IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant v. Roberto ARMENDARIZ, Master Sergeant (E-8) Yeoman (E-3) U.S. Marine Corps, Appellee	)	BRIEF OF UNIVERSITY OF CHICAGO LAW STUDENTS IN SUPPORT OF APPELLANT Crim. App. Dkt. No. 201700338 USCA Dkt. No. 19-0437/MC

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Statement of Statutory Jurisdiction

Appellant's Statement of Statutory Jurisdiction is accepted.

Statement of the Case

Appellant's Statement of the Case is accepted.

Statement of Facts

Appellant's Statement of Facts is accepted.

Statement of Interest

Pursuant to Rule 13A of the Court's Rules of Practice and Procedures this brief of student practitioners in Support of Appellant is filed by invitation of the Court.

Summary of Argument

This Court should reverse the lower court's ruling and affirm the military judge's denial of the motion to suppress evidence from the searches. The lower court erred by adopting an overly formalistic "all-or-nothing" test to assess devolution of command authority. The lower court also misapplied the abuse of discretion standard of review in rejecting the military judge's factual findings, which were not clearly erroneous. Applying the proper functional test to the facts of this case, command authority to authorize searches devolved to Maj CB.

Even if this Court finds that Maj CB did not have authority to authorize searches, the lower court erred in concluding that the good-faith exception, as codified in Military Rule of Evidence ("MRE") 311(c)(3), did not apply to the NCIS agents' objectively reasonable belief that Maj CB had legal authority to authorize the searches. This court has consistently interpreted MRE 311(c)(3) in line with civilian precedent. Thus, the competent authority prong of 311(c)(3) includes a reasonable belief standard, because civilian courts have made it clear that law enforcement's reasonable belief—not the manner in which the Fourth Amendment

was violated—is what matters for the good-faith exception. Because the NCIS agents reasonably believed that Maj CB was competent to issue the authorization, the good-faith exception applies.

Finally, even if this Court concludes that the good-faith exception does not apply, the lower court erred in applying the exclusionary rule, because it failed to properly weigh the costs to the justice system against the deterrent value of exclusion as required by *Davis v. United States*, 564 U.S. 229, 238 (2011). The deterrent value of exclusion is low, because the agents did not act culpably. The costs of exclusion, however, are substantial, given that evidence of sexual assault is difficult to preserve and that sexual assaults are prevalent in the military. The lower court overstated the deterrent value of exclusion by improperly considering deterrence to commanders and by examining various alleged errors—like scrivener's errors—that are unrelated to the alleged Fourth Amendment violation.

Argument

I. APPELLEE ADVANCES AN ILLOGICAL STANDARD OF REVIEW THAT IGNORES THIS COURT'S CLEARLY ESTABLISHED STANDARD FOR REVIEWING EVIDENTIARY RULINGS.

This Court reviews a military judge's ruling on a motion to suppress evidence for abuse of discretion. *United States v. Eppes*, 77 M.J. 339, 344 (C.A.A.F. 2018). The lower court cited the correct standard of review but erred in its application of that standard. Whether a lower court properly applied a standard of review is a

question of law that is reviewed *de novo*. Yet Appellee claims this Court should apply an abuse of discretion standard to the lower court's abuse of discretion review of the military judge. Thus, Appellee asks for two levels of abuse of discretion review. This is illogical and inconsistent with this Court's precedent.

A. Whether a lower court properly applied the abuse of discretion standard is a question of law that is reviewed *de novo*.

The application of a standard of review is an application of law, and questions of law are reviewed *de novo*. *See United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996). This unremarkable yet sometimes overlooked principle describes a basic function of tiered appellate review: an appellate court first applies a standard of review for a trial court's ruling, then a higher appellate court determines whether that standard was applied correctly. *Id.* (citing Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S. Dak. L. Rev. 468, 482–83 (1988)).

This Court has consistently asserted its own *de novo* review when reviewing a lower court's application of the abuse of discretion standard for evidentiary rulings. *See United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015) ("This Court reviews the military judge's . . ."); *Eppes*, 77 M.J. at 344 ("We review . . ."); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Thus, *this Court* focuses on the ruling of the military judge to determine whether the lower court was correct as a matter of law in its application of the abuse of discretion standard.

B. In reviewing for abuse of discretion, this Court accepts a military judge's factual findings unless they are clearly erroneous and reviews conclusions of law *de novo*.

This Court reviews a military judge's denial of a motion to suppress evidence for abuse of discretion. *Eppes*, 77 M.J. at 344. Under this review, a military judge's factual findings will be accepted unless they are clearly erroneous. *Id.* Conclusions of law are reviewed de novo. *Keefauver*, 74 M.J. at 233. Evidence is considered in the light most favorable to the prevailing party (on the motion), in this case Appellant. *See United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011).

Whether a person is a "commander" with authority to authorize searches under MRE 315(d)(1) depends on the legal status of that person in light of factual findings. For such mixed questions of law and fact, a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *Ayala*, 43 M.J. at 298.

For factual findings, "[t]he clearly erroneous standard is a very high one to meet." *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007). An appellate court "cannot substitute its interpretation of the evidence" even if it might "resolve the ambiguities differently." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 (1982). A "mere difference of opinion" is insufficient. *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018). The testimony in the record may have

inconsistencies, but unless the military judge was clearly erroneous in resolving those inconsistencies the lower court must affirm.

II. THE LOWER COURT ERRED IN HOLDING THAT COMMAND AUTHORITY TO AUTHORIZE SEARCHES HAD NOT DEVOLVED TO MAJ CB.

The lower court made three critical errors in assessing whether the military judge abused his discretion in finding that Maj CB had legal authority to authorize searches. First, it departed from this Court's functional approach to command devolution and overemphasized the formal requirements of command delegation and succession. Second, the lower court incorrectly held that command authority must devolve completely or not at all—an unworkable approach. Third, the lower court improperly distinguished *Kalscheuer* and *Law* on two grounds: it misunderstood their holdings as depending significantly on the nature of a commander's absence, and it misapplied the clearly erroneous standard in rejecting the military judge's finding that the unit was effectively split into two organizations.

A. The lower court erred in adopting a formalistic test for command devolution, ignoring this Court's functional approach.

Military regulations and precedent support a functional test for devolution of command authority to authorize searches. *See United States v. Kalscheuer*, 11 M.J. 373, 380 (C.M.A. 1981). Temporary absences frequently arise, and the remaining commander must "strive to carry out the routine and other affairs of the unit in the usual manner." Marine Corps Manual (CH 1-3), para. 1007.2d (1996). This Court

"need not examine the minutiae of Service directives which concern devolution of command" when the commander is absent. *Kalscheuer*, 11 M.J. at 380. Rather, the approach is "chiefly concerned with the functional aspects of command." *Id.* The key issue is whether the remaining officer became the "'acting commander' for purposes of authorizing a search." *Id.* at 379.

Despite *Kalscheuer*'s functional emphasis, the lower court overemphasized Navy regulations for delegation and complete succession of command to incorrectly conclude that temporary command devolution must satisfy similar requirements. *Armendariz*, 79 M.J. at 545–46. Ironically, the lower court overlooked Marine Corps Manual paragraph 1007.2b, which recognizes command devolution even if the commanding officer did not direct the succession. Marine Corps Manual (CH 1-3). Likewise, Appellee marches through the minutiae of service directives for complete succession of command. Appellee's Brief at 16–17. But delegation and complete succession are not at issue here. The test is functional, and the lower court should have looked to whether Maj CB was "treated by others as the commander in connection with the command decisions then being made." *Kalscheuer*, 11 M.J. at 380. It is neither practical nor desirable for military commanders to go through formal delegation each and every time they are absent.

B. The lower court incorrectly adopted an unworkable all-or-nothing approach for determining command devolution, which is unsupported by regulation or precedent.

Command devolution, for purposes of search authorization under MRE 315(d)(1), is not an all-or-nothing proposition. Both the lower court and Appellee erroneously read *Kalschuer* and the U.S. Navy Regulations to require that command authority to authorize searches under MRE 315(d)(1) include command authority to convene courts-martial and order nonjudicial punishment. *Armendariz*, 79 M.J. at 547; Appellee's Brief at 15. Appellee's "all-or-nothing" command devolution rule misstates *Kalscheuer* and is unworkable.

The issue in *Kalscheuer* was devolution of authority *to authorize searches*, not devolution of complete command authority. 11 M.J. at 380. This Court was "satisfied that [the deputy commander] may be equated with [the absent commander] *in connection with his authorizing the search*." *Id.* (emphasis added). Likewise, in *United States v. Law*, there was no discussion of whether the executive officer—the same role Maj CB occupied here—could convene courts-martial or possessed nonjudicial punishment authority. *See generally* 17 M.J. 229 (C.M.A. 1984). Thus, neither case depended on the authorizing commander's complete authority.

U.S. Navy Regulations also reject an all-or-nothing characterization of command, allowing courts-martial authority to be either withheld from command authority completely or limited in scope. In the context of designating a commander,

U.S Navy Regulation 0723 describes the procedure to follow "*if* authority to convene courts-martial *is desired* for the commanding officer or officer in charge" of a newly established separate or detached command. U.S. Navy Regulations, Art. 0723 (1990) (emphases added). Similarly, the Manual for Courts-Martial provides that the power of a commander to convene courts-martial may be limited by superior competent authority. *See* Rule 504(b), Manual for Courts-Martial, United States (2016 ed.). If some portion of the power to convene courts-martial may be withheld or limited, then clearly command authority need not include it completely.

Appellee's all-or-nothing approach is also unworkable. If devolution is all-or-nothing then (i) complete command authority would devolve all the time because absences are common, or (ii) to avoid frequent complete devolution, this Court must eviscerate the functional test for command devolution. The first result would render superfluous the numerous detailed regulations for designation of command authority, especially specific provisions for courts-martial convening authority. *See, e.g.*, *id.*; U.S. Navy Regulations, Art. 0722.2 (1990). Why go through all that trouble if complete authority can so frequently devolve? Instead, the regulations make clear that command authority need not include courts-martial convening authority.

The second result ignores experience and the common scenarios in which courts have found proper devolution of command during an absence. *See, e.g.*, *Law*, 17 M.J. at 230; *United States v. Kugima*, 36 C.M.R. 339, 341 (C.M.A. 1966). Thus,

the lower court's approach would swallow the prudence of *Kalscheuer* and confine its reach to limited factual circumstances. This approach would undermine the regulation of order and safety.

C. The lower court improperly distinguished *Kalscheuer* and *Law* by relying on a misunderstanding of the law and rejecting the military judge's factual findings, which were not clearly erroneous.

The lower court erred in relying on two improper distinctions from *Kalscheuer* and *Law*. First, the lower court misinterpreted the holdings of those cases to depend on the nature, rather than the fact, of a commander's absence. Second, the lower court improperly substituted its own judgment for the military judge's factual findings, which led it to draw improper distinctions from the two authoritative cases.

1. The lower court relied on a misinterpretation of *Kalscheuer* and *Law* by focusing on the nature, rather than the fact, of LtCol BW's absence.

The lower court incorrectly read *Kalscheuer* and *Law* to hinge on the nature of a commander's absence. Thus, the lower court distinguished LtCol BW's "pre-planned" absence from the incidental and temporary absences in *Kalscheuer* and *Law*. *Armendariz*, 79 M.J. at 547. But in both *Kalscheuer* and *Law*, this Court focused on the *fact* of a commander's absence, not the *nature* of that absence. Those cases do not indicate that the absences were spontaneous nor, if they were, that such a fact mattered. *Kalscheuer* emphasized "more of a functional than a geographic and temporal measure of 'absence' of a commander." 11 M.J. at 379 (quoting *United*

States v. Azelton, 49 C.M.R. 163, 166 (A.C.M.R. 1974)). In *Kalscheuer* and *Law*, as with LtCol BW here, the key fact was the functional absence of the commanding officer, not the reason for the absence or whether it was planned. *Kalsheuer*, 11 M.J. at 379; *Law*, 17 M.J. at 240.

The lower court's narrow interpretation of absence is contrary to the variety of situations in which courts concluded that command authority properly devolved. In *Kalscheuer*, the commander was inspecting military installations a few kilometers away from the base without his radio. 11 M.J. at 374. In *Law*, the commander was at a "Fiddler on the Roof" rehearsal twenty-seven kilometers away, without a phone. 17 M.J. at 240. In *Azelton*, command properly devolved from two senior officers who were in their quarters a short distance away from the rest of the unit but "fully occupied in the field" and "poorly situated to conduct business" with the remainder of the unit. 49 C.M.R. at 166. The lower court's improper focus on the nature of an absence gives insufficient weight to the need to ensure the "continuous stream of command authority" over a unit. *Id.*

2. To distinguish *Kalscheuer* and *Law*, the lower court improperly relied on its own judgment of the military judge's factual findings, which were not clearly erroneous.

The military judge made three critical factual findings that are supported by the record and not clearly erroneous. First, LtCol BW was not actively involved with command of the Remain Behind Element ("RBE"). (J.A. 293). Second, the unit was

"effectively split" into two organizations, each pursuing separate missions. (J.A. 292). Third, the RBE continued to function under Maj CB in "substantially the same manner as it did prior to [LtCol BW's deployment]." (J.A. 293). The lower court improperly rejected these findings and instead relied on its own resolution of "inconsistent testimony." *Armendariz*, 79 M.J. at 543.

The lower court incorrectly concluded that "[LtCol BW] was never away from the command." *Id.* at 547. The record clearly refutes this conclusion. Not only was LtCol BW physically absent, attached to a different command, and in another time zone, but Maj CB was the acting commander of the RBE. (J.A. 95, 96, 102). Maj CB made operational decisions without approval from LtCol BW and would "back brief" him precisely because LtCol BW was unable to command the RBE as before. (J.A. 95). LtCol BW testified that he "had no visibility on tasking to the [RBE] while [he] was deployed." (J.A. 96).

The lower court improperly rejected the military judge's finding that the unit was effectively split into two organizations. *Armendariz*, 79 M.J. at 544. The lower court supported this conclusion by pointing to the failure of the military judge to rely on formal procedures for splitting units. *Id.* The military judge, however, found an *effective* split, not a formal split. This distinction is crucial because *Kalscheuer*'s test for devolution of command is functional: "[a]t that time and place" who was the person making command decisions? 11 M.J. at 379. The unit was divided into two

elements "to achieve multiple missions in [separate] parts of the world." (J.A. 292). The military judge found the "intent and effect" of this division was so that the RBE and Forward Deployed Element ("FDE") could "operate as two organizations." (J.A. 292).

The lower court also erred in rejecting the military judge's finding that the RBE functioned in substantially the same manner as it did prior to the deployment's departure. *Armendariz*, 79 M.J. at 544. LtCol BW testified that the RBE "continued providing the full aviation support . . . as [it] had been before." (J.A. 96). Maj CB's testimony corroborates this. (J.A. 103). LtCol BW testified that once deployed, there was a "[c]ompletely different organizational structure" and he had a different chain of command. (J.A. 96).

Because the lower court improperly used an all-or-nothing approach to assess devolution of command authority, it was forced into an untenable dichotomy: either Maj CB assumed complete control by "step[ping] into [LtCol BW]'s shoes" or LtCol BW "actively commanded the entirety of [the unit]." *Armendariz*, 79 M.J. at 544. *Kalscheuer* and *Law* wisely recognize a middle ground.

III. THE LOWER COURT ERRED IN CONCLUDING THAT THE GOOD-FAITH EXCEPTION DID NOT APPLY.

Military Rule of Evidence 311(c)(3) codified the good-faith exception to the exclusionary rule, which was formally recognized by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). Under MRE 311(c)(3), the good-faith exception

applies if: (A) a competent authority authorized the search; (B) there was a substantial basis for probable cause; and (C) the officials relied in good-faith on the warrant. Appellee incorrectly argues that the reasonable belief standard does not apply to the authority of the issuing commander under MRE 311(c)(3)(A).

A. This Court reads the Military Code establishing the good-faith exception in light of civilian precedents.

This Court reads MRE 311(c)(3) in light of civilian precedents. *United States v. Perkins*, 78 M.J. 381, 387 (C.A.A.F. 2019). In 10 U.S.C. § 836, Congress gave the President authority to promulgate the MREs and declared that the rules "shall, so far as [the President] 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." 10 U.S.C. § 836(a). This Court has determined that the drafters' intent in codifying the good-faith exception was to incorporate the principles of federal case law. *United States v. Carter*, 54 M.J. 414, 420–21 (C.A.A.F. 2001) (citing 10 U.S.C. § 836; Drafters' Analysis of Mil. R. Evid. 311(c)(3), Manual for Courts-Martial, at A22–18). This Court should continue looking to civilian precedents.

Appellee argues that the good-faith exception's reasonable belief standard from civilian precedents cannot be read to modify the competent authority requirement of subsection A of MRE 311(c)(3). Appellee's Brief at 38–40. But both Appellee and the lower court acknowledge that, consistent with Supreme Court

precedent, this Court in *United States v. Perkins* recognized a reasonable belief standard in subsection B of MRE 311(c)(3), even though "reasonable belief" is not mentioned in that subsection. *See id*.; *Armendariz*, 79 M.J. at 549; *Perkins*, 78 M.J. at 387. Appellee argues that *Perkins* is inapplicable to subsection A because *Perkins* relied on the "substantial basis" language found only in subsection B. Appellee's Brief at 38–40. *Perkins*, however, did not rely on the presence of "substantial basis" to open the door to importing civilian precedent. 78 M.J. at 387. Instead, *Perkins* recognized that a literal reading of subsection B would destroy the intent of the drafters to codify the good-faith exception in light of civilian precedent. *Id.*

In interpreting MRE 311(c)(3), this Court focuses on both the "purpose of the provision" and the fact that the President "was seeking to codify the good faith exception as stated" in civilian precedents. *Id*. Consistent with Supreme Court precedent, this Court has held that MRE 311(c)(3)(B) is satisfied "if the law enforcement official had an *objectively reasonable belief* that the magistrate had a 'substantial basis' for determining the existence of probable cause." *Id*. at 387 (emphasis added); *see also Leon*, 468 U.S. at 915. Last year, this Court did the very thing that Appellee now says cannot be done: reading in a reasonable belief standard from civilian precedents.

Despite Appellee's claims to the contrary, adding a reasonable belief standard to subsection A would not undermine stability, reduce clarity, or erode privacy.

Appellee's Brief at 38–40. If any of Appellee's fears would result from a reasonableness standard, such fears would have been realized when this Court added precisely this standard to subsection B. Appellee cites no evidence suggesting such consequences resulted. Conversely, following civilian precedents enhances stability and clarity in the law, as military personnel and this Court can look to long-standing Supreme Court precedent and cases from civilian courts for guidance. Aligning one part of the exception with civilian precedent but not another would undermine clarity and coherence. In addition, the only authority Appellee cites to assert that a reasonableness standard will erode privacy is a dissent from the very case that MRE 311(c)(3) was attempting to codify. *Id*. at 37 (citing *Leon*, 468 U.S. at 929–30 (Brennan, J. dissenting)). In line with the intent of the drafters, following civilian precedents harmonizes military privacy with civilian privacy. This hardly constitutes an erosion.

By urging this Court to ignore civilian precedents for stability and privacy concerns, Appellee asks this Court to create a more stringent good-faith exception than the civilian version. But this Court has made it clear that MRE 311(c)(3) "does not establish a more stringent rule than *Leon* did for civilian courts. The first prong [MRE 311(c)(3)(A)] . . . is identical to the civilian rule." *Carter*, 54 M.J. at 421 (updated code). If MRE 311(c)(3)(A) is identical to the civilian rule, then this Court

should look to civilian precedents just as it did for 311(c)(3)(B) in *Carter* and *Perkins*.

B. The good-faith exception applies even when law enforcement reasonably, but mistakenly, believes that the individual authorizing the search had proper legal authority.

Civilian courts have consistently applied the good-faith exception to cases in which the individual who authorized the search lacked competent authority. Even if Maj CB lacked authority, this Court should apply the good-faith exception under MRE 311(c)(3) in line with civilian precedents. This Court and eleven circuits have held that the good-faith exception applies when law enforcement reasonably believes a warrant is valid, even if the warrant is *void ab initio*—void from inception—due to a lack of authority. *See United States v. Taylor*, 935 F.3d 1279, 1290 (11th Cir. 2019) (citing each circuit); *United States v. Chapple*, 36 M.J. 410, 413 (C.M.A. 1993). The type of Fourth Amendment violation is not the focus. Rather the Supreme Court looks to law enforcement's conduct and reasonable belief. *See Herring v. United States*, 555 U.S. 135, 145 (2009); *Arizona v. Evans*, 514 U.S. 1, 14 (1995). There is "no difference between a warrant that does not exist at the time of a defendant's arrest, like the warrants in *Evans* and *Herring*, and a warrant that is void ab initio because of a jurisdictional defect." *United States v. Moorehead*, 912 F.3d 963, 968 (6th Cir. 2019). If law enforcement "could reasonably have thought that the warrant was valid, the specific nature of the warrant's invalidity is immaterial."

Taylor, 935 F.3d at 1290. One court did not even rule on whether the warrant was *void ab initio*—or even if there was a Fourth Amendment violation—because either way law enforcement reasonably relied on the warrant. *United States v. Eldred*, 933 F.3d 110, 121 (2d Cir. 2019).

In the context of the military justice system, this Court and the Fourth Circuit have applied the good-faith exception when commanders granted search authorizations while lacking authority over the people or places searched. *Chapple*, 36 M.J. at 413; *United States v. Seerden*, 916 F.3d 360, 367 (4th Cir. 2019). A lack of authority, like a lack of jurisdiction, is a type of Fourth Amendment violation, and thus it does not change the good-faith analysis.

The lower court erred by relying on the overturned case of *United States v. Scott* to distinguish warrants that are *void ab initio* for a lack of jurisdiction from warrants that are void for lack of authority generally. 260 F.3d 512 (6th Cir. 2001) (holding that the good-faith exception does not apply to a warrant issued by a retired judge because he is completely without authority); *Armendariz*, 79 M.J. at 549. But this distinction conflicts with the rationale of the cases discussed above. Both violations involve a lack of authority, both make the warrant invalid at its inception, and both constitute a type of Fourth Amendment violation whereas the correct analysis focuses on law enforcement's conduct. This distinction was also rejected by *United States v. Pennington*, which held that the good-faith exception applied to

the police's reasonable belief that a judicial commissioner had authority to authorize searches even if the commissioner could not constitutionally wield such authority. 115 F. Supp. 2d 910, 917–18 (W.D. Tenn. 2000), *aff'd on other grounds*, 328 F.3d 215 (6th Cir. 2003).

Appellee's reliance on *Scott* is also misplaced because *Scott* is no longer good law. While the Sixth Circuit did not overturn *Scott* on the precise issue here, the court did repudiate *Scott*'s logic that the good-faith exception was foreclosed where the authorizing person lacked legal authority. *United States v. Master*, 614 F.3d 236, 241–42 (6th Cir. 2010); *see also United States v. Beals*, 698 F.3d 248, 265 (6th Cir. 2012) (citing *Scott* as "overruled"). The court explicitly stated that such a broad interpretation of *Scott* was untenable in light of more recent Supreme Court precedent. *Master*, 614 F.3d at 242 (citing *Herring*, 555 U.S. 135; *Hudson v. Michigan*, 547 U.S. 586 (2006)). Thus, the relevant inquiry when a search is authorized by someone without legal authority is whether law enforcement reasonably believed the person had authority.

C. The NCIS agents had an objectively reasonable belief that Maj CB had authority to authorize the relevant searches.

The NCIS agents' actions and the lack of clarity in the law about when someone is a commander show that the NCIS agents had an objectively reasonable belief that Maj CB could authorize the searches. At the time of the searches, the agents knew LtCol BW was deployed. (J.A. 118). Knowing that LtCol BW would

often be unreachable, LtCol BW and Maj CB agreed on Maj CB's authority over the RBE. (J.A. 100). As a result, all activities typically executed by the commander—including search authorizations—were executed by Maj CB during this period. (J.A. 102–04, 118). Knowing that LtCol BW was deployed and Maj CB was functioning as commander, the NCIS agents continually treated Maj CB as the commander by forwarding her reports, keeping her apprised of investigations, and coordinating with her. (J.A. 104, 118). Even in their probable cause affidavits, the agents referred to Maj CB as the "Commanding Officer," and she authorized them as "Acting Commanding Officer." (J.A. 103–113, 258–65). Thus, the record shows that the agents believed Maj CB possessed command authority to authorize searches.

To the extent that the law was unclear on whether Maj CB had proper legal authority, such lack of clarity in the law is also evidence of the executing agents' good-faith. *United States v. Barajas*, 710 F.3d 1102, 1111 (10th Cir. 2013). For instance, the Fourth Circuit in finding good-faith focused on the lack of clarity in the military rules over who has authority to authorize searches. *Seerden*, 916 F.3d at 367. Given the lack of regulations precisely on point, it was reasonable for the agents to rely on the functionality standard embodied in *Kalscheuer* in reaching the conclusion that Maj CB was in fact a commander empowered to authorize searches. At the very least, there is no precedent exactly on point and law enforcement is not expected to resolve ambiguities in the law. *See United States v. Workman*, 863 F.3d

1313, 1320 (10th Cir. 2017). In finding the agents' beliefs reasonable, the Fourth Circuit also emphasized the fact that multiple officers believed there was authority. *Seerden*, 916 F.3d at 367. Similarly, several officers here—Maj CB, LtCol BW, and Col WS—reasonably believed that Maj CB did have authority, as LtCol BW gave Maj CB a letter saying as much. (J.A. 95, 102–113, 252, 258–65). The belief that Maj CB was a commander who could authorize searches was, at a minimum, reasonable.

IV. THE LOWER COURT ERRED IN CONCLUDING THAT THE DETERRENT VALUE OF EXCLUSION OUTWEIGHED THE SIGNIFICANT COSTS OF EXCLUSION.

Even if this Court concludes that the good-faith exception does not apply, this Court should reverse, because the lower court erred in weighing the benefits of deterrence against the costs to the justice system. The deterrence benefits do not outweigh the substantial costs of exclusion. The lower court reached the opposite conclusion only by overstating the deterrence benefits and altogether failing to consider the costs of exclusion.

A. The benefits of deterrence do not outweigh the substantial costs to the justice system of exclusion.

Courts are hesitant to exclude "inherently trustworthy tangible evidence." *Leon*, 468 U.S. at 907. To exclude such evidence, the benefits of "deterring police misconduct" must outweigh the "substantial social costs" of excluding relevant evidence. *Id.* at 909.

1. Deterrence benefits are negligible when law enforcement conduct is non-culpable.

The benefits side of the analysis focuses on the culpability "of the police misconduct." *Id.* at 911. Culpability is present when law enforcement violates the Fourth Amendment with "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144. If law enforcement's conduct is culpable, "the deterrent value of exclusion is strong." *Davis*, 564 U.S. at 238. Conversely, when law enforcement's conduct involves "simple" or "isolated" negligence, the deterrence rationale "loses much of its force." *Id.* (quoting *Leon*, 468 U.S. at 919).

The law enforcement conduct here is a far cry from conduct that courts have found to be culpable. The agents procured facially valid search authorizations. (J.A. 117). This does not resemble agents who either culpably neglect to obtain search authorizations or culpably execute search authorizations that are "so facially deficient" that the agents "cannot reasonably presume [them] to be valid." *Leon*, 468 U.S. at 923. The agents produced probable cause affidavits and halted all searches when new information called into question Maj CB's authority. (J.A. 254–58, 218). This caution is dissimilar to agents who act culpably by recklessly or "knowingly ma[king] false entries" in warrant databases. *Herring*, 555 U.S. at 146.

Moreover, law enforcement conduct is not culpable when a magistrate committed the relevant Fourth Amendment violation. For instance, when a

magistrate issues a warrant lacking in probable cause, "there is no police illegality and thus nothing to deter." *Leon*, 468 U.S. at 921. Similarly, federal circuit courts have concluded that there is no culpable conduct "to deter if the agents had mistakenly relied on the magistrate judge's authority to issue the warrant." *Workman*, 863 F.3d at 1319.

Thus, if Maj CB lacked authority, then the Fourth Amendment violation occurred due to Maj CB's error and not due to any culpable law enforcement conduct. Seeking to deter agents for a commander's error would be ineffectual, because after a search authorization issues "there is literally nothing more the [agents] can do in seeking to comply with the law." *Leon*, 468 U.S. at 921 (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J. concurring)). The Supreme Court has not required agents to second-guess magistrates, and this Court should not require agents to second-guess commanders by venturing into the weeds of command hierarchy.

2. The costs of exclusion to the justice system are substantial.

Courts "must also account for the 'substantial social costs' generated by" exclusion. *Davis*, 564 U.S. at 237 (quoting *Leon*, 468 U.S. at 907). Exclusion of relevant evidence always "exacts a heavy toll" on the justice system, because it ignores "reliable, trustworthy evidence bearing on guilt or innocence." *Id.* Exclusion is thus a "last resort." *Hudson*, 547 U.S. at 591.

The lower court, however, focused almost exclusively on the deterrent value of exclusion, making no assessment of costs. *Armendariz*, 79 M.J. at 552. While deterrent value is a "necessary condition," it is not a "sufficient condition" of exclusion. *Hudson*, 547 U.S. at 596. By truncating its analysis, therefore, the lower court departed from the Supreme Court's command that courts engage in a "rigorous weighing" of "costs and deterrence benefits." *Davis*, 564 U.S. at 238.

This omission is critical because the cost of exclusion is especially high in the context of sexual assault. DNA evidence of sexual assault must be quickly preserved because it "has a fleeting half-life." Gavin Keene, *Preserving VAWA's "Nonreport" Option: A Call for the Proper Storage of Anonymous/unreported Rape Kits*, 93 Wash. L. Rev. 1089, 1097 (2018). On top of biological preservation issues, "the trauma-induced paralysis experienced by nearly all victims immediately after being raped or sexually assaulted . . . regularly result[s] in a failure to gather evidence" in time. *Id.* at 1098. Due to the evidentiary obstacles present in sexual assault cases, the cost to the justice system of excluding such evidence, when it is preserved, is high.

The military's "sexual assault 'epidemic'" compounds evidentiary problems. Stella Cernak, *Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines*, 22 Mich. J. Gender & L. 207, 209 (2015). In 2013, 2,870 reports of "service member on service member incidents of sexual assault" comprised only about "10 percent of actual incidents of sexual

violence that occur within the military." *Id.* at 209–10. Scholars thus estimate there may be a "higher risk of sexual assault for members of the military than members of the U.S. civilian population." *Id.* at 214.

Given the combination of preservation issues and the prevalence of military sexual assaults, exclusion of DNA evidence of sexual assault extracts an especially heavy toll on the justice system. In order to exclude such evidence, this Court should ensure the presence of culpable law enforcement misconduct. The alleged command delegation error is insufficient.

B. The lower court overstated the benefits of deterrence and failed to analyze costs in considering whether to apply the exclusionary rule.

The lower court erred by overstating the deterrence benefits that exclusion would yield. Specifically, the court erroneously considered deterrence to neutral and detached commanders and deterrence of search authorization errors—like scrivener's errors—unrelated to the alleged Fourth Amendment violation.

1. The lower court erred in assessing the deterrent value beyond the impact on law enforcement.

The lower court concluded that "exclusion will deter future commanders from impermissibly delegating" command authorities. *Armendariz*, 79 M.J. at 552. But the exclusionary rule does not seek to deter commanders; it instead focuses on "deterrence of police misconduct." *Leon*, 468 U.S. at 913. Because judges have "no stake in the outcome of particular criminal prosecutions," exclusion "cannot be

expected significantly to deter" neutral and detached magistrates. *Id.* at 917. And this rule applies "with equal force to search or seizure authorizations issued by commanders." *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992) (quoting Drafters' Analysis of Mil. R. Evid. 311(c)(3), at A22–17). For instance, when a commander "did not have actual authority" to authorize a search, this Court refused to apply the exclusionary rule, because the "exclusionary rule is designed to deter police misconduct rather than punish . . . errors of judges and magistrates." *Chapple*, 36 M.J. at 413 (quoting *Leon,* 468 U.S. at 916).

While Appellee seeks to sidestep this principle by citing *United States v. Stuckey* and *United States v. Queen*, those cases are inapposite to the issue of deterrence. First, unlike *Lopez*, neither case accounted for the Drafters' Analysis of MRE 311(c)(3), which applied *Leon* to commanders. *See, e.g.*, *United States v. Queen*, 26 M.J. 136, 141 (C.M.A. 1988). Second, neither case conducted any deterrence analysis. *See generally id.*; *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981). The lower court erred, therefore, when it sought to deter commanders rather than law enforcement.

a. The lower court erred by seeking to deter Maj CB, because Maj CB was neutral and detached.

While courts may properly seek to deter commanders who are not neutral and detached, the lower court never analyzed whether Maj CB was neutral and detached.

Compare Lopez, 35 M.J. at 39, *with Armendariz*, 79 M.J. at 552. Appellee now contends that Maj CB was not neutral and detached. Appellee's Brief at 42.

Commanders are not *per se* disqualified to act as neutral and detached magistrates. *United States v. Ezell*, 6 M.J. 307, 316 (C.M.A. 1979). Given their authority to refer charges, however, commanders are not neutral and detached if they demonstrate "personal bias or involvement in the investigative or prosecutorial process." *Id.* at 318–19. Maj CB's conduct, however, does not resemble the relevant cases in which commanders lost their neutral and detached qualities.

One category of cases involves commanders who become personally involved in gathering evidence that is later "used as the basis" for a search authorization. *Id.* at 319. For instance, if a commander approves "the use of informants" before granting a search authorization, that commander loses his neutral and detached status. *Id.* There is no evidence that Maj CB helped gather evidence that later supported search authorizations. Another category of cases involves commanders who are present at the search they authorized. *Id.* The record does not indicate that Maj CB was present at any relevant search. (J.A. 111).

Appellee, however, cites "subterfuge" as a basis for concluding that Maj CB was not neutral and detached, claiming that Maj CB asked Appellee "to return *for the purpose of* 'work'" when the purpose was really to search Appellee. Appellee's Brief at 27 (emphasis added). But Appellee mischaracterizes the record. When asked

whether she told Appellee the purpose of his return to Miramar, Maj CB's full answer was "I didn't tell him a purpose. I just said I needed him to come back to work." (J.A. 109). Because Maj CB presented no purpose for Appellee's return, her inclusion of "work" indicated not the *purpose* of, but instead the *place* of, Appellee's return. Maj CB did not, therefore, engage in subterfuge concerning the purpose of Appellee's return.

Regardless, Appellee fails to cite a single case mentioning "subterfuge" in relation to neutrality. Indeed, in the most relevant case, a commander's approval of "a bogus naval message" as an investigatory tool, did not "so involve[] him in the investigation" that he lost his neutral and detached status. *United States v. Allen*, 31 M.J. 572, 630 (N-M. C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). If a bogus message does not negate neutrality, then neither does Maj CB's asking Appellee to return to work.

Appellee also argues that Maj CB rubber-stamped search authorizations, because Maj CB, like the agents, misspelled Appellee's name. Appellee's Brief at 32. Appellee fails to cite any cases suggesting that scrivener's errors establish rubber-stamping. Instead, when commanders ask agents to provide "'all the facts in detail' before making a decision," those commanders are "not rubber-stamping the application." *Perkins*, 78 M.J. at 389. Consistent with *Perkins*, Maj CB sought detailed information: after agents indicated that a sexual assault occurred, Maj CB

sought to identify the victim's role in the unit, spoke with an agent in person, and received a probable cause affidavit detailing the allegations. (J.A. 113, 254–57). The Fourth Amendment requires commanders to review relevant information as Maj CB did. It does not require commanders to double-check agents' spelling.

2. The lower court erred by considering deterrence of actions unrelated to the underlying Fourth Amendment violation.

The lower court's conclusion that exclusion "would deter unlawful searches" rested on the court's evaluation of deterrence in relation to scrivener's errors, cut and paste errors, the warrant's generality, the warrant's incorporation of affidavits, and concerns about probable cause. *Armendariz*, 79 M.J. at 552, 553–55. But the court stopped short of concluding that these alleged errors violated the Fourth Amendment. *Id.* at 555. Instead, the court found one—and only one—Fourth Amendment violation: Maj CB "lacked authority to authorize searches." *Id.* at 548.

The problem with consideration of various alleged errors is that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," not a slew of alleged errors that a court is unwilling to call Fourth Amendment violations. *Davis*, 564 U.S. at 236–37. Because deterrence focuses on a case's underlying Fourth Amendment violation, deterrence only focuses on the culpability of the law enforcement misconduct "at issue." *Id.* at 238. Thus, deterrence must relate to a Fourth Amendment violation that the court finds.

By considering deterrence of other alleged errors, the lower court overstated the deterrence benefits. As Appellee did not successfully argue that any of these alleged errors were Fourth Amendment violations, he cannot now relitigate those issues under the guise of a deterrence analysis. Appellee's Brief at 28–32.

3. The lower court's deterrence analysis failed to focus on the culpability of law enforcement misconduct.

By focusing on deterrence of commanders and other alleged errors, the lower court overlooked the central inquiry necessary to justify exclusion: culpability. *Davis*, 564 U.S. at 240. But the Supreme Court has "'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Id.* (quoting *Herring*, 555 U.S. at 144). Given the centrality of culpability to the cost-benefit analysis, the lower court's omission constitutes legal error.

Conclusion

The student practitioners on behalf of the Appellant respectfully request that this Court reverse the lower court's decision.

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CERTIFICATE OF FILING AND SERVICE

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