IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant v. Anderson A. IXCOLGONZALEZ Lance Corporal (E-4) U.S. Marine Corps, Appellee	ANSWER ON BEHALF OF APPELLEE USCA Dkt. No. 25-0243/MC Crim. App. Dkt. No. 202400253

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

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III.

Did the Military Judge err holding that the affidavit was not incorporated where the authorization twice referenced the attached affidavit signed by the commanding officer, and where Mil. R. Evid. 315 only requires statements in support of probable cause to be "communicated," but does not require words of incorporation.

IV.

Did the Military Judge abuse his discretion when he found that law enforcement conduct was sufficiently culpable such that the exclusionary rule would meaningfully deter it?

Statement of Statutory Jurisdiction

The lower court had jurisdiction under Article 62(a)(1)(B), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction over the certified issues under Article 67(a)(2), UCMJ.[2]

Relevant Authorities

The Fourth Amendment 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.[3]

Military Rule of Evidence 311 provides in relevant part:

> (a) evidence obtained as a result of an unlawful search or seizure made by a person acting in governmental capacity is inadmissible against the accused if:
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> (1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

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[1] U.S. CONST. amend. IV.
[2] 10 U.S.C. § 867(a)(2) (2024).
[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. III (2024) [hereinafter MCM].

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

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs of the justice system.[4]

Military Rule of Evidence 315 provides in relevant part:

(a) General rule. Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization, or under the exigent circumstances described in this rule, is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces.

(d) Who May Authorize. A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in paragraphs (d)(1) [Commander], (d)(2) [Military Judge or Magistrate], and (d)(3) [Other competent search authority] of this rule.

(f)(2) Probable Cause Determination. Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule will be based upon any or all of the following:

(f)(2)(A) Written statements communicated to the authorizing official.[5]

[4] MCM, MIL. R. EVID. 311(a).
[5] MCM, MIL. R. EVID. 315.

Statement of the Case

Upon referral of the charges, Defense Counsel timely moved to suppress evidence obtained from Appellee's digital devices and derivative evidence for violations of Military Rule of Evidence (M.R.E.) 311 and the Fourth Amendment. After hearing evidence and argument on the motion, the Military Judge issued a written ruling suppressing the evidence.[6] The Government appealed the ruling pursuant to Article 62, UCMJ.[7] On review, the lower court held the Military Judge did not abuse his discretion.[8] The Judge Advocate General of the Navy then timely certified the issues presented to this Court.

Statement of Facts

The Naval Criminal Investigative Service (NCIS) assigned Agent Lawrence to investigate a National Center for Missing and Exploited Children (NCMEC) CyberTipline Report.[9] Appellee's Snapchat account became the focus of the investigation after a search of his account revealed four videos of suspected child pornography.[10]

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[6] J.A. at 000393-409.
[7] J.A. at 000025.
[8] J.A. at 000002.
[9] J.A. at 000236
[10] J.A. at 000162 (Agent Lawrence testifying that the primary basis of probable cause was the evidence found in Appellee's Snapchat account), 000236 (stating the search was done pursuant to Article 30a, UCMJ, and Rule for Courts-Martial 703A).

Agent Lawrence drafted an affidavit stating his belief that there was probable cause to associate Appellee with Snapchat account "agoku70."[11] The affidavit listed the types of digital devices he was interested in searching and the places to be searched within those devices.[12] It requested the seized items to be searched for:

- Any and all computer, mobile, or storage media devices capable of storing digital files, located in Barracks FC574, Room 301, CLNC and on IXCOLGONZALEZ's person, pertaining to suspected violations of Article 134 (possessing, receiving, or viewing of child pornography) and Article 134 (Distribution of Child Pornography) of the UCMJ;

- Snapchat social media messaging application pertaining to the mentioned violations of the UCMJ;

- Presence of the email address andersonlopez383@gmail.com;

- Child pornography images and videos pertaining to the mentioned violations of the UCMJ;

- Proof of ownership of the mobile/computer devices seized; and

- Any and all applications in which videos and photographs are stored or records thereof.[13]

[11] J.A. at 000247.
[12] J.A. at 000249.
[13] J. A. at 000250.

Agent Lawrence went to Appellee's commander with a Command Authorization for Search Seizure (CASS) and presumably the affidavit.[14] The commander signed both documents.[15] However, the CASS did not contain the particulars contained in the affidavit, nor did it specify where law enforcement could search and what they could seize from the digital devices.[16] The CASS only provided:

> [T]here is reason to believe that on the person of and/or on the premises known as: Digital devices belonging to LCpl Anderson Ixcolgonzalez, USMC and Barracks FC574, Room 301, Camp Lejeune, NC . . . there is being concealed certain property, namely: Evidence of violations of Article 134 (Possession, receiving, or viewing of child pornography) and Article 134 (Distribution of Child Pornography) of the Uniform Code of Military Justice.[17]

The CASS mentioned "affidavit(s)" twice and only in the probable cause issuance statement:

> *Affidavit(s)* having been made before me by Special Agent Daryl Lawrence . . . I am satisfied that there is *probable cause* to believe that the property so described is being concealed on the person and/or premises above described and that *grounds for application for issuance* of a command authorized search *exist* as stated in the supporting *affidavit(s)*.[18]

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[14] J.A. at 000144 (while Agent Lawrence testified he went to the commander with the CASS, he said nothing about the affidavit).
[15] J.A. at 000252, 000240, 000251.
[16] J. A. at 000252.
[17] *Id*.
[18] J. A. at 000252 (emphasis added).

Later that day, after transporting him to the NCIS field office, Agent Lawrence interrogated Appellee, who immediately invoked his right to counsel.[19] Undeterred, Agent Lawrence brought Appellee with him to execute the search at the barracks; Agent Lawrence continued to ask Appellee questions inside his barracks room, including which rack and wall locker belonged to him.[20] Agent Lawrence then seized Appellee's Apple iPhone, Motorola Cellphone, a Kingston hard drive (HD), a Seagate HD, a Western Digital (WD) HD, and a subscriber identity module (SIM) card.[21] Agent Lawrence later testified he would not have known which digital devices belonged to Appellee but for Appellee identifying them.[22] When asked at trial, Agent Lawence did not remember if he gave a copy of the CASS to Appellee.[23] He was never asked if he provided the affidavit to Appellee.[24]

Agent Lawence then submitted a request to the Department of Defense Cyber Crimes Center (DC3) Cyber Forensic Laboratory to analyze the digital

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[19] J. A. at 000144.
[20] J. A. at 000147.
[21] J. A. at 000395.
[22] J. A. at 000155-56.
[23] J. A. at 000149-50 (trial counsel asking Agent Lawence if he provided the CASS to Appellee).
[24] *Id*.

devices seized from Appellee's barracks room. Agent Lawrence requested DC3 recover and analyze the following:

- Identify items pertaining to the suspected violations of Article 134 [Possessing, receiving, or viewing Child Sexual Abuse Material (CSAM)] and Article 134 (Distribution of Child Pornography) of the Uniform Code of Military Justice;
- Snapchat messaging application pertaining to the above mentioned violations of the UCMJ;
- Presence of the email address andersonlopez382@gmail.com;
- Proof of ownership of the submitted evidence items; and
- Any and all applications in which videos and/or photographs are stored or records of.[25]

The digital analyst who performed the DC3 examination found most of the incriminating evidence on Appellee's Apple iPhone, within his Telegram account, not Snapchat.[26]

[25] J. A. at 000206.
[26] J. A. at 000206-13, 000396.

Summary of Argument

Viewing the evidence in the light most favorable to Appellee, the Military Judge did not abuse his discretion when he ruled that the CASS was facially deficient and did not incorporate the affidavit. The record supports his factual findings and application of the law. He applied the exclusionary rule reasonably because the CASS's infirmity occurred not from "a failure to appreciate a uniquely-nuanced or hyper-technical understanding of the law," but from a lack of regard for the particularity requirement. Far from a technicality, this requirement "is so basic, obvious, and fundamental to the protections guaranteed by the Fourth Amendment."[27] Thus, the Military Judge's ruling suppressing the evidence was within the range of reasonable choices available.

[27] J. A. at 000409 (quoting *Groh v. Ramirez*, 540 U.S. 551 (2004)).

Argument

I.

The Military Judge did not err by suppressing digital device evidence because the search authorization did not conform to the Fourth Amendment's particularity requirement.

Standard of Review

"A military judge's decision to exclude evidence is reviewed for an abuse of discretion."[28] In reviewing for an abuse of discretion, 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."[29] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion."[30] "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[31] Thus, the standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision

[28] *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021) (citation omitted).
[29] *Id*. (citation omitted).
[30] *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000).
[31] *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (citation omitted).

remains within that range."[32] "The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[33]

Analysis

A. Like all Fourth Amendment searches, a search authorization for a cell phone must particularly describe the place to be searched and things to be seized—even if probable cause is properly articulated.

The Fourth Amendment applies equally to the search of electronic devices.[34] Furthermore, a military search authorization "[M]ust adhere to the standards of the Fourth Amendment of the Constitution."[35]

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, 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 person or things to be seized*.[36]

The right to "be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment."[37] The particularity requirement prevents a

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[32] *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019).
[33] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations and internal quotation marks omitted).
[34] *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017).
[35] *Id*. at 369; *see also* MCM, MIL. R. EVID. 315(a) (2024) (stating "Evidence obtained from reasonable searches conducted pursuant to a . . . search authorization . . . is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution . . . .").
[36] U.S. CONST. amend. IV (emphasis added).
[37] *Groh v. Ramirez*, 540 U.S. 551, 559 (2004).

warrant from authorizing a general search.[38] This requirement also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his powers to search."[39] In sum, a warrant is unconstitutional if it does not describe with particularity the things to be seized and the places to be searched.

A search authorization specifying the alleged offense and issued upon probable cause can still violate the Fourth Amendment's particularity requirement.[40] The Supreme Court in *Stanford v. Texas* found a warrant violated the Fourth Amendment even though it identified the statutes alleged to have been violated and listed the items to seize: "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments."[41] Per the warrant, law enforcement seized and searched 300 books from the appellant's personal library, his marriage certificate, his insurance policies, household bills, and his personal correspondence files.[42] The Court held the warrant was invalid because the broad "indiscriminate sweep of the language" used did not particularly

[38] *Stanford v. Texas*, 379 U.S. 476, 485 (1965).
[39] *Groh*, 540 U.S. at 561.
[40] *Stanford*, 379 U.S. at 480.
[41] *Id*.
[42] *Id*. ("Among the books taken were works by such diverse writers as Karl Marx, Pope John XXIII, and Mr. Justice Hugo L. Black.").

describe the things to be seized.[43] Likewise, military search authorizations, which are issued upon probable cause and state the alleged UCMJ violation, can still violate the Fourth Amendment.

B. Because cell phones are the modern-day equivalent to "books, papers, and effects," search authorizations must describe the data law enforcement is authorized to search with particularity.

In *Riley v. California*, the Supreme Court recognized modern cell phones contain vast amounts of personal data.[44] "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life."[45] The data stored on a cell phone is distinguishable from physical items.[46] "[Cell phones] could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[47]

Even before *Riley*, federal circuit courts recognized the Fourth Amendment's application to digital devices. The Tenth Circuit instructed: "If the

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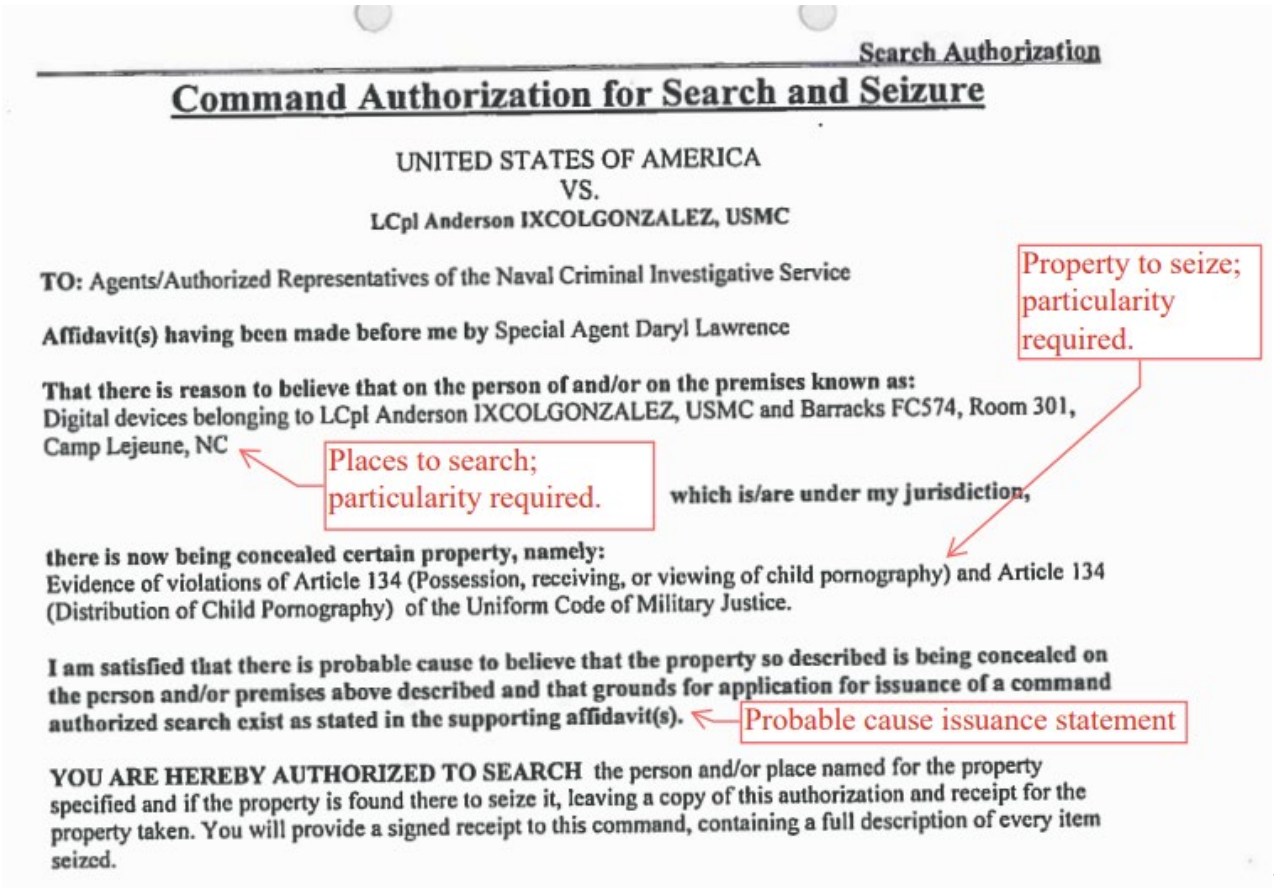
[43] *Id*. at 485.
[44] *Riley v. California*, 573 U.S. 373, 386 (2014).
[45] *Id*. at 403 (citations omitted) (quotations omitted).
[46] *Id*. at 393 (rejecting the government's assertion that searches of cell phone data are "materially indistinguishable" from searches of physical items reasoning, "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of [physical items].").
[47] *Riley*, 573 U.S. at 393.

warrant is read to allow a search of all computer records without description or limitation it would not meet the Fourth Amendment's particularity requirement."[48] And after *Riley*, the D.C. Circuit advised that officers should draft documents for digital devices with "greater particularity" when possible, to avoid Fourth Amendment challenges.[49]

This Court also held that a cell phone is an "electronic repository" that can hold a vast amount of the sorts of "'personal papers and effects' the Fourth Amendment was and is intended to protect."[50] Therefore, search authorizations for cell phones must particularly describe the types of data law enforcement is allowed to search.

To be clear, for a CASS, particularity is required in the sections describing the "person of and/or on the premises known" and "certain property" as indicated here:

[48] *United States v. Burgess*, 576 F.3d 1078, 1091 (10th Cir. 2009) (citing *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005)).
[49] *United States v. Smith*, 108 F.4th 872, 880 (D.C. Cir. 2024).
[50] *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014).



Search Authorization

Command Authorization for Search and Seizure

UNITED STATES OF AMERICA
VS.
LCpl Anderson IXCOLGONZALEZ, USMC

TO: Agents/Authorized Representatives of the Naval Criminal Investigative Service

Affidavit(s) having been made before me by Special Agent Daryl Lawrence

That there is reason to believe that on the person of and/or on the premises known as:
Digital devices belonging to LCpl Anderson IXCOLGONZALEZ, USMC and Barracks FC574, Room 301, Camp Lejeune, NC

which is/are under my jurisdiction,

there is now being concealed certain property, namely:
Evidence of violations of Article 134 (Possession, receiving, or viewing of child pornography) and Article 134 (Distribution of Child Pornography) of the Uniform Code of Military Justice.

I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and/or premises above described and that grounds for application for issuance of a command authorized search exist as stated in the supporting affidavit(s).

YOU ARE HEREBY AUTHORIZED TO SEARCH the person and/or place named for the property specified and if the property is found there to seize it, leaving a copy of this authorization and receipt for the property taken. You will provide a signed receipt to this command, containing a full description of every item seized.

[51]

C. In ruling that the CASS lacked sufficient particularity, the Military Judge and the lower court applied *United States v. Richards* reasonably.

The Military Judge correctly determined the CASS was facially deficient due to its failure to sufficiently describe: (1) the places—specific data—to be searched within Appellee's digital devices; and (2) the types of evidence (pictures, videos, and/or communications) to be seized from those devices.[52]

[51] J.A. at 000252.
[52] J.A. at 000397.

Applying *United States v. Richards*, the Military Judge reasoned that the specificity needed to satisfy the particularity requirement is "whether it was reasonable to provide a more specific description of the items at that juncture of the investigation."[53] The Military Judge noted this Court, in *Richards*, endorsed the Tenth Circuit's principle from *United States v. Riccardi* that computer search warrants "must affirmatively limit the search to evidence of specific federal crimes or specific types of material."[54] He also noted the *Richards* Court "recognized the dangers of too narrowly limiting where investigators can go.[55]

In *Richards*, this Court found the CASS satisfied the Fourth Amendment because the CASS was particular to search *communications* within the appellant's cell phone.[56] This Court stated "Searches of electronic devices must be expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent."[57] "The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation."[58] This Court stressed

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[53] *Id*. (quoting *Richards*, 76 M.J. at 369).
[54] *Id*. (citing *Richards*, 76 M.J. at 369).
[55] *Id*. (citing *Richards*, 76 M.J. at 369).
[56] *Richards*, 76 M.J. at 370.
[57] *Id.*
[58] *Id*. at 365 (quoting *United States v. Richards*, 659 F.3d 527, 541 (6th Cir. 2011)).

that the standard under the Fourth Amendment is "reasonableness" and "what is reasonable in one instance may not be so in another."[59]

Here, it was reasonable for the Military Judge to conclude that the CASS fell well short of sufficient specificity. In his thorough, seventeen-page ruling, the Military Judge relied on the fact that the affidavit supporting the CASS unambiguously provided a particularized list of the places to be searched and the things to be seized within Appellee's digital devices.[60] But Agent Lawrence's affidavit does not authorize the search—it states the grounds to issue the authorization—and the commander who authorized the search did not implement any particularity or incorporate Agent Lawrence's requested scope into the CASS. Rather, the commander issued a general warrant.

Based on the digital analyst's report, the Military Judge correctly noted the analyst conducted his search pursuant to Agent Lawrence's written request to him—not upon reliance on the CASS or the affidavit.[61] But Agent Lawrence did not have authority to define the contours of the search; only the CASS could do that, which is fundamental to the entire request-and-issuance warrant process.[62]

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[59] *Id*. at 366, 369 n.6.
[60] J.A. at 000400.
[61] J.A. at 000395-96.
[62] MCM, MIL. R. EVID. 315(d) (only an impartial, competent commander, military judge, or magistrate may authorize a search), 315(f) (the agent's role is as a person communicating the basis for the search authorization to the authorizing official).

Further, the Military Judge was correct in finding that providing a more specific description of the types of data within the Appellee's "digital devices" would not have unduly restricted the government.[63] The Supreme Court squarely held this "indiscriminate sweep" of language used to draft warrants violates the Fourth Amendment.[64] The CASS here is no different from the *Stanford* warrant because a cell phone is the modern equivalent to "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments."[65]

Notably, Agent Lawrence provided immense detail to narrow the physical location to search—"Barracks FC574, Room 301, Camp Lejeune, NC"—even though he did not have probable cause to believe Appellee had tangible items, apart from digital devices, pertaining to child pornography in his barracks room.[66] But when it came to electronics, for which he had probable cause to search, Agent Lawrence wrote "digital devices" without narrowing the location to search within the device.[67] Thus, the CASS authorized a general search of Appellee's digital devices.

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[63] J.A. at 000400.
[64] *Standford*, 379 U.S. at 486.
[65] *See Riley*, 573 U.S. at 393 ("[Cell phones] could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."); *Stanford*, 379 U.S. at 486.
[66] J.A. at 000252.
[67] *Id.*; *see also* J.A. at 000399 n.39 (Military Judge finding).

The Military Judge found several facts, supported by the record, to illustrate that at that juncture in the investigation, it was reasonable to require law enforcement to provide a specific description of the items.[68] Therefore, the Military Judge and the lower court did not err.

D. The Military Judge applied federal circuit cases reasonably.

When acknowledging this Court's holding in *Richards*, the Military Judge carefully analyzed the Sixth and Tenth Circuit cases it cited in a 346-word paragraph with eight footnotes.[69] This paragraph was only one of over thirty paragraphs in the "Conclusions of Law" section of his ruling.

The Government declaratively concludes the Military Judge abused his discretion in "relying" on *Riccardi* because the Sixth Circuit "reject[ed]" it and the Tenth Circuit "distanced itself" from it.[70] Rather, he accurately cited this Court's treatment of *United States v. Riccardi* (10th Circuit), *United States v. Burgess* (10th Circuit), and *United States v. Richards* (6th Circuit), including pertinent citations from each case.[71] He then distinguished the facts of this case from those

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[68] *See* J.A. at 000400-01 (noting the digital analyst's reliance upon Agent Lawrence's request (which was nearly identical to the affidavit), as opposed to the language on the CASS "is convincing evidence that the CASS lacked the particularity necessary").
[69] J.A. at 00399-400.
[70] Appellant's Br. at 24-26.
[71] J.A. at 000399-400.

in this Court's decision in *Richards*.[72] Contrary to the Government's implication, his ruling did not hinge on *Riccardi* in a vacuum, and he did not use that case in a way that is inconsistent with how this Court treated *Riccardi* in its *Richards* decision. He acknowledged that warrants should use as much specificity as the government's knowledge and circumstances allow (*Riccardi*), while recognizing that there is not a demand for precise *ex ante* knowledge and that a warrant does not need to structure the mechanics of the search (*Burgess* and *Richards* (6th)).[73]

The Military Judge's careful analysis of all these precedents, both binding and persuasive, was not an abuse of discretion. His conclusions that the CASS needed more particularity, and that requiring more particularity would not have unduly restricted the government's search objectives, were well within the range of reasonable choices available to him, especially when viewing the evidence in the light most favorable to Appellee.[74]

This case is not and need not be a referendum on *Riccardi*. *Richards* (CAAF), *Riccardi*, *Burgess*, and *Richards* (6th) all coalesce around finding a balance between avoiding general warrants and ensuring that warrants are not held to an unrealistic and impractical standard. The Military Judge recognized this

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[72] *Id*.
[73] *Id*.
[74] J.A. at 000400.

balance by discussing binding authority and persuasive authority from both sides. His conclusion that the CASS fatally lacked particularity because it authorized the general search of a slew of Appellee's "digital devices" with only a sole reference to Article 134 was not an abuse of discretion.

E. Unlike here, the CASS in *United States v. Shields* was particular because it authorized law enforcement to search only the appellant's communications with the victim.

The Military Judge also reasonably distinguished *United States v. Shields*.[75] The issue in *Shields* was not whether there was a lack of particularity in the search authorization; rather, it focused solely on the *methodology* in which the digital analyst executed his search pursuant to a valid warrant.[76] Whether a warrant has particularity and whether the methodology of a search exceeds the authorized scope are different issues. In *Shields*, the digital analyst chose to sort the files by size, not date.[77] The Military Judge here reasoned that neither the temporal scope, nor the methodology, were challenged.[78] Therefore, the Military Judge did not err when he acknowledged and distinguished *Shields*.

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[75] *Id*. (citing *United States v. Shields*, 83 M.J. 226, 231 (C.A.A.F. 2023)).
[76] *Shields*, 83 M.J. at 231.
[77] *Id*. at 229.
[78] J.A. at 000400.

Furthermore, the Government suggests the digital analyst in this case "stayed within the scope of the authorization."[79] But the issue at trial, and the issue before this Court, is not whether the analyst exceeded that scope. The issue is whether the CASS had any scope *at all*.

Regardless, Agent Lawrence never sent the CASS or the affidavit to the analyst.[80] Rather—demonstrating at best a reckless or at worst a conscious disregard of the law about who *requests* and who *authorizes* a search—Agent Lawrence *himself* told the analyst what he could search and where.[81] Notably, even if that informal instruction were legally valid—which it is not—the analyst still exceeded the scope outlined in the affidavit because he did not have probable cause to seize the sixty-three incriminating messages associated with Appellee's Telegram application.[82]

In sum, it is the Government's burden to prove admissibility both at trial and now in this appeal.[83] The Military Judge's conclusion that the CASS lacked

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[79] Appellant's Br. at 27-28.
[80] J.A. at 000206 (digital analyst's report stating he conducted his search pursuant to Agent Lawrence's request).
[81] *Id.*
[82] J.A. at 000396.
[83] MCM, MIL. R. EVID. 311(d)(5)(A); *see Becker*, 81 M.J. at 488 (this Court "reviews the evidence in the light most favorable to the party which prevailed at trial").

particularity in this case is reasonable considering the precedent from the Supreme Court and this Court. Accordingly, the Military Judge did not abuse his discretion.

II.

The military judge correctly ruled the good faith exception did not apply.

Standard of Review

"A military judge's decision to exclude evidence is reviewed for an abuse of discretion."[84] 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."[85]

Analysis

A. The good faith exception applies when law enforcement's actions are objectively reasonable.

The good faith exception only applies where the officer's reliance, believing that the warrant was properly issued, was objectively reasonable.[86] The central question courts ask when deciding to apply the good faith exception is: "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[87]

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[84] *Becker*, 81 M.J. at 488 (citation omitted)
[85] *Id*. (citation omitted).
[86] *United States v. Leon*, 468 U.S. 897, 922-23 (1984).
[87] *Groh*, 540 U.S. at 563.

In *Groh v. Ramirez*, the Supreme Court found the good faith exception did not apply to a situation where a warrant was invalid due to its failure to comply with the Fourth Amendment's particularity requirement.[88] The Court reiterated, "the basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are *presumptively unreasonable*" also applies to searches whose *only* defect is a lack of particularity in the warrant.[89]

In *Groh*, the warrant was deficient because it failed to describe the items to be seized. The warrant "did not simply omit a few items from a list to be seized" or make a technical mistake or typographical error.[90] By not describing the items to be seized, the warrant was so obviously deficient that the search had to be regarded as warrantless.[91] "Given that the particularity requirement is stated in the [Fourth Amendment's] text, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."[92] The Court also noted the agent could not rely on the Magistrate's assurance because he—the agent—had prepared the invalid warrant.[93]

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[88] *Groh*, 540 U.S. at 565.
[89] *Id*. at 563.
[90] *Id*. at 558.
[91] *Id*.
[92] *Id*. at 563.
[93] *Id*. at 563-64.

Conversely, the Supreme Court applied the good faith exception in *Massachusetts v. Sheppard*.[94] There, the Court determined there was an objectively reasonable basis for the officer's mistaken belief that the warrant authorized the search.[95] The Court noted "the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid."[96] The Court noted that the officer took every step reasonably expected of him. There, the officer: (1) prepared an affidavit; (2) the district attorney reviewed the affidavit; (3) a judge concluded the affidavit established probable cause; (4) the officer told the judge the warrant might need to be changed; (5) the officer saw the judge make changes to the warrant; and (6) the judge told the officer the warrant was valid.[97] Ultimately, the Court found that the judge rendered the warrant invalid—not the police officer.[98] Thus, the good faith exception applied.

In *United States v. Seerden*, the Fourth Circuit held that the good faith exception applied as it was objectively reasonable that the NCIS agents relied on the subsequently invalid CASS.[99] In *Seerden*, NCIS consulted staff judge

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[94] *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).
[95] *Id.* at 987-88.
[96] *Id.*
[97] *Id*.
[98] *Id.* at 990.
[99] *United States v. Seerden*, 916 F.3d 360, 368 (4th Cir. 2019).

advocates (SJAs) on two bases regarding which commander had the proper jurisdiction to issue a search authorization under M.R.E. 315(d).[100] The court held that is was objectively reasonable that NCIS relied upon the search authorization because both NCIS and the commanders consulted with SJAs per military procedure, and it was objectively reasonable that they misinterpreted the M.R.E., which the court characterized as having "no bastion of clarity."[101] Thus, the good faith exception applied.

B. Agent Lawrence's actions were not objectively reasonable.

The Military Judge's decision not to apply the good faith exception was reasonable because the CASS was facially invalid. Here, the Military Judge cited key Supreme Court precedent addressing this concept. In doing so, he noted the four circumstances where the good faith exception does not apply.[102] Specifically, suppression is appropriate "where the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."[103] That is precisely the situation here—Agent Lawrence failed in his duty to ensure the search was

[100] *Id.* at 367.
[101] *Seerden*, 916 F.3d at 367.
[102] J.A. at 000397 (citing *Leon*, 468 U.S. at 923) (citations omitted).
[103] *Id*.

lawfully authorized and lawfully conducted.[104] The Military Judge squarely applied that analogous scenario.

The Military Judge was correct to apply *Groh* and presume the search conducted pursuant to the invalid CASS was unreasonable. The present case does not involve a judge who thoughtfully made edits to the agent's warrant, as seen in *Sheppard*; or a scenario in which the Agent Lawrence and Appellee's commander consulted with SJAs, as seen in *Seerden*.

Rather, Agent Lawrence handed Appellee's commander a general warrant to sign.[105] Agent Lawrence drafted a detailed affidavit—effectively acknowledging that there were logical subject matter and temporal restrictions (that he did not include in the warrant). Appellee's commander made no changes to the CASS. The record is devoid of any facts to suggest Agent Lawrence mistakenly concluded that his conduct complied with the Fourth Amendment. In fact, the Military Judge properly considered this and correctly noted the record provided no evidence that Agent Lawrence and the digital analyst relied upon Appellee's commander's assurance that the CASS provided authority to search in a manner consistent with

[104] *Groh*, 540 U.S. at 563 ("It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted.").
[105] The staff judge advocate did not testify at trial and Agent Lawence did not testify that he sought advice from any attorney.

the supporting affidavit.[106] This is not good faith. Thus, the Military Judge did not abuse his discretion when he ruled the good faith exception did not apply.

The Government, relying on *United States v. Leedy*, argues that the good faith exception should apply because "there is no evidence that the Commanding Officer had a generalized proclivity towards simply conceding search requests to investigators."[107] But this is misplaced because the issue in *Leedy* concerned probable cause. And here, there is no evidence of the commander's proclivity—generalized or not—because he did not testify despite the Government's burden.

In *Leedy*, the chief of military justice determined probable cause existed based on an eye-witness statement.[108] Then, an investigator prepared an affidavit requesting search authorization and presented it to the base military magistrate.[109] At trial, the appellant argued the good faith exception did not apply partly because the magistrate did not perform his duties in a neutral and detached manner by deferring to the investigator.[110] The government argued there was a substantial basis upon which the magistrate could have found probable cause under the totality of the circumstances.[111] Specifically, the evidence showed the magistrate closely

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[106] J.A. at 000407.
[107] Appellant's Br. at 30-31.
[108] *Id.* at 211.
[109] *Id*.
[110] *Id*. at 212.
[111] *Id*.

read the affidavit and questioned the investigator for more than twenty minutes.[112] This Court upheld the warrant because the record demonstrated that the magistrate was mindful of his duties and sufficiently detached from the investigator.[113] Thus, there was sufficient probable cause to issue the *Leedy* warrant.

Here, the record is devoid of practically any evidence to demonstrate Appellee's commander was sufficiently detached. The Government—who carries the burden—did not call Appellee's commander or the digital analyst to testify at trial. When testifying, Agent Lawrence did not provide any details surrounding his conversation with Appellee's commander.[114] The only detail Agent Lawrence provided was that he went to the commander with a CASS "to search Appellee's barracks room and his person *for his electronic devices*," which is not an accurate description of the CASS.[115]

There is no evidence in the record to suggest Appellee's commander closely read the documents or discussed them with Agent Lawrence. Accordingly, the Military Judge was correct to infer Appellee's commander may not have acted in a

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[112] *Id*. at 217-18.
[113] *Id*. at 218.
[114] *See* J.A. at 000143-44.
[115] *compare id*. (emphasis added), *with* J.A. 000252 (CASS authorizing a search of Appellee's digital devices).

neutral and detached manner and may have signed the documents without any review.[116]

The Government also suggests that Agent Lawrence and the digital analyst "reasonably believed that the commanding officer had a 'substantial basis' to find probable cause" and "reasonably relied on the CASS."[117] But the Supreme Court explicitly rejected this argument in situations where the agent prepared the invalid warrant.[118] Again, the Government misidentifies the issue. It is not whether there was probable cause; it is whether an experienced NCIS agent acted in good faith in relying on a general warrant that he authored and then asked the commander to sign. The Military Judge correctly noted that the analyst conducted his search "per Agent Lawrence['s]" informal, *independent* request.[119] Thus, Agent Lawrence and the digital analyst did not rely on the commanding officer's probable cause determination or the CASS.

The good faith exception exists to encourage, or at least not discourage, reasonable police practices in light of technical or ministerial errors. Here, an agent

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[116] J.A. at 000408-09.
[117] Appellant's Br. at 31-33.
[118] *Groh*, 540 U.S. at 563-64.
[119] *Compare* J.A. at 000206 (digital analyst's report stating he analyzed the devices "pursuant to the . . . request submitted by . . . Special Agent Daryl Lawrence"), *with* J.A. at 000396 (Military Judge's ruling noting the guidance provided to the digital analysts is "nearly identical to the specified list included within [Agent] Lawrence's affidavit") (emphasis added).

who was aware of the particularity required for a warrant consciously decided to request far more scope than he knew he needed.[120] He succeeded in obtaining a general warrant and then dragged Appellee who had invoked his right to counsel with him and asked eliciting questions to find the items he wanted to search. He then informally directed his colleague, the digital analyst, to search multiple devices but never sent him the CASS. All the while, binding Supreme Court precedent states that the law imposed on this agent the knowledge that this general warrant violated the Fourth Amendment.[121] The Military Judge's conclusion of the same was well within his range of reasonable choices.

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[120] To become an NCIS Special Agent, every trainee is required to complete the Criminal Investigator's Training Program (CITP) at the Federal Law Enforcement Training Center (FLETC) and Special Agent Basic Training Program. *Careers: Special Agents*, Naval Criminal Investigative Service, https://www.ncis.navy.mil/Careers/Special-Agents/ (last visited Nov. 4, 2025). The CITP curriculum includes a dedicated legal "section" that reviews and advises on Constitutional Law, Federal Criminal Law, and the Fourth Amendment among other foundational legal principles and protections. *Criminal Investigator Training Program*, Federal Law Enforcement Training Centers, https://www.fletc.gov/criminal-investigator-training-program (last visited Nov. 4, 2025).

[121] *Groh*, 540 U.S. at 564-65 ("No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. Indeed, as we noted nearly 20 years ago in *Sheppard:* 'The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.' Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot

The Government now desires to argue that Agent Lawrence acted reasonably and in good faith. But it failed to ask him questions to establish that and failed to call the commander or the analyst. The Government's unsupported inferences are not persuasive and cannot prevail where it was the Government's burden at trial, and where this Court must view the evidence (or lack thereof) in the light most favorable to Appellee.

Finally, the Government argues Appellee waived the issue regarding whether the commander "rubber stamp[ed]" the CASS.[122] On the contrary, Appellee responded to the same "rubber stamp" argument the Government made to the lower court.[123] Therefore, Appellee preserved this issue. Regardless, if this Court disagrees, because Appellee prevailed at trial and in the lower court, "An *appellee* or respondent may defend the judgment below on a ground not earlier aired."[124] While the Government's assertions of waiver are unsupported in both fact and law, it is even more alarming that the Government takes this position

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reasonably have relied on an expectation that we would do so.") (quoting *Sheppard*, 468 U.S. at 988, n.5) (citations omitted).

[122] Appellant's Br. at 30-31.

[123] J.A. at 000076-77 (Appellee's argument at the lower court that the commanding officer may not have acted neutral and detached), *see also id*. at n.73 (citing Appellant's lower court brief arguing the commanding officer did not "rubber stamp" the CASS).

[124] *Greenlaw v. United States*, 554 U.S. 237, 250, n.5 (2008) (emphasis added).

when, barely one year ago, it cited this same rule of appellate law to this Court to argue against waiver when *it* was an *appellee*.[125]

In sum, the Fourth Amendment's most *basic* principle supports the Military Judge's decision. He reasoned that the Fourth Amendment's particularity requirement "is not the product of some hyper-technical legal interpretation of Fourth Amendment jurisprudence."[126] He provided thorough factual support from the record in his written ruling that was not clearly erroneous.[127] And his decision not to apply the good faith exception was within the range of reasonable choices: he relied on binding, analogous precedent to determine that a reasonable law enforcement officer would not believe that a CASS that plainly failed to comply with the Fourth Amendment's particularity requirement was valid. Therefore, the Military Judge did not abuse his discretion, and the lower court did not err in upholding his ruling.

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[125] Brief on Behalf of Appellant/Cross-Appellee, at 9, *United States v. Harborth*, Nos. 24-0124, 24-0125, 2025 CAAF LEXIS 436, __ M.J. __, (C.A.A.F. 2025) (citing *Greenlaw*, 554 U.S. at 250, n.5).

[126] J.A. at 000407.

[127] *Id.* (noting "there is no evidence that Agent Lawrence or [the digital analyst] relied upon the commanding officer's assurance that the CASS provided authority to search in a manner consistent with the supporting affidavit or in a manner consistent with how [the digital analyst] conducted the search").

III.

The Military Judge correctly ruled that the CASS did not incorporate the affidavit because boilerplate language is insufficient for incorporation.

Standard of Review

"A military judge's decision to exclude evidence is reviewed for an abuse of discretion."[128] 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."[129]

Analysis

A. Express words are required to incorporate an affidavit into a CASS.

1. The Supreme Court has rejected use of boilerplate language.

The Fourth Amendment does not prohibit a warrant from cross-referencing other documents so long as: (1) *appropriate words of incorporation are used*; and (2) the supporting document accompanies the warrant when served.[130]

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[128] *Becker*, 81 M.J. at 488 (citation omitted).
[129] *Id*.
[130] *Groh*, 540 U.S. at 557-58 (citations and quotations omitted).

Incorporation is not a mere technicality; it is important because the affidavit is not an extension of the warrant and does not define the scope of the warrant.[131]

In *Groh v. Ramirez*, the Supreme Court rejected the notion that the warrant's language regarding probable cause was enough to incorporate the affidavit by reference.[132] Probable cause and particularity are separate aspects of the Fourth Amendment, and the warrant's acknowledgement of the source of probable cause is not read to also incorporate particularity into an otherwise general warrant.[133] The warrant in *Groh* failed to state which items law enforcement was authorized to seize.[134] Like here, law enforcement in *Groh* described the items in an application.[135] But the Court stated, "The fact that the *application* adequately described the things to be seized does not save the *warrant* from its facial invalidity."[136] Therefore, boilerplate references to an affidavit stating the

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[131] *United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985) ("The traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant. . . .").
[132] *Groh*, 540 U.S. at 554-55.
[133] *Id*. at 557 ("The presence of a search warrant serves a high function and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection.") (citations omitted).
[134] *Id*. at 554.
[135] *Id*. at 555.
[136] *Id*. at 557 (emphasis added).

commanding officer found probable cause are insufficient to incorporate the affidavit and cure the warrant's facial invalidity.

Here, the Military Judge properly ruled the CASS did not incorporate the affidavit because it omitted words of incorporation.[137] The Supreme Court precedent in this area is clear: "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents."[138] The Military Judge reasonably applied this clear requirement. His written ruling properly identified *Groh's* two-part test to determine whether a supporting document is incorporated into the terms of a warrant.[139] This is the test used in *United States v. Armendariz* and remains good law despite this Court's reversal on other grounds.[140]

The Military Judge reasonably drew on Supreme Court precedent when finding that the CASS's probable cause statement did not incorporate the

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[137] J.A. at 000405.
[138] *Groh*, 540 U.S. at 557.
[139] J.A. at 000402 (Military Judge's finding: "In order for the text of the supporting affidavit to be incorporated into the terms of the CASS the following two requirements must be established: (1) the affidavit accompanies the warrant [when served]; and (2) the warrant uses suitable words of reference which incorporate the affidavit therein.") (quoting *Groh*, 540 U.S. at 557-58).
[140] *See United States v. Armendariz*, 79 MJ. 535, 554-55 (N-M. Ct. Crim. App. 2019), *rev'd on other grounds*, 80 M.J. 130 (C.A.A.F. 2020); *see also* J.A. at 000404 n.63 (Military Judge's Ruling).

affidavit.[141] Notably, the boilerplate language here refers to "affidavit(s)," but there was only one affidavit in this case. Regardless, the boilerplate section where the CASS does mention the affidavit solely speaks to the finding of probable cause.[142] However, the section where particularity was required (i.e., the "places to be searched") makes no reference to, or incorporation of, the affidavit whatsoever.[143]

And the United States conceded before the Fourth Circuit earlier this year that this boilerplate language is insufficient to incorporate an affidavit into a military CASS.[144] The trial counsel prosecutes the case "in the name of the United States."[145] The Government now takes a different approach but provides no compelling case law or argument supporting its reversal. In *Ray*, the agent wrote "See Attachment (A)" on the "*affidavit* for Search Authorization."[146] But he did not include similar language on the one-page CASS.[147] That is exactly what happened here.[148] The Fourth Circuit upheld the district court's order granting the

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[141] J.A. at 000405 (referencing *Groh*).
[142] *See* J.A. at 000252.
[143] *See* J.A. at 000252.
[144] *United States v. Ray*, 141 F.4th 129, 149 (4th Cir. 2025) (Rushing, J., dissenting) (The district court determined that this language was insufficient to properly incorporate the affidavit into the CASS, a finding no one disputed on appeal.).
[145] Art. 38, UCMJ, 10 U.S.C. §838 (2024).
[146] *Ray*, 1141 F.4th at 143 (emphasis added).
[147] *Id.* at 143-44.
[148] *Compare* J.A. at 000252 (the CASS) *with* J.A. at 000240 (Affidavit for search authorization stating "See Attachment A" as grounds to authorize).

accused's motion to suppress because—among other reasons—the CASS did not incorporate the affidavit.[149] This Court should find the Fourth Circuit's conclusion particularly persuasive. The Military Judge reasonably applied *Groh* and his conclusion, which the Fourth Circuit and even the Department of Justice agreed, was within the range of reasonable choices available to him.

The Government contends that the lower court had no basis for finding that the CASS's reference to "affidavit(s)" in the issuance statement failed to incorporate the affidavit.[150] Yet the Supreme Court in *Groh* and the Fourth Circuit in *Ray* provides that very basis.

The Eighth Circuit also endorsed the notion that referencing the source of probable cause is not the same thing as affirmatively incorporating particularity from an affidavit.[151] In *United States v. Strand*, the Eight Circuit found the language in the warrant's probable cause issuance statement was not enough to incorporate the affidavit: "affidavit(s) [have] been made" and "grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s)."[152] The CASS here used the same language, referencing the

[149] *Ray*, 141 F.4th at 131.
[150] Appellant's Br. at 45.
[151] *See* Appellant's Br. at 47 (arguing the lower court wrongly applied *Strand*).
[152] *Strand*, 761 F.2d at 453.

"affidavit(s)" as the grounds to issue the CASS.[153] But that is not enough to incorporate the affidavit into the CASS. Therefore, this Court should also find the Eighth Circuit's conclusion persuasive.

The Government's reliance on *Baranski v. Fifteen Unknown Agents of the BATF* is misplaced because there the warrant properly incorporated the affidavit by reference. Law enforcement wrote "See Attached Affidavit" on the search warrant in the proper place—where the things to be seized are described.[154] Here, the warrant mentions supporting "affidavit(s)" in the paragraph regarding probable cause.[155] Thus, *Baranski* is distinguishable from the present case.

Viewing the evidence in the light most favorable to Appellee, finding a lack of incorporation under these circumstances was well within the range of reasonable choices available to the Military Judge.

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[153] J.A. at 000252.
[154] *Baranski v. Fifteen Unknown Agents of the BATF*, 452 F.3d 433, 436 (6th Cir. 2006).
[155] J.A. at 000252.

2. This Court should give clear guidance to law enforcement and commanders in the field and fleet.

This Court should provide clear guidance that (1) the Fourth Amendment requires a CASS for digital devices to particularly describe the place to be searched and the things to be seized; (2) to follow Supreme Court precedent—that references to "affidavit(s)" in the issuance statement is not enough to incorporate an affidavit; and (3) encourage law enforcement and commanders to utilize the legal resources available.

The Government urges this Court to reject guidance to the field and fleet that would require "officials to unbold and re-type anew language."[156] But the Government again misidentified the issue that needs fixing. Law enforcement must either state—with particularity—what to search and seize in the proper sections of the CASS or use sufficient words of incorporation.

Furthermore, all "O-5 and O-6 commanding officers, executive officers, and senior enlisted leaders/advisors" in the United States Navy are required to complete legal training at the Naval Justice School.[157] In addition to attending the

[156] Appellant's Br. at 45 (citations omitted).
[157] *Senior Leader Legal Course (SLLC)*, Navy JAG Corps, https://www.jag.navy.mil/about/organization/ojag/njs/ curriculum/soc/ (last visited Nov. 5, 2025).

legal training, commanders are equipped with United States Navy/United States Marine Corps Commander's Quick Reference Legal Handbook (QUICKMAN).[158] The QUICKMAN devotes an entire section to search and seizure.[159] In alignment with the Fourth Amendment's requirements, the QUICKMAN clearly lays out that a search authorization must be authorized by a neutral commanding officer (CO) and the CO may not "rubber stamp another's probable cause determination."[160] There is a "SEARCH AND SEIZURE BEST PRACTICES" section that instructs COs to "consult [their] staff judge advocate prior to authorizing a search."[161]

And there is a checklist COs can use to fool-proof the process.[162] The checklist reiterates the "requirement of specificity" and that "[n]o valid search authorization will exist unless the place to be search and the items to be sought are *particularly described*."[163] The checklist provides a bullet point list of the details to be included when describing the person and place to be searched, and directs COs to "be as specific as possible, with great effort to prevent the area which is being

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[158] *USN/USMC Commander's Quick Reference Legal Handbook (QUICKMAN)* (June 2025), https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/QUICKMAN_-_June_2025_Update.pdf (last visited Nov. 5, 2025).
[159] *Id*. at 16-17.
[160] *Id*. at 17 (emphasis added).
[161] *Id*. at 16-17.
[162] *Id*. at 173-74.
[163] *Id*. 174 (emphasis added).

authorized for search from being too broad, giving rise to the possible claim that the search is just an illegal 'fishing expedition.'"[164]

This Court should endorse the reasonable guidance that the authorizing official make clear what he is authorizing and what he is incorporating. When he uses boilerplate forms from decades ago (that pre-date *Groh*)—he and the government do so at their peril. Ensuring that a warrant satisfies the particularity requirement "is not a duty to proofread; it is, rather a duty to ensure that the warrant conforms to constitutional requirements."[165] Such a duty is a "constitutional safeguard" not an "unreasonable hurdle."[166] These requirements serve to protect against rogue agents, perfectly aware of the particularity and scope of their probable cause, from asking for—and then executing—general warrants. If the commanders are truly neutral, detached, and impartial, they serve as a check, as magistrates and judges do in the civilian system.

[164] QUICKMAN at 174.
[165] *Groh*, 540 U.S. at 553.
[166] *Id*.

B. At trial and in the lower court, the Government conceded that incorporation *is necessary*.

The Government—for the first time—now argues in the alternative that incorporation is *not* necessary.[167] The Government bases its argument on Judge Gannon's dissent in the lower court.[168] This Court should, as it has in the past, decline to entertain this untimely argument.[169] It should particularly do so here because the Government did not just miss an argument. Here, it consciously and declaratively took the *opposite* position at the lower court.[170]

Even more, Judge Gannon's dissenting opinion, while thought provoking, is an entirely novel approach. Before his dissenting opinion, no military case held that the Fourth Amendment's particularity requirement applies any differently in the military than it does in the civilian courts. Rather, this Court held the opposite in *Richards*, which the lower court explained in answering Judge Gannon's

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[167] Appellant's Br. at 49-50.
[168] J.A. at 000016.
[169] *See United States v. Gilmet*, 83 M.J. 398, 408 (C.A.A.F. 2023) (declining to entertain the government's untimely argument that it failed to raise in the lower court) (citing *Giordenello v. United States*, 357 U.S. 480, 488 (1958); *United States v. Muwwakkil*, 74 M.J. 187, 191-92 (C.A.A.F. 2015)).
[170] J.A. at 000040-44 (government's brief at the lower court arguing and concluding that "the [CASS] incorporated the affidavit"), J.A. at 000195-96 (government acknowledging they are also making the argument that the military judge "should consider [] the affidavit as incorporated within the face of the warrant").

dissent.[171] Surely, the Military Judge cannot have abused his discretion in ruling that the particularity requirement applies to the military in reliance on this Court's binding precedent.[172]

Moreover, the record does not support Judge Gannon's view and the Government's new argument. M.R.E. 315(f) permits written statements to determine *probable cause*.[173] Written statements contained in an affidavit are not an extension of the warrant and do not define the warrant's scope.[174] The issue in this case is unrelated to the probable cause determination. Rather, the issue here is one of *incorporation* because the CASS did not particularly describe the place to be searched and the things to be seized.

Accordingly, the commanding officer's probable cause determination pursuant to M.R.E. 315(f) was not at issue before the trial court, the lower court, or

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[171] J.A. at 000010 n.45 (citing *Richards*, 76 M.J. at 369).
[172] *See* Art. 36, UCMJ, 10 U.S.C. § 836 (2024) (stating procedures for cases triable by courts-martial "may be prescribed by the President by regulations which *shall*, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts"); *Ortiz v. United States*, 585 U.S. 427, 437-38 (2018) ("Military courts are in strict accordance with a body of federal law (of course including the Constitution)."); *United States v. Seerden*, 916 F.3d 360, 365 (4th Cir. 2019) ("The Military Rules of Evidence cannot usurp the Fourth Amendment.").
[173] MCM, MIL. R. EVID. 315(f)(2)(A).
[174] *Strand*, 761 F.2d at 453 ("The traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant. . . .").

this Court. The Military Judge properly examined whether the CASS incorporated the affidavit, and, relying on Supreme Court precedent, concluded it did not. Viewed in the light most favorable to Appellee, the Military Judge did not abuse his discretion.

IV.

The military judge did not err in applying the exclusionary rule.

Standard of Review

This Court reviews a military judge's application of the exclusionary rule with respect to the appreciable deterrence test or balancing test for a "'clearly unreasonable' exercise of discretion."[175] 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."[176]

Analysis

M.R.E. 311(a) codified the exclusionary rule and provides:

> (a) evidence obtained as a result of an unlawful search or seizure made by a person acting in governmental capacity is inadmissible against the accused if:
> (3) *exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs of the justice system*.[177]

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[175] *United States v. Lattin*, 83 M.J. 192, 198 (C.A.A.F. 2023) (citation omitted) (explaining this standard provides less deference than the clear-error standard).
[176] *Becker*, 81 M.J. at 488 (citation omitted).
[177] MCM, MIL. R. EVID. 311(a) (emphasis added).

The exclusionary rule serves to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systemic negligence."[178] And is "designed to safeguard Fourth Amendment rights" and incentivize law enforcement not to violate the Fourth Amendment.[179] Courts must implement the exclusionary rule as a means to discourage general searches of digital devices.[180] The rule applies when deterrence is substantial enough to outweigh any harm to the judicial system.[181] "The prosecution has the burden of proving by a preponderance of the evidence . . . that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence."[182]

The Military Judge in this case acted well within the options available to him given the facts of this case when he applied the exclusionary rule. He identified that personal cell phones raise powerful Fourth Amendment concerns because of their ability to hold data pertaining to every aspect of an individual's existence.[183]

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[178] *Davis v. United States*, 564 U.S. 229, 237 (2011).
[179] *Id*. at 197 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).
[180] *Riley*, 573 U.S. at 403 (explaining modern cell phones hold "the privacies of life") (citation omitted).
[181] *Id*. (citations omitted).
[182] MCM, MIL. R. EVID. 311(d)(5)(A).
[183] J.A. at 000408 (citing *Riley*, 573 U.S. at 395).

He then cited the correct legal test for the exclusionary rule, applied the test, and explained his reasoning.[184]

There is no reasonable justification for Agent Lawrence's actions in this case—he is a highly experienced agent. In his affidavit, he detailed his background, training, and specialized knowledge of smartphones and Snapchat extensively.[185] At the time of the investigation, he had over 400 hours of NCIS training and over ten years of experience as a detective prior to NCIS.[186] He knew the scope and limits of the probable cause he had based on the information from the NCMEC report; he knew the incriminating evidence was limited to *photos* and *videos* and such evidence would be found in Appellee's Snapchat account.[187] Rather than limiting his search to photos and videos within Snapchat, Agent Lawrence presented the commander with a general warrant to search Appellee's digital devices carte blanche.

Even worse, Agent Lawrence advised the digital analyst to "identify *items* pertaining to [child pornography]."[188] This guidance went beyond the scope stated

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[184] J.A. at 000408 (stating that "this [c]ourt must consider whether exclusion of the evidence results in appreciable deterrence of unlawful searches or seizures and whether the benefits of such deterrence outweigh the costs to the judicial system").
[185] J.A. at 00242-46.
[186] J.A. at 000241.
[187] J.A. at 000250 (emphasis added).
[188] J.A. at 000206 (emphasis added).

in his affidavit, which established probable cause to searching only for "images and videos."[189] As a result, the digital analyst's rummaging uncovered evidence of other potential crimes—sixty-three communications in Appellee's Telegram application.[190]

His actions reveal a blatant disregard for the Fourth Amendment's particularity requirement and a concerning display of his misunderstanding of the scope of his authority. Thus, excluding the evidence in this case serves as a compelling deterrent to future unlawful searches and this deterrence outweighs the resulting cost to the justice system. To hold otherwise essentially grants law enforcement complete freedom to act independently when it comes to drafting search authorizations, devoid of particularity, and then conducting unreasonable searches based on those general search authorizations.[191]

This Court should uphold the military judge's ruling as it did in *United States v. Lattin*, which involved a similar general warrant.[192] Unlike Agent Lawrence, the agent there testified to the reasoning behind her actions.[193] When

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[189] J.A. at 000250.
[190] J.A. at 000206.
[191] *Lattin*, 83 M.J. at 204 (Ohlson, C.J., dissenting).
[192] *Id*. at 194 (stating the Air Force Court of Criminal Appeals (AFCCA) held the search violated the Fourth Amendment because the search authorization was overbroad. This Court granted review to determine "Whether the [AFCCA] erred when it did not apply the exclusionary rule.").
[193] *Id*. at 195.

applying the balancing test, this Court found that "The high costs of excluding the evidence are undisputed, and while exclusion of the evidence may produce some future deterrence, the degree of this future deterrence is subject to reasonable disagreement."[194] This Court upheld the military judge's ruling because it "[could] not say that the military judge's decision [not to apply the exclusionary rule] was clearly unreasonable."[195]

Here, in an Article 62 posture, the Military Judge—just like the judge in *Lattin*—reasonably outlined and applied the law. This Court should likewise find that the Military Judge acted well within his reasonably available options. Like *Lattin*, this Court should consider this not as a "one-sided" issue, but one that is within the "judgment" of the trial judge.[196] The Military Judge carefully applied the rationale behind the exclusionary rule to determine Agent Lawrence's actions warranted deterrence. Therefore, this Court should give the same deference to the Military Judge as it did in *Lattin*, regardless of the result.

When he testified at trial, Agent Lawrence did not explain the process he used to obtain the CASS, whether a judge advocate reviewed the CASS, or whether a judge advocate was present when he briefed Appellee's commander. On

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[194] *Lattin*, 83 M.J. at 199.
[195] *Id*.
[196] *Id*. at 198-99 ("[W]eighing the benefits of deterrence against the cost to society is more a question of judgment than an issue of fact.").

the contrary, when asked about the process used to obtain the CASS, Agent Lawrence testified that he presented the CASS to Appellee's commander—and said nothing more.[197] In fact, the Government, who holds the burden, did not call Appellee's commander to testify on the suppression motion. The Court should deter this reckless and negligent conduct.

The Government urges this Court to apply *United States v. Shields* and defer to the expertise and methodology the digital analyst in that case used.[198] But the Government's reliance on *Shields* is misplaced. In *Shields*, this Court deferred to the search methodology when determining whether the search *violated* the Fourth Amendment—not for the purposes of applying the exclusionary rule.[199] *Shields* did not implicate the exclusionary rule.[200] Accordingly, *Shields* does not provide guidance on how courts should apply the rule to a facially invalid CASS.

Here, exclusion is necessary and warranted to deter future unlawful searches and outweighs the costs to the justice system. As the *Lattin* dissent notes, this case provides a straightforward example of a blatantly unconstitutional general warrant issued by law enforcement. This is precisely the type of "wide-ranging exploratory

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[197] J.A. at 000143-44.
[198] Appellant's Br. at 57-58, s*ee also* Appellant's Br. at 56-57 (arguing "the lower court relied on the Military Judge's incorrect application of law . . . .").
[199] *Shields*, 83 M.J. at 233-34.
[200] *Id*. at 235.

search [that] the Framers intended to prohibit."[201] The Military Judge thoroughly explained the deterrent benefit not just for the current case, but for law enforcement and commanding officers in the future.[202] Therefore, the Government has not met its burden to prove the exclusionary rule does not apply.

Viewing the evidence in the light most favorable to Appellee, the Military Judge's decision to exclude the evidence was not clearly unreasonable, and the lower court did not err in upholding his ruling.

Conclusion

Appellee respectfully requests this Honorable Court affirm the lower court's ruling.

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[201] *Lattin*, 83 M.J. at 199-200 (Ohlson, CJ., dissenting) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

[202] J.A. at 000408-09 (reasoning that excluding the evidence will deter law enforcement agent from failing to adhere to the particularity requirement. And deterrence is vital in cases "like this" where the CASS permits a general search of a personal cell phone (that contains data pertaining to every aspect of an individual's existence)).

Respectfully submitted.

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