-obtained warrants an "independent source" of the evidence. *See, e.g.,* Bah, 794 F.3d at 634-35 (following illegal search of phone, officers powered it off until a warrant could be obtained); Eldarir, 681 F. Supp. 3d at 47 (after illegal manual search of phone, government made "a digital copy of the phone to freeze its contents" before obtaining a warrant several weeks later); Brooks, 715 F.3d at 1074 (police illegally searched phone and kept it in custody for 8 months before applying for a warrant to legally search it). Perhaps most probative of all, court have applied the independent doctrine to the re-seizure of evidence that was originally seized illegally and continuously remained in law enforcement's custody. *See, e.g.,* Grosenheider, 200 F.3d at 329 (validating federal agent's re-seizure pursuant to warrant of a computer containing CSAM that was illegally seized by city police); Budd, 549 F.3d at 1148 (validating re-seizure of computer containing CSAM that was illegally seized and maintained by police for over a month before a warrant issued); Lewis, 2024 U.S. Dist. LEXIS 105148, at *5 (validating re-seizure of electronic devices containing CSAM that were seized pursuant to a later invalidated warrant and maintained by federal authorities for over two years prior to the re-seizure); Hanhardt, 155 F. Supp. 2d at 852 (police illegally seized and searched briefcase and kept it in custody for two years before re-seizing pursuant to a valid warrant). In all these cases,

the courts engaged in a strict application of the Murray test and deemed later-obtained warrants an "independent source" of evidence already under law enforcement control as long as the affidavits supporting them did not exploit information learned from the prior illegality. By doing so, the courts made it clear that evidence is not considered "tainted" simply because it was protected from destruction or degradation by virtue of being in law enforcement's custody after an illegal search.

Indeed, if the preservation of illegally obtained evidence was necessarily considered an extension of the initial illegality, the above body of case law would not exist. But given that it does, the military judge's determination that the March 2025 "cannot be a genuinely independent source of the tangible evidence" is a misunderstanding of the law and thus an abuse of discretion. (App. Ex. XVIII, ¶ 69.) The military judge's contention that the devices at issue lack an independent source *because* they were preserved in their original condition is precisely the type of "[s]ophisticated argument" that the Supreme Court has warned must be tempered with "good sense." Segura, 468 U.S. at 816.[12] Taken to its logical conclusion, the military judge's reasoning suggests that evidence cannot be cleanly reseized unless it is first returned to private control, the natural byproduct of which is give criminal defendants an opportunity to tamper with said evidence. *See* Saelee, 51 F.4th at 338 (if evidence had to be returned, it would give the accused the "opportunity to destroy [evidence] or conceal its whereabouts," which are "not interests that the exclusionary rule is designed to protect"); Grosenheider, 200 F.3d at 329 (if

[12] "[W]e are reminded of Justice Frankfurter's warning that '[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof,' and his admonition that the courts should consider whether '[as] a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint.'" Segura, 468 U.S. at 816 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

devices had to be returned prior to reseizure, defendant could have "either purged it of all the child pornography or thrown it away where it could not be found"). Good sense tells us that this is an erroneous view of the law. The Supreme Court tells us that it "defies both logic and common sense." Segura, 468 U.S. at 816.

This flawed understanding of the independent source doctrine led the military judge to the similarly problematic conclusion that applying the doctrine "would indeed place the Government in a *better* position than it would have been in but for its own error." This conclusion was premised on a string of adverse assumptions about how the investigation might have played out in 2022 if not for the invalidated affidavit[13] and what state the devices might have been in if they had never been seized.[14] (App. Ex. XVIII, ¶¶ 67, 71.) But this focus is misplaced, and therefore error.

Obviously, in considering what position the police might be in absent an illegal seizure, a military judge cannot actually undo that seizure—any evidence in police custody because of said seizure will stay there. And anyone using their "[c]ommon sense and knowledge of…the ways of the world," United States v. Rivera, 54 M.J. 489, 491 (C.A.A.F. 2001), would understand that evidence in police custody will be preserved in its seized state—a bloody knife will not be wiped down; bedsheets from a sexual assault will not be laundered clean; and a phone full of CSAM will be not reset to its factory settings. Thus, implicit in *any* search authorization for items

[13] The military judge theorized that it was "unclear" whether law enforcement would have been permitted to seize the devices and "doubtful" that probable cause would have existed after February 2022 "had those devices not been preserved in the Government's possession." (App. Ex. XVIII, ¶ 71.)

[14] The military judge opined that it was "dubious whether someone would still possess and use the same electronic devices they possessed and used four years prior, whether they would still use the same applications or have those same applications on their devices, and whether they would still maintain the same accounts on any such applications." (App. Ex. XVIII, ¶ 67.)

already in police custody is "reason to believe that they remain in the same state as when they were seized." (App. Ex. XVI, Atch. 8.) Under these circumstances, it is meaningless to conjecture about what state illegally seized evidence might be in today if it had *never* been seized back then or whether there would be probable cause to seize the evidence in its hypothetically changed state. If this was part of the independent source analysis, it is doubtful that *any* search warrants for evidence preserved in law enforcement custody could be upheld. But that is obviously not the case. *See, e.g.,* Grosenheider, 200 F.3d at 329; Budd, 549 F.3d at 1148; Lewis, 2024 U.S. Dist. LEXIS 105148, at *5; Hanhardt, 155 F. Supp. 2d at 852; Romero, 585 F.2d at 395.

Considering the above, the fact that the March 2025 affidavit stated Appellee's devices had been in law enforcement custody and that there was therefore "reason to believe they remain in the same state as when they were seized" does not render the later search a "product of illegal government activity." (App. Ex. XVIII, ¶ 70.) The military judge's conclusion to the contrary was error. But assuming (without conceding) for the sake of argument that this statement constitutes "express[] relianc[e]" on the illegal search, the military judge erred by failing to excise the offending statement and consider whether the affidavit nevertheless established probable cause. United States v. Camanga, 38 M.J. 249, 252 (C.M.A. 1993) (if an affidavit contains both legally and illegally obtained information, the latter should be excised; if the remaining information is sufficient to establish probable cause, it is deemed to be from an independent source). Even without this statement, the search authority would have known that the evidence was stored at OSI based simply on the Air Force Form 1176's description of where the items to be seized were located. (App. Ex. XVI, Atch. 8.) Combined with the other information in the affidavit, including the OSI affiant's explanation that "[d]ata files on cellular

phones can be recovered months or even years after they have been downloaded, deleted, or viewed via the Internet," this would have established a substantial basis for a finding of probable cause. (App. Ex. XVI, Atch. 8.) The military judge's failure to conduct, much less reach, this independent source analysis is clear error that put the United States in a *worse* position than it would have been in if no law enforcement error had occurred. *See* Nix, 467 U.S. at 443.

Put differently, the way to put the United States in the same position it would have been in had the illegality not occurred was to assume that, at the time of the second search, the evidence existed in the same state on the devices as it did on the date of the first search. But the military judge did the opposite: he presumed that but for the illegality, the evidence on the phone would have changed, thereby putting the government in a worse position. This was error.

3. Given the "dearth" of controlling military case law, the military judge erred by dismissing the significance of prevailing federal practice.

That the military judge should have applied the independent source doctrine is further reinforced by the fact that this is the prevailing practice in other federal circuits, which "applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment." United States v. Nivens, 21 C.M.A. 420, 423 (C.M.A. 1972).

As the military judge noted, there is a "dearth" of controlling military case law on this issue. (App. Ex. XVIII, ¶ 68.) In the absence of controlling authority, "a robust 'consensus of cases of persuasive authority'" can serve as precedent. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (quoting Wilson v. Layne, 526 U.S. 603, 617, 119 (1999)). And where a military judge "fail[s] to recognize their unanimity and the significance of their holdings," this Court has found that the military judge's ruling "was informed by an erroneous view of the state of the law." United States v. Lutcza, 76 M.J. 698, 702 (A.F. Ct. Crim. App. 2017).

Such is the case here. The "robust consensus" of federal cases cited by the United States—first in its motion for reconsideration and now in this brief—establish that the independent source doctrine can be applied to evidence that was preserved in law enforcement custody. al-Kidd, 563 U.S. at 742. Since there was no military case law suggesting otherwise, the military judge should have *adopted* (rather than merely acknowledged) the "import" of these decisions. By summarily dismissing them as "persuasive authority, not binding on this Court," (App. Ex. XXI, ¶ 9), the military judge erroneously failed to recognize that federal common law is a source of authority where the Constitution, federal statutes, UCMJ, executive orders, and other military directives provide none. *See* United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (noting that federal common law is part of the military's hierarchy of laws).

The error in the military judge's reasoning is only further evidenced by the fact that military courts appear to have never addressed this specific issue before—meaning the federal practice of applying the independent source doctrine to evidence re-seized from law enforcement custody has never been deemed incompatible with military law, nor have any courts found "special requirements of the military establishment" that would justify a different approach. Nivens, 21 C.M.A. at 423. In other words, the military judge had no authority before him suggesting that the federal practice was wrong or should not be applied to the military. On the contrary, he had nothing but federal cases applying the independent source doctrine under circumstances similar to this case. His failure to recognize the "unanimity and the significance of their holdings" indicates that his ruling was "informed by an erroneous view of the state of the law." Lutcza, 76 M.J. at 702. The military judge's failure to follow widely-accepted federal law, when no other authority gave him reason to reject it, was arbitrary and clearly unreasonable, and thus an abuse of discretion.

B. The military judge's conclusion that the deterrent value of excluding evidence would not outweigh the costs to the justice system was clearly unreasonable.

Because the military judge should have applied the independent source doctrine, this Court's analysis should end there. But even if this Court finds that the military judge's decision in that regard was not an abuse of discretion, it should nevertheless reverse because the military judge's balancing of the deterrence versus societal harm was an abuse of discretion.

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can *meaningfully* deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. Since assessing the "magnitude of deterrence…is more of a prediction of what is likely to happen in the future rather than an assessment of something that has already happened," and "weighing the benefits of deterrence against the costs to society is more a question of judgment than an issue of fact," a military judge's assessment of these matters is reviewed under a "less deferential standard." United States v. Lattin, 83 M.J. 192, 198 (C.A.A.F. 2023). Instead of reviewing for "clear error," this Court asks whether the military judge's determination was a "clearly unreasonable" exercise of discretion. Id. And, here, it was clearly unreasonable.

In concluding that the balancing test weighed in favor of exclusion, the military judge leaned heavily on the fact that the United States "did not provide evidence, other than the fact of obtaining the refreshed search authorization, to demonstrate that exclusion would not result in the appreciable deterrence discussed by this Court in its initial ruling." (App. Ex. XXI, ¶ 13.) This reflects a failure to appreciate that the balancing test is "more a question of judgment than an issue of fact," Lattin, 83 M.J. at 198, and that the military judge already had all the information he needed to conclude that the "appreciable deterrence" was *de minimis*, and therefore did not outweigh the costs of exclusion.

Critically, the military judge fails to recognize the import of his own acknowledgment that "[a]ppreciable deterrence of law enforcement conduct, in the context of this case, is less certain." (App. Ex. XXI, ¶ 12); *see also* United States v. Ceccolini, 435 U.S. 268, 281 (1978) (Blackmun, J., concurring) ("Empirically speaking, though, I have the gravest doubts as to whether the exclusion of evidence, in and of itself, has any direct appreciable effect on a policeman's behavior in most situations."). The judge's concession recognizes, perhaps, the unlikelihood a positive deterrent effect, given that law enforcement's misstatements in the February 2022 affidavits did not implicate the "search first, warrant later" mentality with which the exclusionary rule is concerned. Murray, 487 U.S. at 540 n.2. Nor did OSI apply for a search authorization knowing that they did not have probable cause. OSI had evidence supporting probable cause from the beginning. Although they erred along the way, law enforcement *always* intended to obtain a search authorization pursuant to probable cause, based on information they already had. *Cf.* United States v. Williams, 656 F. App'x 751, 754 (6th Cir. 2016) (suppressing evidence where officers illegally searched a location in order to gather probable cause for the subsequent warrant). This is not the kind of "flagrantly abusive" conduct that warrants deterrence at the price of the truth. Herring, 555 U.S. at 143.

When the deterrent effect of suppressing evidence is "marginal," it cannot justify "the substantial costs of exclusion." Leon, 468 U.S. at 922. "[T]he benefits of deterrence *must* outweigh the costs." Herring, 555 U.S. at 141 (emphasis added). Thus, it was clearly unreasonable for the military judge to conclude that the benefits of "appreciable deterrence" outweighed the costs of exclusion. That he did so despite his earlier concessions about the uncertain deterrent effect demonstrates that he misunderstood the law. That this was unreasonable is further evidenced by the military judge's findings regarding the costs of

exclusion. Compared to his non-committal assessment of appreciable deterrence, the military judge was *unequivocal* about the costs of excluding the evidence, which he recognized on three separate occasions as "clear," "very high," and "particularly high." (App. Ex. IX, ¶¶ 80, 83.) The military judge acknowledges, in no uncertain terms, that "if the evidence is excluded, the allegations against the Accused almost certainly cannot be submitted to the trier of fact," and that "child pornography offenses are repugnant and exact harm not only to individual victims, but to society writ large." (App. Ex. XXI, ¶ 12.) By nevertheless concluding that these undisputed costs were worth bearing despite the "less certain" deterrent value, the military judge abused his discretion. *See* Lattin, 83 M.J. at 199 (where "high costs of excluding evidence are undisputed" while "degree of…future deterrence is subject to reasonable disagreement," application of exclusionary rule was not required).

That the military judge's determination is clearly unreasonable is further evidenced by the disproportionality between law enforcement's transgressions and the "magnitude of the benefit conferred on [Appellee]," Leon, 468 U.S. at 907-08, and lacks "an assessment of the flagrancy of the police misconduct," which the Supreme Court has said is "an important step in the calculus of applying the exclusionary rule." Herring, 555 U.S. at 143. Here, in the grand scheme of things, law enforcement's "transgressions" do not rise to the level of "intentional conduct that was patently unconstitutional" that the exclusionary rule seeks to deter. Id.

As evidenced by the fact that the 2025 search authorization (which the judge found was supported by probable cause) was based on the same underlying information as the 2022 authorization, law enforcement had probable cause to seize and search Appellee's devices from the very beginning. That they then used the information to request a search authorization demonstrates that they were attempting to do the right thing—not trying to "search first, warrant

later." Murray, 487 U.S. at 540 n.2. Though they erred while articulating probable cause, this is not the type of "transgression" that warrants suppression, especially considering the fact they re-accomplished a search authorization that "accurately and matter-of-factly establishe[d] a nexus between the NCMEC report that launched this investigation and the ultimate seizure of the [Appellee]'s devices." (App. Ex. XVIII, ¶ 60.) Taken altogether, this demonstrates that while law enforcement could have been more precise in their 2022 affidavits, their misstatements were not designed to deceive the search authority into finding probable cause that did not exist, and is therefore not the type of "patently unconstitutional" conduct that the exclusionary rule seeks to deter. Id.

Ultimately, the military judge's determination loses sight of the fact that "it is the defendant, and not the constable, who stands trial." Payner, 447 U.S. at 734; United States v. Khamsouk, 57 M.J. 282, 292 (C.A.A.F. 2002) ("Unwarranted application of the rule can result in a disparity between the error committed by the police and the windfall afforded the accused that is 'contrary to the idea of proportionality that is essential to the concept of justice.'"). Left uncorrected, his "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." Id. Where probable cause always existed to search Appellee's devices and a proper search authorization was eventually obtained, it would be an undeserved windfall to exclude probative evidence and preclude Appellee's court-martial for a serious crime against children. Accordingly, this Court should find that the military judge's application of the balancing test was a clearly unreasonable exercise of discretion, and reverse his ruling.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court reverse the military judge's decision to suppress evidence from the March 2025 search and seizure of Appellee's devices. Further, the United States asks this Court to determine that the evidence is admissible and remand the case to the trial court for further proceedings.

WHEREFORE, the United States respectfully requests that this Honorable Court reverse the military judge's ruling.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 September 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

APPENDIX C

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**ANSWER TO UNITED STATES'**
Appellant	)	**APPEAL UNDER ARTICLE 62,**
	)	**UCMJ**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4)	)	
KENNETH P. ARMOUR II	)	Misc. Dkt. No. 2025-10
United States Air Force	)	
Appellee	)	1 October 2025

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Introduction

The military judge properly applied binding precedent to the facts before him and did not abuse his discretion. Law enforcement acted with reckless disregard for the truth on seven sworn affidavits which resulted in the unlawful search and seizure of Appellee's devices. In March 2025, when the eighth search in this case occurred, law enforcement sought to benefit from their prior illegal activity. Law enforcement attempted to cure stale probable cause by relying on their over three-year unlawful possession of Appellee's devices. The military judge applied the only binding precedent before him and correctly held that under the independent source doctrine, law enforcement cannot rely on their own illegal actions to support a later search; he therefore suppressed the fruits of the March 2025 search. Additionally, the fruits of the March 2025 search are otherwise inadmissible because the March 2025 search authorization relied upon other unlawful searches. The military judge was correct in reason and judgment and did not abuse his discretion; therefore, this Court should affirm his ruling.

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY EXCLUDING EVIDENCE ON THE GROUNDS THAT THE INDEPENDENT SOURCE DOCTRINE COULD NOT APPLY TO THE [MARCH 2025] SEARCH AND SEIZURE.

Statement of the Case

Appellee, Senior Airman Kenneth P. Armour II, generally accepts the Government's statement of the case.[1]

Statement of Facts

Appellee generally accepts the Government's statement of facts, with the following corrections and additions.

Investigation & Searches

On 1 August 2021, the National Center for Missing & Exploited Children (NCMEC) published a CyberTipline Report that reported multiple instances of video and image file uploads from a Kik Messenger (Kik) account. App. Ex. IV at 45-55, Atch. 3. Those uploads were associated with an internet protocol (IP) address in Atlanta, Georgia. *Id.* at 45-52, Atch. 3. Logins to the Kik account were associated with four IP addresses located in Atlanta, Georgia (United States), Toronto, Ontario (Canada), London, England (Great Britain), and Columbia, South Carolina (United States). *Id.*at 45, 51-52.

In January 2022, a civilian investigator, Inv. KF, finally acted on the NCMEC report. App. VI at 10-17, Atch. 1. Inv. KF, *without investigation or recorded research*, assumed that all but one

---

[1] However, the Office of Special Trial Counsel referred the charges against Appellee on 14 August 2024, not 15 May 2024. *Contrast* Appellant's Br.at 3, *with* Record of Trial, Vol. 1, *DD Form 458*, Charge Sheet (Aug. 15, 2024) (charges preferred 15 May 2025), *and* Record of Trial, Vol. 1, *DD Form 458*, Charge Sheet (Aug. 15, 2024) (additional charge preferred 14 August 2024).

of the IP addresses from the NCMEC report were associated with proxy servers or Virtual Private Networks (VPNs). *Contrast* Appellant's Br. at 5-6, *with* Trial Tr. 49-50, 79-80, *and* App. Ex. IX at 6, ¶ 32, *and* App. Ex. XVIII at 6, ¶ 36. Inv. KF guessed that the only IP address that could be traced to a physical location was 71.**.*.***, the login associated with Columbia, South Carolina, which was used by "aftermatter" to log into Kik. *Id.* Inv. KF assumed that the user behind the suspect account had to physically be in the house on the network when they used the IP address to log into the account. *Id.* Inv. KF did not subpoena any of the other internet service providers or conduct individual research on those other internet service providers. *See* Trial Tr. 43-45, 49-50, 79-80.

Inv. KF applied for and was granted a search warrant of Charter Communications on 11 January 2022 – the first search in this case. App. VI at 10-17, Atch. 1. The return of that warrant revealed the name "BB" associated with the internet service account, and BB's residential address. *Id.* at 15-16.

Inv. KF then applied for and was granted a search warrant of BB's residential address on 26 January 2022 – the second search in this case – which was executed on 28 January 2022. App. Ex. IV at 56-63, Atch. 4. During that search, law enforcement found "USPS packages disclosing [Appellee's] name and address" matching BB's address. *Id.* at 85, Atch. 7, ¶ 3.e.; *see also id.* at 92, Atch. 8, ¶ 3.e.

On 27 January 2022, the Air Force Office of Special Investigations (AFOSI) applied for and was granted a search authorization for BB's person and devices on his person – the third search in this case – to be executed concurrently with the search of his residence. *Id.* at 74-79, Atch. 6. This search revealed nothing relevant to Appellee's case.

On 10 February 2022, AFOSI applied for and was granted two search authorizations for Appellee's person and deployed residence – the fourth and fifth searches in this case. *Id.* at 81-93, Atchs. 7-8. An Apple iPad and iPhone XR were collected during these searches. *Id.* at 31, Atch. 1, ¶¶ 2-11, 2-12.

On 25 July 2023, AFOSI applied for and was granted a search authorization for BB's devices that were seized during the 28 January 2022 search – the sixth search in this case. *Id.* at 115-127, Atch. 13. This search revealed nothing relevant to Appellee's case.

On 20 December 2023, the DoD Cyber Crime Center (DC3) prepared a report for AFOSI, outlining their analysis of the devices seized from BB and Appellee. *Id.* at 135-146, Atch. 15. DC3's report formed the basis for the charges against Appellee. *Id.*

On 9 August 2024, AFOSI applied for and was granted a warrant pursuant to 18 U.S.C. § 2703 through an Article 30a, Uniform Code of Military Justice (UCMJ) proceeding – resulting in the seventh search in this case. *Id.* at 168-191, Atchs. 22-23.[2] This search warrant was to Yahoo Inc. for the email address associated with the Kik account, identified in the 1 August 2021 NCMEC report. *Id.* at 186-191, Atch. 23.

The First Motion to Suppress

During pretrial motions practice, Appellee's trial defense counsel moved to suppress items seized during five of the seven searches in this case. *Contrast* Appellant's Br. at 8, *with* App. Ex. IV at 1 (challenging searches four, five, and seven), *and* App. Ex. VI at 4-6 (challenging searches one, two, four, five, and seven), ¶¶ 18-29, *and* Trial Tr. 114-16 (trial defense counsel confirming challenge to searches one, two, four, five, and seven during motions argument).

---

[2] However, the first application for a warrant through Article 30a, UCMJ, was denied on 19 July 2024. App. Ex. VI at 52-53, Atch. 5.

On 24 February 2025, the military judge suppressed the fruits of searches four, five, and seven, finding that law enforcement's affidavits were written with reckless disregard for the truth and that no exception saved the searches. App. Ex. IX at 14-20. The military judge did not mention or otherwise reference trial defense counsel's challenge to searches one or two; however, the military judge did find that Inv. KF "recklessly disregarded the truth" "in her 11 January 2022 Spectrum/Charter affidavit, and 26 January 2022 affidavit for the search of [BB's and Appellee's alleged residence]." *Contrast* Appellant's Br. at 9, *with* App. Ex. IX at 17, ¶ 79.

The March 2025 Reseizure of Appellee's Devices

On 24 March 2025, AFOSI applied for and was granted a search authorization for the devices seized from Appellee's person and deployed residence – resulting in the eighth search in this case (hereinafter the "March 2025" search). The supporting affidavit from the Air Force Office of Special Investigations (AFOSI) for the March 2025 search authorization including the following information from the first and second searches:

> Accordingly, on or about 10 January 2022, [Inv. KF] applied for and was issued a search warrant to be executed on Charter Communications, Inc. (Charter), which operates under the brand name Spectrum, for "[s]ubscriber and any related information associated with the listed IP addresses registered to Spectrum to include but not limited to: subscriber information, physical address, device information, billing information, contact information, or any other related data associated with the use of the listed IP address(es): 71.[**.*.***].
>
> The subscriber record returned by Charter in response to the search warrant provided the following information, in relevant part: . . . Subscriber Name: [BB] . . . Service Address: [BB's and Appellee's alleged address].
>
> . . . .
>
> Based on the information returned in response to the warrant executed on Charter, on or about 26 January 2022, [Inv. KF] applied for and was issued a search warrant related to the residence located at [BB's address] . . . . [which] assisted investigators in confirming [Appellee] shared the residence with [BB] during the time period relevant to the NCMEC CyberTipline Report, in part due to the observation that United States Postal Service packages displayed [Appellee]'s name and the address. A search of the South Carolina Department of Motor Vehicles also verified [Appellee] to be a resident of the address.

> . . . .
> Because [Appellee] shared a residence at [BB's address] with [BB] during the time period of the CSAM uploads described in the NCMEC CyberTipline Report, there is reason to believe he had access to the residential Internet connection . . . associated with the Kik User ID . . . login event on 06-30-2021.

App. Ex. IV at 87-88, Atch. 8, ¶ 16.l-m., p., r., t.

The Second Motion to Suppress

On 9 April 2025, trial defense counsel moved to suppress the March 2025 search. App. Ex. XVI. Trial defense counsel moved to suppress the March 2025 search because (1) the search authority was without a substantial basis for probable cause and (2) the March 2025 search is not independent of previous unlawful searches because (i) law enforcement were prompted to conduct the March 2025 search by previous unlawful conduct and (ii) the search authority relied upon unlawful searches to find probable cause (first and second searches by Inv. KF). *Id.* at 17-23. Additionally, trial defense counsel again requested that searches one and two be suppressed. *Id.* at 18, ¶¶ 95-96.

On 9 July 2025, the military judge suppressed the March 2025 search because it was not independent of law enforcement's previous unlawful conduct. App. Ex. XVIII at 18. The military judge held, "[W]here the Government expressly relies on its own unlawful seizure to support probable cause and defeat staleness for a later reseizure, that later reseizure as both a practical and prudential matter was not genuinely independent of the earlier one." *Id.* at 18, ¶ 74. The military judge did find that the search authority had a substantial basis for probable cause. *Id.* at 14, ¶ 62. The military judge did not mention or otherwise reference trial defense counsel's challenge to searches one or two but did reference its fruits, finding that "based on a search of [BB's] residence, and publicly available DMV records, it was determined that [Appellee] shared the searched residence with [BB] *at some point* prior to the search." *Id.* (emphasis added).

The Denial of Reconsideration

On 31 July 2025, the military judge denied the trial government counsel's request for reconsideration. App. Ex. XX. The Appellee disagrees with the Government's characterization of the case law upon which it relied at trial, specifically that cases cited in App. Ex. XIX, the trial government counsel's motion for reconsideration, "demonstrat[e] that the [independent source] doctrine could be—and had been—applied to the re-seizure of evidence preserved by virtue of being under law enforcement control after an illegal search and/or seizure." Appellant's Br. at 14.

While the Government's brief correctly synopsizes the trial government counsel's argument in its 11 July 2025 motion to reconsider, App. Ex. XIX, the Appellee disagrees with the Government's conclusion that:

> [T]he military judge's ruling to the contrary was at odds with federal practice and "effectively suggests that evidence which has been safeguarded from alteration or destruction can never be cleanly re-seized," which "amounts to a suggestion that the Fourth Amendment requires criminal defendants be given an opportunity to tamper with evidence that was illegally seized."

Id.

The military judge denied the motion for reconsideration, emphasizing his reliance on "the ultimate inquiry for this Court, pursuant to *Murray*," that he must determine "whether the March 2025 search authorization was 'genuinely independent' of the earlier, unlawful February 2022 seizure." App. Ex. XX at 2, ¶ 8 (referencing *Murray v. United States*, 487 U.S. 533 (1988)). The military judge stressed that his ruling in no way gave a "right to tamper with or destroy evidence," but rather that the Government needs to move quickly with evidence "because the state of the evidence, and possession of that evidence by an accused, might ordinarily be expected to change over the course of several years," and probable cause may become stale. *Id.* The military judge acknowledged the trial government counsel's case citations, finding that they had "seemingly

contrary rulings," but recognized that they were not binding nor overrode *Murray*'s ultimate inquiry. *Id.* at 2-3, ¶ 9. Lastly, the military judge again did not mention or otherwise reference trial defense counsel's challenge to searches one or two but did add that "[i]t remains true that on seven separate occasions, law enforcement asserted false information, made with reckless disregarded (sic) for the truth, concerning the actual nexus between the upload of child pornography and the residence shared by the Accused." *Id.* at 4, ¶ 12.

Analysis

The military judge articulated his analysis on the record, reasonably applying correct and binding legal principles. The military judge held that allowing law enforcement agents to use the independent source doctrine as a sword to strike down staleness of their own creation would place law enforcement in a *better* position than they would have been in had no violation occurred, thus warranting suppression under *Murray*. *See Murray* 487 U.S. at 533. Allowing law enforcement to abuse the independent source doctrine in that manner would effectively circumvent law enforcement's responsibilities to write honest affidavits and obtain lawful search authorizations while evidence is still ripe. The March 2025 search is dependent on the original, unlawful February 2022 searches, and its fruits must be suppressed.

Furthermore, should this Court determine that the two-part test that some courts have extrapolated from *Murray* supersedes *Murray*'s "ultimate question," the March 2025 search still fails. Law enforcement was prompted to seek the March 2025 search authorization by information obtained during two unlawful pre-February 2022 searches. The fruits of those unlawful searches were relied upon by the March 2025 search authority. Therefore, the March 2025 search is a poisonous fruit of those unlawful searches, it did not result from an independent source, and evidence derived from it must be suppressed.

The benefits of deterring law enforcement's unlawful conduct, which include reckless falsities made under oath to magistrates and search authorities *seven* times across *two* law enforcement agencies, significantly outweigh the resulting costs of suppressing the evidence in a single case. The military judge is entitled to high deference and correctly applied the relevant legal principles; therefore, the fruits of the search must remain suppressed.

Standard of Review

This Court reviews a military judge's ruling on the admissibility of evidence for "an abuse of discretion" and "consider[s] the evidence in the light most favorable to the party that prevailed at trial." *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000); *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017). Military judges abuse their discretion when: "(1) their findings of fact 'are not supported by the evidence of record;' (2) they fail 'to consider important facts;' (3) they use 'incorrect legal principles;' or (4) their application of correct legal principles to the facts is 'clearly unreasonable.'" *United States v. Maebane*, __ M.J. __, No. 24-0196/NA, 2025 CAAF LEXIS 772, at *13 (C.A.A.F. Sep. 18, 2025) (quoting *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)). "When the ruling involves mixed questions of fact and law, findings of fact are reviewed for clear error and conclusions of law are reviewed de novo." *Id.*; *see United States v. Kelley*, 45 M.J. 275, 279-81 (C.A.A.F. 1996). Courts are highly deferential when military judges articulate their analysis on the record. *See United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). These standards apply to interlocutory appeals under Article 62, UCMJ. *Mitchell*, 76 M.J. at 417.

Law

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

"To supplement the bare text [of the Fourth Amendment], th[e] [Supreme] Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231-32 (2011). The rule was created to "compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960); *see Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The exclusionary rule requires a "weighing of its costs and deterrence benefits." *Davis*, 564 U.S. at 238. "[T]he deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue. When the police exhibit 'deliberate,' '*reckless*,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* (citations omitted) (emphasis added).

> Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attentuated (sic) as to dissipate the taint.'

Murray, 487 U.S. at 536-37 (citations omitted).

"Evidence that would otherwise be suppressed is admissible if it meets a limited number of exceptions to the exclusionary rule, such as [whether] evidence can be derived from an

independent source." *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (citations omitted). "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (*which may well be difficult to establish where the seized goods are kept in the police's possession*) there is no reason why the independent source doctrine should not apply." *Murray*, 487 U.S. at 542 (emphasis added).

> The purpose of the independent source doctrine is to put "the police in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred" because if evidence with an independent source were excluded, this "would put the police in a worse position than they would have been in absent any error or violation."

United States v. Garcia, 80 M.J. 379, 388 (C.A.A.F. 2020) (quoting *Murray*, 487 U.S. at 357 (internal quotation marks omitted) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

Specific to the facts in *Murray*, the Court held that the independent source doctrine would not apply "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Murray*, 487 U.S. at 542. However, the Court held that "[t]he ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Id.*

A. The military judge's holding is grounded in binding precedent and was articulated on the record.

The question before this Court "is not whether [it] would have reached the same result, but whether the [military judge] abused [his] discretion in" reaching his conclusion. *United States v. Hutchison*, 57 M.J. 231, 234 (C.A.A.F. 2002) (per curiam). He did not. The military judge correctly applied the ultimate question of the independent source doctrine despite finding that the March 2025 search met both parts of the test extrapolated from *Murray*. In *Murray*, police entered a warehouse without a warrant, suspecting the warehouse to have evidence of a marijuana

distribution operation. *Murray*, 487 U.S. at 535. Upon entering the warehouse, police found "numerous burlap-wrapped bales" and then left the warehouse. *Id.* After leaving the bales untouched, police applied for a warrant, excluding their unlawful entry into the warehouse from their application, which was granted eight hours later. *Id.* at 535-36. Following the warrant's issuance, police seized the bales and discovered marijuana. *Id.* Murray challenged the warrant, arguing that law enforcement should have mentioned the unlawful entry in the warrant application and, if it had been mentioned, the warrant would have been invalid because it was tainted by the earlier unlawful search. *Id.* at 536. The Court found that the independent source doctrine saved the warrant, in part, because "[k]nowledge that the marijuana was in the warehouse was assuredly acquired *at the time* of the unlawful entry. But it was also acquired *at the time* of entry pursuant to the warrant" by independent means. *Id.* at 541 (emphasis added). Because the information *at the time* the warrant was requested was from an independent source and established probable cause, the police were "in the *same* position they would have occupied if no violation occurred." *Id.* By restricting law enforcement's information to that pre-unlawful search, they did not "profit from [their] illegal activity," nor were they deprived of information lawfully gained and "placed in a worse position than [they] would otherwise have occupied." *Id.* at 542.

In the present case, the military judge, consistent with *Murray*, restricted law enforcement's information to pre-10 February 2022 searches, nothing more. The military judge did not *place* the Government in a worse position than if no violation had occurred; the military judge put the Government in the same informational space it previously occupied. The Government placed itself in a different period of time due to its delays investigating this case, execution of unlawful searches and seizures, and delays in taking the case to trial. *See* App. Ex. XVI at 3-8, ¶¶ 11-51. If the passage of time created a "worse" position, it is the Government's own fault; the military judge did not

place it there. The Government does not get to introduce fruits of an unlawful search and seizure if it cannot establish independent probable cause *at the time* it finally decides to write a truthful affidavit seeking a lawful warrant – time machines do not exist yet, and the military judge cannot gift one.

1. *The military judge's application of* Murray *was articulated on the record and was not clearly unreasonable.*

The military judge conducted his analysis on the record, writing in his ruling, "Here, though the new search authorization may be a genuinely independent source of *the information* supporting probable cause for a new search and seizure, it cannot be a genuinely independent source of the tangible evidence, that is, the devices, which have been in the possession of government authorities since 10 February 2022." App. Ex. XVIII at 17, ¶ 69. The military judge acknowledged the distinction *Murray* draws about time versus information space:

> In this case, there is no means by which the Court can place law enforcement in the *same* position they would have been in had they not included false statements in the 10 February 2022 search authorization affidavit for the Accused's devices. Because had they not done so, it is entirely unclear whether they would have been permitted to seize the Accused's devices in February 2022 or any time thereafter. And it is doubtful probable cause would still have existed to seize and search the devices at any point later in time than February 2022 had those devices not been preserved in the Government's possession.

Id. at 17-18, ¶ 71.

> Whether that information from 2021 would have become stale prior to the initial search of the devices in August 2023, or prior to the refreshed March 2025 seizure and search *is an altogether different factual question*, even in the child pornography context. This is not because of any supposed right to tamper with or destroy evidence, *but because the state of the evidence, and possession of that evidence by an accused, might ordinarily be expected to change over the course of several years*.

App. Ex. XX at 2, ¶ 8 (emphasis added); *see also* App. Ex. XVIII 16, ¶ 67, n.11 (citing cases about the effect of time on probable cause).

“Simply put, where the Government expressly relies on its own unlawful seizure to support probable cause and defeat staleness for a later reseizure, that later reseizure as both a practical and prudential matter was not genuinely independent of the earlier one.” App. Ex. XVIII at 18, ¶ 74. *Murray* acknowledges this very issue: proving “a later, lawful seizure is genuinely independent of an earlier, tainted one . . . may well be difficult to establish where the seized goods are kept in the police’s possession.” *Murray*, 487 U.S. at 542.

The military judge applied *Murray*’s “ultimate question” and was not bound to the two fact-specific parts that some nonbinding case law from lower courts have extrapolated. Despite the Government’s assertions, the military judge’s analysis was not “erroneous,” “arbitrary,” nor without support from legal authority. Appellant’s Br. at 23. The Court in *Murray* never mandated the use of a two-part test but rather gave two factors to help develop its answer to the ultimate question in the specific case before it, and the Court has never established that two-part test itself. *Murray*, 487 U.S. at 542; *see Utah v. Strieff*, 579 U.S. 232, 238, 240 (2016) (citing *Murray*, no discussion of a two-part test); *see also Hudson v. Michigan*, 547 U.S. 586, 616-17, 626 (2006) (Breyer, J., dissenting) (citing *Murray*, no discussion of a two-part test); *New York v. Harris*, 495 U.S. 14, 22 (1990) (Marshall, J., dissenting) (citing *Murray*, no discussion of a two-part test).

To develop its answer to the ultimate question in the specific case before it, the *Murray* Court stated the “search pursuant to warrant” would not be “a genuinely independent source” “if the agents’ decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.” *Murray*, 487 at 542. The Court’s language is tailored to the specific facts of *Murray*, not an abrogation of the Court’s standard “whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here.”

With *Murray* providing the *only* binding precedent, the military judge did not erroneously apply the law. Rather, the military judge used the binding, ultimate question, and recognized that the Government expressly relied on its unlawful activity to place itself in a better position, violating *Murray* and the Appellee's Fourth Amendment rights.

2. The Government's cited cases are inapposite.

The Government's suggestion that there is a myriad of applicable case law does not accurately reflect the law or how *Murray* applies in the present case. The Government cites cases from four federal circuits and two district courts (one of which is in one of the four federal circuits and the other of which is unpublished) for the proposition that "[t]he 'independent source doctrine' can and has been applied to the reseizure of evidence that is preserved by virtue of being in law enforcement custody." Appellant's Br. at 23.[3] The Government also asserts that the two district court cases and one of the circuit court cases demonstrate that "when the relevant information underlying probable cause was known prior to the illegal seizure, the 'independent source' doctrine can safely be applied."[4] These assertions are true, but do not support the Government's incredibly broad conclusion that "all the applicable law before the military judge pointed to a singular conclusion: when both parts of the *Murray* test are met, the independent source doctrine applies, even if the police continuously possessed the evidence, such that the re-seizure would not result in a physically independent origin." *Id.* at 22-23. On the contrary, those cases never discussed how

---

[3] *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000); *United States v. Budd*, 549 F.3d 1140 (7th Cir. 2008); *United States v. Saelee*, 51 F.4th 327 (9th Cir. 2022); *United States v. Herrold*, 962 F.2d 1131 (3d Cir. 1992); *United States v. Romero*, 585 F.2d 391 (9th Cir. 1978); *United States v. Hanhardt*, 155 F. Supp. 2d 840 (N.D. Ill. 2001); *United States v. Lewis*, No. 3:21-cr-00021, 2024 U.S. Dist. LEXIS 105148 (E.D. Ky. June 13, 2024).

[4] Appellant's Br. at 23 (citing *Saelee*, 51 F.4th at 336; *Hanhardt*, 155 F. Supp. 2d at 852; *Lewis*, 2024 U.S. Dist. LEXIS 105148, at *13).

the passage of time would affect probable cause and how difficult it would be to show genuine independence "where the seized goods are kept in the police's possession." *Murray*, 487 U.S. at 542. Out of the Government's cited authority, only *Murray* discusses the distinction between time and information, which is what the military judge relied upon. And of all the Government's cited authority, only *Murray* is binding on this Court.

Most of the cases the Government cites have nothing to do with electronic evidence or child pornography and are inapplicable to the issues of staleness central to this case. *See Saelee*, 51 F.4th at 332 (drug possession); *Hanhardt*, 155 F. Supp. 2d at 843 (jewelry thefts); *Herrold*, 962 F.2d at 1133 (drug possession); *Romero*, 585 F.2d at 393-94 (illegally transporting stolen gold in interstate commerce). One case cited by the Government, *Romero*, predates *Murray* and precedent *Murray* relied upon. *Contrast Murray*, 487 U.S. at 535, 537, 539 (decided in 1988) (citing *Segura v. United States*, 468 U.S. 796 (1984); *Nix v. Williams*, 467 U.S. 431 (1984); *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986)), *with Romero*, 585 F.2d at 391 (decided in 1978).

The four cases the Government cites that do involve child pornography offenses are likewise inapposite due to the timing of the searches or their lack of discussion about staleness. *See Grosenheider*, 200 F.3d at 324-25 (warrantless, unlawful search, and warrant-backed search occurring within eight hours of each other); *Budd*, 549 F.3d at 1142-43 (search of electronics not occurring until after law enforcement had a warrant); *United States v. Mulholland*, 702 Fed Appx. 7, 11 (2d Cir. 2017) (warrantless, unlawful search, and warrant-backed search occurring within three days of each other); *Lewis*, 2024 U.S. Dist. LEXIS 105148, at *10-11 (staleness or reliance on earlier unlawful activity to prevent staleness was neither raised nor discussed). Only two of the cases involve two warrants (*Romero* and *Lewis*), like the present case, and only the unpublished

district court opinion in *Lewis* dealt with false or reckless statements in a warrant affidavit, the extent of which was not discussed by the court.

In *Lewis* and *Hanhardt*, the only cases where staleness of evidence *could* be at issue, neither defendant challenged the probable cause of the warrants, and neither court discussed the impact of time on law enforcement's "position." *Lewis*, 2024 U.S. Dist. LEXIS 105148, at *10-11 (computer in government's possession for two years between searches); *Hanhardt*, 155 F. Supp. 2d at 843-44 (briefcase in government's possession for two years between searches). In *Lewis*, the court found that the defendant's "argument that the evidence has remained with the government in 2021 is inconsequential" *because* "seized objects do not have to be returned to private control before they can be cleanly reseized." *Lewis*, 2024 U.S. Dist. LEXIS 105148, at *10-11. Staleness or reliance on earlier unlawful activity to prevent staleness was neither raised nor discussed. *Id.* Additionally, in *Lewis* and *Hanhardt*, the time between searches was extensive because of trial or appellate proceedings, while in the present case, the time between searches is longer and so extensive because of the Government's slow processing of its case. App. Ex. XVI at 3-8, ¶¶ 11-51.

The Government's brief stretches these cases beyond their factual predicates. In none of these cases did the court analyze whether the position law enforcement would be in during the second, lawful search was better, the same, or worse due to the passage of time – the subject of the military judge's central finding in the present case. App. Ex. XVIII at 16-17, ¶¶ 66-74. It is unclear in any of the cases whether law enforcement, in their applications for new warrants, relied upon their original unlawful search to convey that evidence was in the same state in which it was unlawfully seized. The Government argues that the cases it cites represent the "prevailing practice" on this issue, and constitute a "robust consensus of . . . persuasive authority," but none are on-point

or address the central issue in the present case: what constitutes "the same position" under *Murray*? Appellant's Br. at 30-31.

Despite the Government's case law being inapt comparisons to the present case, the Government posits that "the federal courts' application of the independent source doctrine reflects the law's understanding that under most circumstances, the incidental preservation of evidence through police custody of the same is not a standalone basis for applying the exclusionary rule." Appellant's Br. at 25. But that is not what the case law reflects. None of the case law even discusses the issue of preservation of evidence – it is a new area of independent source doctrine application. "[T]he courts [*have not*] made it clear that evidence is not considered 'tainted' simply because it was protected from destruction or degradation by virtue of being in law enforcement's custody after an illegal search;" in fact, none of the cases have said anything about it at all. Appellant's Br. at 27. The military judge recognized this dearth of case law, acknowledged the "import" of "*seemingly* contrary rulings," and correctly applied the only binding precedent, *Murray*, to make a decision within his discretion. App. Ex. XX at 2-3, ¶ 9 (emphasis added).

3. The military judge correctly applied applicable precedent in a new area of the law.

The military judge articulated his reasoning and reached his holding in a vacuum of on-point precedent, but nonetheless reasonably navigated this void. Relying on the sole binding precedent, *Murray*, the military judge asked the ultimate question: "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Murray*, 487 U.S. at 542. Understanding that it is "difficult to establish [whether the lawful seizure is genuinely independent of an earlier, tainted one] where the seized goods are kept in the police's possession," the military judge sought to determine whether the March 2025 search was "untainted by the initial illegality." *Id.* at 537, 542. Recognizing that some federal circuits

have extrapolated a two-part test from *Murray* to help answer these questions, the military judge applied it, finding that the original February 2022 searches met both parts. App. Ex. XVIII at 15-16, ¶¶ 64-65. Still, however, the military judge held that the *Murray* test is "not applied in a vacuum," circling back to the "ultimate determination." *Id.* at 16, ¶ 66. The *Murray* Court also went beyond the restrictive two-part test and embraced the ultimate question, as did two of the Government's cited cases.[5] The military judge followed and reasonably applied the only binding precedent before the court: *Murray*.

The military judge found that the March 2025 search was "the product of" the initial illegality of the February 2022 searches because the March 2025 search authorization affidavit relied upon the unlawful preservation of evidence from 2022, which was required to establish probable cause. *Id.* at 17, ¶ 70. The military judge found that law enforcement relied on their illegal activity to cure a staleness issue in their March 2025 affidavit, putting them in a *better* position in March 2025 than they would have been in otherwise. *Id.* at 18, ¶ 73. If that reliance on preservation were excised, probable cause would cease to exist. *Id.* at 16, ¶ 66 ("the 24 March 2025 search authorization is rooted in probable cause that likely *only still exists* because the Government possessed the Accused's devices in the preceding 37 months").

The military judge's discussion about using an illegal search to defeat staleness is the key distinction that none of the cases cited by the Government's brief discuss. It is here where the Government's arguments fail – it has no law to support the assertion that law enforcement is allowed to illegally seize, search, and keep a person's property for more than three years just to

---

[5] *See Grosenheider*, 200 F.3d at 327-30 (using *Murray*'s "ultimate question" to guide its analysis, not a "two-part test"); *Lewis*, 2024 U.S. Dist. LEXIS 105148, at *9-14 (using *Murray*'s "ultimate question" to guide its analysis, not a "two-part test").

preserve initially weak probable cause. The military judge, however, has *Murray*, binding precedent that commands that he not place law enforcement in a better position because of a violation, but only in a position with the same knowledge that they can try to use "at the time" they seek a new, falsity-free warrant. *Murray*, 487 U.S. at 541.

The Government errs by arguing that the military judge's ruling "suggests that evidence cannot be cleanly reseized unless it is first returned to private control, the natural byproduct of which is [to] give criminal defendants an opportunity to tamper with said evidence." Appellant's Br. at 27. The military judge did not suggest that evidence must be returned; he insisted that the Government *must do its job in a timely manner*. App. Ex. XVIII at 18, ¶ 73 ("Permitting the Government to benefit from its own mistakes is not the purpose of the independent source doctrine, and this Court declines to do so here."). "Taken to its logical conclusion, the military judge's reasoning suggests" that the Government must conduct its lawful search before probable cause becomes stale, like every other warrant its agents execute. *See* Appellant's Br. at 27. Contrary to the Government's assertions, it is not "meaningless to conjecture about what state illegally seized evidence might be in today if it had *never* been seized . . . or whether there would be probable cause to seize the evidence in its hypothetically changed state." *Id.* at 29. Under the military judge's ruling, "search warrants for evidence preserved in law enforcement custody could be upheld" if the Government maintains independent probable cause for that evidence without relying on an unlawful seizure. *Id.*

The military judge's interpretation of *Murray* simply makes the most sense, and it is within his discretion to make this determination in this void of on-point law. The logical conclusion of the Government's position is that law enforcement could lie on a search affidavit to get a warrant, search a citizen's home, and seize their personal effects without ever having to return them, so

long as some time in the future they tell the truth on a search affidavit. The military judge's application of *Murray* encourages the Government to move with deliberate speed instead of allowing it to sit on unlawfully seized evidence for years. *See* App. Ex. XVI at 3-8, ¶¶ 11-51. The military judge drew a line at exploiting illegal activity to cure staleness; the Government's position has no limits on potential abuse.

The military judge applied the correct legal principles in a reasonable manner, navigating the dearth of on-point case law. The military judge did not abuse his discretion, and the evidence is viewed in the light most favorable to the party that prevailed at trial: the Defense. *Mitchell*, 76 M.J. at 417. Furthermore, the military judge articulated his analysis on the record in twenty-three pages of rulings, which is given great deference by this Court. *Manns*, 54 M.J. at 166. This Court should affirm the military judge's decision to suppress evidence from the March 2025 search and seizure of Appellee's devices.

B. The March 2025 search fails both parts of the extrapolated *Murray* test.

Even under the two-part test that some federal civilian courts have extrapolated from *Murray*, the March 2025 search fails. "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *see also United States v. Wuterich*, 68 M.J. 511, 517 n.9 (N-M. Ct. Crim. App. 2009) (citing *Dandridge* for the same).

The Defense challenged five of the seven pre-March 2025 searches conducted in Appellee's case, including two searches pre-dating the 10 February 2022 searches: 1) the 11 January 2022 warrant to Charter Communications (first search), and 2) the 26 January 2022

warrant for BB's and Appellee's alleged residence (second search).[6] App. Ex. IV at 17-21, ¶¶ 83-89; App. Ex. VI at 4, ¶¶ 18-22; Trial Tr. 114-16; App. Ex. XVI at 18, ¶¶ 95-96. The military judge found that in all seven searches, including two that pre-dated the 10 February 2022 searches, "law enforcement asserted false information, made with reckless disregard[] for the truth, concerning the actual nexus between the upload of child pornography and the residence shared by the Accused." App. Ex. XX at 4, ¶ 12; *see also* App. Ex IX at 17, ¶ 79. Although the military judge did not explicitly rule on the lawfulness of the pre-10 February 2022 searches, the military judge did make all the necessary findings to render them unlawful. *See* App. Ex. XVIII at 13-14, ¶¶ 60, 62 (explaining the search authority's reliance on the pre-10 February 2022 searches); App. Ex IX at 17, ¶ 79 (finding that Inv. KF acted with reckless disregard for the truth in her pre-10 February 2022 affidavits). Trial defense counsel raised this issue in their motion to suppress the March 2025 search, but the military judge did not address it. *Contrast* App. Ex. XVI at 18, ¶¶ 95-96, *with* App. Ex. XVIII.

Information from the first and second searches was included in the March 2025 search affidavit. App. Ex. XVI at 87, Atch. 8, ¶ 16.l.-n. ("[O]n or about 10 January 2022, Investigator Fleming applied for and was issued a search warrant to be executed on Charter Communications, Inc. (Charter)" which "provided the following information," Appellee's alleged address); App. Ex. XVI at 88, Atch. 8, ¶ 16.p.-r. ("Based on the information returned in response to the warrant executed on Charter, on or about 26 January 2022, [law enforcement] applied for and was issued

---

[6] Additionally, Appellee is not conceding his positions at trial that (1) all search affidavits, except those written for searches three and eight, were written with reckless disregard for the truth, (2) in all searches post-11 January 2022 (first search), the search authority did not have a substantial basis for probable cause, and (3) that all the post-11 January 2022 searches relied upon the poisonous fruits of their preceding search(es). *See* App. Exs. IV, VI, XVI.

a search warrant related to the residence" which contained a package with Appellee's name on it).

Should this Court find that the two-part test some federal civilian courts have extrapolated from *Murray* is the only lawful application of the independent source doctrine, the evidence obtained from the March 2025 search must still be suppressed. Law enforcement's "decision to seek the warrant was prompted by what they had seen during the initial entry." *Murray*, 487 U.S. at 542. Law enforcement only sought to search Appellee's person and deployed residence *because* of what they found during the other two unlawful searches of his internet service provider and primary residence. In fact, the *only* alleged connection from the NCMEC report to Appellee was the return from those two unlawful searches. *See* App. Ex. IX at 17, ¶ 79 (military judge finding that AFOSI relied upon Inv. KF's false affidavits); App. Ex. XVIII at 13-14, ¶¶ 60, 62 (military judge outlining the evidence's nexus to Appellee). Law enforcement *had to* rely on those unlawful searches to establish probable cause to search the Appellee and his residence. Therefore, law enforcement's decision to seek the search authorization was prompted by what they discovered during the initial unlawful search.

Law enforcement likewise presented information obtained from those unlawful searches to the military search authority, which affected the military search authority's decision to issue the search authorization. Without the nexus to Appellee, there was no probable cause to search the Appellee or his deployed residence.

Law enforcement has no independent source for the information gleaned from the warrant to Charter Communications for subscriber data, nor from their search of BB's and Appellee's alleged residence. Law enforcement tried to obtain an independent source for this information in March 2025 by contacting Charter Communications, who said that "the records at issue no longer

exist within their systems," but they could speculate that the original warrant return was accurate. App. Ex. XVI at 87, Atch. 8, ¶ 16.o. The Government still has no independent source for the subscriber data linking the IP address with the Appellee's alleged residence. Law enforcement also interviewed BB, the Appellee's alleged roommate, who said that they began living together in July 2020, but provided no information about how long they lived together, or if there were any gaps in Appellee's residence. App. Ex. XVII at 14, Atch., ¶ 2-46. Even so, this information was not included in law enforcement's affidavit that provided the basis for the Article 30a warrant authorizing the March 2025 search. *See* App. Ex. XVI at 88, Atch. 8, ¶ 16.r.-t. The Government still has no independent source for Appellee's alleged residence during the time of the alleged misconduct as identified by the NCMEC report.

Law enforcement and the search authority expressly relied upon the fruits of unlawful searches to justify the March 2025 search. The military judge found that law enforcement acted with reckless disregard for the truth in all seven pre-March 2025 searches, including searches which returned the address of the residence to be searched and Appellee's alleged association with that address. App. Ex. XX at 4, ¶ 12. If those recklessly false statements were excised from the warrant affidavits, probable cause would not have existed to search those areas. *See* App. Ex. IX at 15, ¶ 74. There is no exception that saves the January 2022 searches of Charter Communications and BB's and Appellee's alleged residence. The Government did not provide an independent source for information gained from those searches in the March 2025 affidavit. Therefore, under the two-part test extrapolated from *Murray*, the fruits of the March 2025 search must be suppressed.

C. The Military Judge's analysis of the deterrent value of exclusion was clearly reasonable.

"When the police exhibit . . . '*reckless*,' . . . disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis*, 564 U.S. at 238. "[I]n not a single affidavit related to this case did any affiant even attempt to articulate the actual state of the evidence, which was never particularly complex." App. Ex. IX at 18-19, ¶ 82. "[E]xclusion would encourage greater care in carefully assessing the readily available evidence in the case rather than merely parroting misleading assertions of previous investigators." *Id.* at 19, ¶ 83. Suppression of evidence derived from the March 2025 search "would encourage the inclusion of materially relevant information even where that information may cut against or even defeat probable cause. And in any event, it would encourage more 'reasonable' searches by imposing costs for presenting magistrates with affidavits likely to mislead them about the true state of the evidence." *Id.*; *see also* App. Ex. IV at 15-16, ¶ 75.

The Government's assertion that the appreciable deterrence achieved by excluding this evidence is "*de minimis*" is shocking. Appellant's Br. at 32. Government officials lied, or at least acted with reckless disregard for the truth, on *seven* sworn affidavits to search citizens' homes and seize their belongings. These are no mere "transgressions." Appellant's Br. at 34. While the military judge acknowledged that the cost of suppressing this evidence is high, he could *only* be "less certain" about the deterrent effects because it requires a prediction of the future. Recognizing that he is not clairvoyant, the military judge spent nearly three pages of his opinion outlining why the costs are outweighed by the deterrent effects. App. Ex. IX at 17-19, ¶¶ 79-83.

The Government highlights the cost of suppression, ignoring that the burden is on it to get the searches right in the first instance, or eighth. Law enforcement only had to read the thirteen pages of the NCMEC report and truthfully convey their contents to a search authority to start their

string of searches, but they chose not to *seven times*. Should the military judge be reversed and the March 2025 search be upheld, the message to law enforcement would be that they can ignore and omit key facts from sworn affidavits if they are able to correct it within thirty-seven months. They can lie, steal, search, and prosecute with impunity, as long as they fix it later. However, the military judge's suppression of the fruits of those searches sent a clear signal to law enforcement that they must carefully read their evidence, conduct thorough investigations, and be *honest* on a sworn affidavit that could result in the search of a person's most private dwelling and seizure of their most treasured belongings. This Court should not disturb that clear signal. The military judge outlined how the Government should be conducting the search; the Government only has to listen and get it right with knowledge it has *at the time* it seeks a new search authorization.

Conclusion

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the military judge's ruling.

Respectfully submitted,

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
John.Fredericks.2@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 October 2025.

JOHN M. FREDERICKS, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
John.Fredericks.2@us.af.mil

APPENDIX D

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant,* v. Senior Airman (E-4) **KENNETH P. ARMOUR II,** United States Air Force *Appellee.*	)))))))))	**UNITED STATES' REPLY BRIEF** Before Panel No. 3 Misc. Dkt. No. 2025-10 8 October 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

In Murray v. United States, the Supreme Court set forth a two-part test for determining whether a later, lawful search warrant is a "genuinely independent" source of evidence that was previously seized illegally. 487 U.S. 533, 540 (1988). Such a warrant will be an independent source as long as no information learned from the illegal seizure affected "either [1] the law enforcement officers' decision to seek a warrant or [2] the magistrate's decision to grant it." Id. By concluding that the 2025 search authorization could not be an independent source of evidence seized in 2022 even though it passed this test, the military judge abused his discretion and revealed an "erroneous view of the law." United States v. Shields, 83 M.J. 226, 230 (C.A.A.F. 2023). Because Appellee's defense of this outcome is premised on a similarly flawed understanding of the independent source doctrine, this Court should reject his arguments and conclude that the military judge abused his discretion.

A. The "ultimate question" in Murray is answered by the two-part test employed by federal courts and the military judge, not independent of it.

In defending the military judge's ruling, Appellee suggests there is a difference between Murray's "ultimate question" and the two-part test associated with it, which he contends is a

"non-binding" test that has been "extrapolated" from the Murray opinion by lower courts. [1] (Ans. Br. at 11-21.) This reflects a failure to understand that the two-part test comes directly from Murray and is *how* courts are supposed to determine the answer to the "ultimate question" of "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue." 487 U.S. at 542.

Contrary to Appellee's assertion that the Supreme Court "never established that two-part test itself," (Ans. Br. at 14)[2], a careful reading of Murray reveals that the Court did, in fact, articulate this test. The Murray court unambiguously stated that when the government is asking for application of the independent source doctrine to the reseizure of illegally-seized evidence, it has the "much more onerous burden of convincing a trial court that no information gained from the illegal [search] affected either [1] the law enforcement officers' decision to seek a warrant or [2] the magistrate's decision to grant it." 487 U.S. at 540. Later, the Court repeated these two

[1] The two-part analysis, set forth in the opening paragraph of this brief, is used by every single federal circuit. *See*, *e.g.,* United States v. Dessesaure, 429 F.3d 359 (1st Cir. 2005); United States v. Mulholland, 702 F. App'x 7 (2d Cir. 2017); United States v. Herrold, 962 F.2d 1131 (3d Cir. 1992); United States v. Walton, 56 F.3d 551 (4th Cir. 1995); United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000); United States v. Jenkins, 396 F.3d 751, 757 (6th Cir. 2005); United States v. Budd, 549 F.3d 1140 (7th Cir. 2008); United States v. Green, 9 F.4th 682 (8th Cir. 2021); United States v. Saelee, 51 F.4th 327, 338 (9th Cir. 2022); United States v. Amador, 752 F. App'x 541 (10th Cir. 2018); United States v. Barron-Soto, 820 F.3d 409 (11th Cir. 2016); United States v. Halliman, 287 U.S. App. D.C. 380, 923 F.2d 873 (D.C. Cir. 1991).

[2] As support for this assertion, Appellee points to Supreme Court decisions that have cited Murray as having "no discussion of a two-part test." (Ans. Br. at 14.) While this is technically true, it is legally insignificant. An examination of the decisions reveals *why* there is no discussion of the two-prong test—because none of them involved application of the independent source doctrine. *See* Utah v. Strieff, 579 U.S. 232, 238 (2016) (attenuation case citing Murray once in reference to existence of independent source doctrine as one of several exceptions to exclusionary rule); Hudson v. Michigan, 547 U.S. 586, 617 (2006) (case regarding the "knock and announce rule" where only the dissent cited Murray in reference to independent source doctrine); New York v. Harris, 495 U.S. 14, 22 (1990) (warrantless arrest case citing Murray once in reference to suppression of evidence derived from unlawful searches).

considerations and their impact on the "ultimate question" regarding the applicability of the independent source doctrine:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. at 542.

Placed in context, the Court's discussion of the "ultimate question" reveals that it is not an independent inquiry that overrides the two-part test. Id. Rather, the two-part test is the methodology for determining "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue." Id. When neither the decision to seek a warrant nor the magistrate's decision to grant it was based on information gained from the initial illegality, the independent source doctrine applies. Id. at 540.

That this two-part inquiry is all that is required is evident from the Murray court's admonition that "what counts is whether the actual illegal search had any effect in *producing the warrant*…only that much is needed to assure that what comes before the court is not the product of illegality; to go further than that would be to expand our existing exclusionary rule." Id. at 542 (emphasis added). By focusing only on how "information gained" from the illegal search might have contributed to the subsequent warrant and *not* requiring any analysis of how the seizure affected the evidence's material condition, the Murray test recognizes that the right "to be secure…against unreasonable searches and seizures," U.S. CONST. amend. IV, does not encompass a right to the degradation of evidence obtained in violation thereof. Indeed, if the incidental preservation of illegally-seized evidence was considered police misconduct, subsequent search warrants could never be upheld as an "independent source" under Murray.

But that is obviously not the case, as evidenced by the fact that courts have applied the independent source doctrine to evidence that sat in law enforcement custody for hours,[3] weeks,[4] and even years.[5] Thus, inherent in every court's application of the Murray test is an understanding that law enforcement's preservation of evidence "already seized" does not infringe on any rights and is therefore not a police illegality that precludes application of the independent source doctrine. 487 U.S. at 542; (*see* Gov. Br. at 26-29); *see also* United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986) ("The Government has a duty to use good faith and due diligence to preserve and protect evidence.").

Under this framework, the military judge's error is apparent. Although the 2022 seizure resulted in the physical preservation of the evidence (and by extension, probable cause), this is "inconsequential," United States v. Lewis, No. 3:21-cr-00021-GFVT, 2024 U.S. Dist. LEXIS 105148, at *5 (E.D. Ky. June 13, 2024), because the Murray analysis is only concerned with the exploitation of "information gained" from the initial illegality. 487 U.S. at 542. Here, no "information gained" from the invalidated 2022 search and seizure "had any effect in producing the warrant," given that the probable cause affidavit supporting the 2025 search authorization was based on information known to law enforcement prior to 2022. Murray, 487 U.S. at 542. By nevertheless declining to apply the independent source doctrine even though "no information gained from the illegal [2022 seizure] affected either the law enforcement officers' decision to

[3] *See* Grosenheider, 200 F.3d at 328 (illegally-seized computer containing child sexual abuse material held in city police custody for over four hours before valid re-seizure by federal agent).

[4] *See* Budd, 549 F.3d at 1148 (illegally seized computer containing child sexual abuse material held for almost seven weeks prior to valid re-seizure).

[5] *See* Lewis, 2024 U.S. Dist. LEXIS 105148, at *5 (computer containing child sex abuse material was originally seized pursuant to a later-invalidated warrant and remained in law enforcement custody for two years prior to valid re-seizure).

seek [the 2025] warrant or the magistrate's decision to grant it," id. at 540, the military judge disregarded "the only binding precedent before [him]: Murray." (Ans. Br. at 19.) Thus, his decision fell "outside the range of choices reasonably arising from the applicable facts and the law." Shields, 83 M.J. at 230.

Unsurprisingly, Appellee contends that "the military judge's interpretation of Murray simply makes the most sense" because it "drew a line at exploiting illegal activity to cure staleness." (Ans. Br. at 20-21.) Like the military judge, Appellee suggests because the evidence was preserved in law enforcement's custody, the 2025 warrant cannot be an independent source, otherwise it would put law enforcement in "a better position in March 2025 than they would have been in otherwise." (Ans. Br. at 19.) This argument is unavailing first and foremost because the Murray court unequivocally recognized that evidence already in police custody can be re-seized under the independent source doctrine: "[T]he reseizure of tangible evidence *already seized* is no more impossible than rediscovery of intangible evidence already discovered." 487 U.S. at 542 (emphasis added). If a valid warrant "would have been sought even if what actually happened had not occurred," Murray, 487 U.S. at 542 n.3, treating the re-seizure as an independent source simply puts law enforcement in "the same, not a *worse*, position" that they would have been in absent police error. Nix v. Williams, 467 U.S. 431, 443 (1984). Such is the case here.

Here, although the 2022 search authorizations were invalidated by the military judge due to misstatements in the supporting affidavits, the fact that they exist proves that law enforcement always intended to obtain Appellee's devices via legal means and "would have obtained that evidence if no misconduct had taken place." Nix, 467 U.S. at 444. That the new search authorization was re-accomplished three years after the initial seizure does not mean law

enforcement was knowingly "sit[ting] on unlawfully seized evidence for years" instead of "mov[ing] with deliberate speed." (App. Br. at 21.) Given that the initial seizure was itself accomplished pursuant to a search authorization, law enforcement would not have had any reason to believe that the evidence in its custody was "unlawfully seized" until the judge invalidated the 2022 search authorization. Indeed, this is *why* applying the independent source doctrine in this case would put law enforcement in the same (not a better) position that they would have been in absent any error or violation. Nix, 467 U.S. at 443. Had the misstatements never occurred, law enforcement still would have sought search authorizations for Appellee's devices back in 2022 because they already had the information required to establish probable cause. *See* Murray, 487 U.S. at 542 n.3. This is evidenced by the fact that the 2025 search authorization—which the military judge found "established a substantial basis for a finding of probable cause"—was "prompted by, or premised upon, information already known as of February 2022." [6] (App. Ex. XVIII.) By nevertheless refusing to apply the independent source doctrine and excluding the evidence instead, the military judge placed law enforcement in a *worse* position and effectively penalized the Government for preserving evidence.

B. The 2025 warrant, which the military judge conceded passed the Murray test, cannot be invalidated based on searches that Appellee lacks standing to challenge.

Next, Appellee contends that the March 2025 search fails the Murray test because "[l]aw enforcement only sought to search Appellee's person and deployed residence because of what they found during the other two unlawful searches of his internet service provider and primary residence." (Ans. Br. at 21-22.) This argument is unavailing for two reasons.

[6] Considering this, this Court should be unpersuaded by Appellee's suggestion that the 2022 seizure was effected "just to preserve initially weak probable cause." (App. Br. at 20.)

First, even the military judge found that the March 2025 search authorization passed the two-part Murray test, given that (1) "[i]t was not the information gathered during that initial illegal search that 'prompted' Special Agent [TS] to seek the instant search authorization," and (2) "it is apparent from the record that the [search authority] was not *per se* presented in the probable cause affidavit with information obtained *as a result of* the unlawful searches and seizures." (App. Ex. XVIII, ¶¶ 64-65.)

Second, Appellee's position is based on a mischaracterization of what is relevant to his Fourth Amendment challenge. By starting his argument with the fact that there were "seven pre-March 2025 searches" in the case file, Appellee implies that all these searches are germane to determining whether the 2025 search authorization was an independent source under Murray. (Ans. Br. at 21.) Appellee is incorrect. Only two of them—the February 2022 search authorizations for Appellee's person and dorm—are relevant. Indeed, even the military judge focused only on the February 2022 search authorizations, as he should have. The other five relate either to searches for the person and property of someone other than Appellee or evidence already suppressed and not the subject of this appeal. (*See* App. Ex. XVII, ¶ 40-43) (noting that Appellee lacks standing to challenge searches where BB and his things were the target). What Appellee describes as "unlawful searches of *his* internet service provider and primary residence," (Ans. Br. at 23) (emphasis), were actually searches of his *former* roommate BB's Charter Communications account and residence at 4 Beard Drive—neither of which Appellee has standing to challenge. Rakas v. Illinois, 439 U.S. 128, 143 (1978) (ability to raise Fourth Amendment challenge hinges on "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"). Appellee did not have a "legitimate expectation of privacy" in the Charter account information, given that it was

registered to BB. (*See* App. Ex. IX, ¶ 15.) Similarly, he did not have a reasonable expectation of privacy in 4 Beard Drive because he had not been living there for several months by the time it was searched. *See* United States v. Gomez, 770 F.2d 251, 254 (1st Cir. 1985) (even though defendant was lessee of the apartment searched, he had no reasonable expectation of privacy in it because he was living elsewhere, had not lived there for four months prior to the search, and did not appear to have possession or control of the premises).

Considering the above, and the fact that "Fourth Amendment rights are personal rights which…may not be vicariously asserted," Rakas, 439 U.S. at 133-34 (citation omitted), this Court need not entertain Appellee's attempts to challenge the 2025 search authorization based on alleged misstatements in affidavits related to the internet service provider and house.[7]

C. Excluding evidence based on an assumption that future law enforcement will be incentivized to engage in misconduct is error.

Finally, in defending the military judge's refusal to apply the independent source doctrine, Appellee—like the judge—suggests that validating the 2025 search would incentivize police misconduct: "[T]he message to law enforcement would be that…[t]hey can lie, steal, search, and prosecute with impunity, as long as they fix it later." (Ans. Br. at 26.) But the Supreme Court has already rejected the hypothesis that law enforcement will engage in illegalities if given the opportunity. Murray, 487 U.S. at 540; *see also* United States Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of government agencies."). In the Court's view, an officer *with* probable cause sufficient to obtain a search warrant would be "foolish" to attempt an illegal search or seizure first, because "[b]y

[7] For the same reasons, this Court should not be swayed by Appellee's assertion that "Government officials lied, or at least acted with reckless disregard for the truth, on *seven* sworn affidavits to search citizens' homes and seize their belongings." (Ans. Br. at 25) (emphasis in original).

doing so, he would risk suppression of all evidence." Id. On the flipside, an officer *without* sufficient probable cause would have no incentive to engage in illegal search or seizure, "since whatever he finds cannot be used to establish probable cause before a magistrate." Id. In other words, there is no reason to presume that application of the independent source doctrine will incentivize law enforcement to obtain evidence in violation of the Fourth Amendment, since they know that such evidence may be excluded and result in "suppress[ing] the truth and set[ting] the criminal loose in the community without punishment." Davis v. United States, 564 U.S. 229, 237 (2011). Considering this, the military judge's refusal to apply the independent source doctrine so as to combat a nebulous probability that future law enforcement might act in bad faith was clearly unreasonable, given that exclusion is only warranted if it will "*meaningfully* deter" police misconduct. Herring v. United States, 555 U.S. 135, 144 (2009) (emphasis added).

The requirement for meaningful deterrence to be balanced against the "public interest in having juries receive all probative evidence of a crime," Nix, 467 U.S. at 443, recognizes that society has a "compelling interest in finding, convicting, and punishing those who violate the law." Howes v. Fields, 565 U.S. 499, 514 (2012). By refusing to apply the independent source doctrine out of a concern that it would allow law enforcement to "cure a defective warrant any time a competent search authority later agrees that probable cause existed at the time of the initial seizure," the military judge failed to appreciate this compelling societal interest, as well as the reality that the independent source doctrine does, in fact, allow law enforcement to cure defective warrants. (App. Ex. XVIII, ¶ 71.) If law enforcement learns that their initial seizure of evidence might be invalid, they can and *should* remedy their mistakes and re-seize that evidence if they have always had probable cause. *See* United States v. Hanhardt, 155 F. Supp. 2d 840, 844 (N.D. Ill. 2001) (law enforcement proactively sought a new warrant for search of a briefcase that

was illegally searched). This promotes compliance with the Fourth Amendment while also balancing society's interest in facilitating the truth-seeking function of criminal courts.

Here, the record demonstrates that law enforcement always intended to obtain the evidence via search authorization and always had the information necessary to support probable cause for such a search authorization, but were imprecise in their first attempt. This conduct is neither "sufficiently deliberate that exclusion can *meaningfully* deter it," nor "sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144 (emphasis added). Indeed, as the military judge himself recognized, "the costs of exclusion are clear, and the deterrent effect necessarily less certain." (App. Ex. IX, ¶ 83.) Under these circumstances, "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." United States v. Payner, 447 U.S. 727, 734 (1980).

For these reasons, the United States respectfully requests that this Honorable Court reverse the military judge's decision to suppress evidence from the March 2025 search and seizure of Appellee's devices. Further, the United States asks this Court to determine that the evidence is admissible and remand the case to the trial court for further proceedings.

WHEREFORE, the United States respectfully requests that this Honorable Court reverse the military judge's ruling.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial & Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 October 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on February 2, 2026, and that a copy was also electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant

CERTIFICATE OF COMPLIANCE
WITH C.A.A.F. R. 21(b) & 37

This supplement complies with the type-volume limitation of C.A.A.F. R. 21(b) because it contains 5,102 words.

This supplement complies with the typeface and type-style requirements of C.A.A.F. R. 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

JOHN M. FREDERICKS, Capt, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
John.Fredericks.2@us.af.mil
U.S.C.A.A.F. Bar No. 37723

Counsel for Appellant