IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellant | ) | ANSWER ON BEHALF OF APPELLANT |
| v. | ) | Crim.App. Dkt. No. 201700338 |
| Roberto ARMENDARIZ,<br>Master Sergeant (E-8)<br>Yeoman (E-3)<br>U.S. Marine Corps<br>Appellee | ) | USCA Dkt. No. 19-0437/MC |


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UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES



UNITED STATES CIRCUIT COURT OF APPEALS CASES

## Issues Presented

I.

WHETHER THE LOWER COURT ERRED IN OVERTURNING THE MILITARY JUDGE'S ADMISSION OF EVIDENCE WHERE THE MILITARY JUDGE FOUND THE OFFICIAL WHO AUTHORIZED THE SEARCH WAS THE ACTING COMMANDER WITH FULL AUTHORITY AND CONTROL OVER THE REMAIN BEHIND ELEMENT, EXCEPT FOR AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT AND CONVENE COURTS-MARTIAL?

II.

WHETHER THE LOWER COURT ERRONEOUSLY APPLIED THE EXCLUSIONARY RULE UNDER MIL. R. EVID. 311(a)(3) BY FAILING TO APPROPRIATELY BALANCE THE BENEFITS OF DETERRENCE AGAINST THE COSTS TO THE JUSTICE SYSTEM, AND THEREBY ERRED IN OVERTURNING THE MILITARY JUDGE'S DECISION NOT TO APPLY THE EXCLUSIONARY RULE?

III.

WHETHER THE LOWER COURT ERRED IN FINDING THE GOOD-FAITH EXCEPTION DID NOT APPLY WHERE THIS COURT HAS, IN *UNITED STATES V. CHAPPLE*, 36 M.J. 410 (C.M.A. 1993), HELD THE EXCEPTION APPLIES EVEN WHEN THE INDIVIDUAL ISSUING THAT SEARCH AUTHORIZATION LACKED AUTHORITY UNDER MIL. R. EVID. 315(d)(1), AND HERE LAW ENFORCEMENT REASONABLY BELIEVED THE ACTING COMMANDER WAS AUTHORIZED TO ISSUE SEARCH AUTHORIZATIONS?

## Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction over this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2016).

## Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellee, contrary to his pleas, of one Specifications each of wrongful use of Government property, fraternization, sexual assault, abusive sexual contact, and adultery in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934 (2016). Appellee was acquitted of one Specification of sexual assault by bodily harm in violation of Article 120, UCMJ, 10 U.S.C. §920. Before the entry of pleas, one Specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. §920, was withdrawn and dismissed.

The Members sentenced Appellee to eighteen months of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed with the lower court on November 22, 2017. After Appellee and the United States submitted briefs and oral argument,

the lower court specified three additional issues for supplemental briefing. On May 22, 2019, the lower court set aside the findings and sentence, except for the fraternization conviction. On June 21, 2019, the United States filed a Motion for Reconsideration. On June 25, 2019, the lower court denied the Motion.

On August 23, 2019, the Judge Advocate General filed a Certificate of Review with this Court.

## Statement of Facts

A. Appellee moved to suppress evidence from a search of his person, office, car, and phones.

Before trial, Appellee filed a Motion to Suppress Evidence seized from his person, office, car, and phones pursuant to three search and seizure authorizations. (J.A. 168-232.) In his Motion, Appellee argued that his Executive Officer did not have authority to grant the search and seizures and provided supporting documentation. (J.A. 130-46, 179-82, 190-232.) The United States opposed and enclosed additional information in its Motion. (J.A. 147-56, 240-45, 252-81.)

At the suppression hearing, the United States called Lieutenant Colonel (LtCol) BW, Appellee's Commanding Officer, (J.A. 92-101); Major (Maj) CB, Appellee's Executive Officer (J.A. 101-16); and Naval Criminal Investigative Service Special Agent AE, an agent involved with the sexual assault investigation, (J.A. 117-20). After considering the testimony and the documents enclosed in the

Motions of both parties, the Military Judge denied Appellee's Motion in a written ruling. (J.A. 282-94.)

B. Lieutenant Colonel BW, Maj CB, and Special Agent AE testified, and the documentary evidence showed, Maj CB was the Acting Commanding Officer of the Remain Behind Element at the time law enforcement Agents requested search and seizure authorizations.

1. Appellee's Commanding Officer deployed to the Middle East, leaving Major CB, the Executive Officer, in charge as Acting Commanding Officer.

Lieutenant Colonel BW was the Commanding Officer of Appellee's unit, Marine Wing Support Squadron-373 (MWSS-373), and Maj CB was the Executive Officer. (J.A. 93, 101.) As a component squadron of 3d Marine Aircraft Wing, MWSS-373 provides aviation ground support to Marine Aircraft Group 11. (J.A. 93.) Colonel (Col) WS, the commanding officer of Marine Aircraft Group 11, was LtCol BW's reporting senior. (J.A. 95.)

Lieutenant Colonel BW deployed for a period of six months with approximately 300 Marines from his unit. (J.A. 94.) On the deployment, LtCol BW and the "Forward Deployed Element" of MWSS-373 attached to the Special Purpose Marine Air-Ground Task Force, Crisis Response-Central Command. (J.A. 94.) Once attached, LtCol BW received a new reporting senior outside of 3D Marine Aircraft Wing. (J.A. 94, 96.)

The "Remain Behind Element," the portion of MWSS-373 that did not deploy, comprised of approximately 200 Marines, including Appellee and Maj CB.

(J.A. 95.) The "Remain Behind Element" was still a part of MWSS-373. (J.A. 98, 107.)

In anticipation of his March 2016 deployment, LtCol BW knew that often there would be "no way to get in touch with [him]." (J.A. 95.) Lieutenant Colonel BW and his reporting senior, Col WS, discussed and agreed on Maj CB's position, authority, and responsibilities over the Remain Behind Element. (J.A. 100.) Lieutenant Colonel BW explained his "concern" of "not being available to make decisions" and "holding up any sort of progress." (J.A. 100.) They agreed Maj CB would "make decisions in [his] stead because of the traveling." (J.A. 100, 102.)

Prior to his deployment, LtCol BW gave Maj CB "full authorities as the commanding officer" of the Remain Behind Element that were "authorized in that setting . . . to make decisions in my stead." (J.A. 95, 102, 111-12.) Lieutenant Colonel BW told Maj CB to make "all" the decisions "when it required her decision. She would then just back brief [him] later just so [he] was aware of what was going on." (J.A. 95, 102.) Lieutenant Colonel BW withheld nonjudicial punishment authority and courts-martial convening authority from Maj CB because he "didn't have the authority to authorize that." (J.A. 97, 100, 106.)

In a letter titled "Delegation of 'Acting' and Signature Authority," LtCol BW "delegate[d] authority to sign 'Acting' in the capacity of the Commanding Officer, Marine Wing Support Squadron (MWSS) 373" on "official

correspondence and all documents" to Maj CB. (J.A. 95, 102, 252.) The letter provided, "the Executive Officer is the only office temporarily succeeding the Commanding Officer and authorized to sign as 'Acting.'" (J.A. 252.)

2. During LtCol BW's deployment, Maj CB made all the administrative and operational decisions for the Remain Behind Element.

During LtCol BW's deployment, Maj CB signed "reenlistment certificates; administrative separation documents, as required; searches and seizures; awards," including, approval of Navy-Marine Corps Achievement Medals and Certificates of Commendation; and military protective orders. (J.A. 102-03.)

At the time, all four Agents working out of the Naval Criminal Investigative Service office on Marine Corps Air Station Miramar knew that LtCol BW had deployed. (J.A. 118.) Agents assigned to the Naval Criminal Investigative Service office on the installation routinely forwarded reports of pending investigations involving members of MWSS-373 to Maj CB. (J.A. 104, 118.) The Agents believed Maj CB had authority to authorize search authorizations and believed they should coordinate with Maj CB on investigations involving MWSS-373 personnel. (J.A. 118.)

Marine Aircraft Group 11 and 3d Marine Aircraft Wing continued to task MWSS 373's Remain Behind Element. (J.A. 96, 103.) Major CB exercised command and control over the unit, providing full aviation support to 3d Marine

Aircraft Wing units assigned to Marine Corps Air Station Miramar, without prior approval from LtCol BW. (J.A. 96, 103.) The Remain Behind Element provided motor-T support, combat engineer support, heavy equipment, utilities, and air field operations support. (J.A. 103.) All tasking for the Remain Behind Element, whether from Marine Aircraft Group 11 or another authority, went directly to Maj CB for her action. (J.A. 96.)

Lieutenant Colonel BW "had no visibility on tasking to the squadron while [he] was deployed." (J.A. 96.) For example, during the deployment, the Remain Behind Element was tasked with recovering aircraft—a mission LtCol BW "did not know about" until "a day or two later." (J.A. 96.) Lieutenant Colonel BW testified it would not have been operationally feasible to route tasking through him due to time constraints and location. (J.A. 96.)

3. <u>During the deployment, LtCol BW deployed to different countries</u>.

Lieutenant Colonel BW deployed to Bahrain, Kuwait, Jordan, and Iraq during his six-month deployment. (J.A. 94, 98.) Lieutenant Colonel BW testified he was in Kuwait at the end of July, but he could not remember the exact dates since the time he spent in Kuwait "always varied." (J.A. 98.) Lieutenant Colonel testified he was in Kuwait "around July the 20th or so" and stayed "for about six or seven days." (J.A. 98.) He could not remember what day he left Kuwait. (J.A.

98.) In Kuwait, he had an office with access to phone, internet, and email. (J.A. 99.)

Throughout his deployment, there were times he was not reachable. (J.A. 96.) For example, every time he went to Iraq, it was "very difficult to get in touch with [him]" the entire time he was there. (J.A. 96.)

4. When the Victim reported the sexual assault in late July, law enforcement Agents sought command authorization from Maj CB to search and seize evidence from Appellee.

On July 25, 2016, Special Agent AE (formerly AH) interviewed the Victim about her sexual assault allegations against Appellee. (J.A. 117.) After the interview, Agent AE believed there was probable cause to request a search authorization. (J.A. 117.) Agent AE coordinated with Special Agent IP who then drafted a command authorization for search and seizure. (J.A. 117-18, 259.) The Agents drafted the probable cause affidavits for the search authorizations referring to Maj CB as the Commanding Officer of MWSS-373. (J.A. 257, 264.) The Agents also drafted their investigation reports referring to Maj CB as the Acting Commanding Officer of MWSS-373. (J.A. 265.)

That same day, Special Agent IP informed Maj CB of the investigation into Appellee and provided her with probable cause affidavits with supporting documents. (J.A. 103, 113, 254-57.) Major CB believed she had authority to approve the search authorization. (J.A. 104.) After the Agent's brief, Maj CB

signed the command authorization for search and seizure as "Maj, USMC, Acting Commanding Officer" of the command, "MWSS-373." (J.A. 103, 113, 259.)

Special Agent AE testified the Agents believed Maj CB had authority to issue the search authorizations. (J.A. 118.) She explained if the Agents knew Maj CB lacked authority to sign the search authorizations, they would have approached either the commanding officer of Marine Aircraft Group 11 or the installation commander for authorization. (J.A. 118.)

5. Law enforcement Agents executed the search authorizations.

a. On July 25, Agents searched Appellee's office and car pursuant to a written and verbal command search authorization. They seized his clothing and two iPhones.

Special Agent IP requested authorization to search Appellee's person, "cellular telephones," office, and vehicle, and to seize evidence relating to the alleged sexual assault. (204-205, 259.)

After searching Appellee's office, law enforcement Agents seized two pairs of Appellee's shorts and two pairs of underwear from a wall locker, as well as a piece of black fabric from a couch where the sexual assault occurred. (J.A. 266-67.)

When Special Agent IP arrested Appellee later that day, he saw a cell phone inside Appellee's car. (J.A. 258, 268.) Law enforcement officials then verbally requested, and Maj CB verbally authorized, a search of Appellee's car. (J.A. 110-

11, 258.) Agents then seized a black iPhone, a white iPhone, shorts, and two pairs of underwear from Appellee's car. (J.A. 262, 268.) Appellee underwent a sexual assault forensic examination following his apprehension where an examiner swabbed Appellee's genitalia and cheek to collect his DNA. (J.A. 158-63.)

b. On July 26, Agents requested and executed a second written search authorization. The Agents seized Appellee's Samsung phone.

On July 26, Special Agent IP requested a second written authorization from Maj CB to search again Appellee's person, cell phone, office, and vehicle in order to seize Appellee's "cell phone," this time in search of evidence of obstruction of justice and sexual assault. (J.A. 200-01, 260-64.) In support of his request, Special Agent IP provided a new probable cause affidavit with supporting documentation stating that Appellee retrieved an iPhone with a cracked screen at an off-base location after his interview with law enforcement. (J.A. 260-64.)

The Agents searched Appellee again and seized a Samsung phone. (J.A. 217.) They did not find an iPhone with a cracked screen. (J.A. 208.)

6. On or after September 12, 2016, law enforcement Agents told forensic analysts to stop examining evidence due to concerns with Maj CB's authority to grant search authorizations.

Maj CB periodically briefed LtCol BW on the status of the case. (J.A. 116.)

On September 12, 2016, someone notified law enforcement Agents that Maj CB might not have had authority to grant the search authorizations she approved

on July 25th and 26th. (J.A. 218.) The Agents then told the "cyber Agent that was analyzing two of [Appellee's] cellular telephones . . . to stop all examinations/analyses." (J.A. 218.) The Agents also told the "U.S. Army Criminal Investigations Laboratory (USACIL) . . . to stop examinations/analyses on the submitted evidence until the updated CASS could be obtained." (J.A. 218.)

7. When LtCol BW returned from deployment, he authorized a third command search and seizure, resuming forensic analysis of Appellee's clothes and phone.

Lieutenant Colonel BW returned from deployment around October 5, 2016. (J.A. 96.) On November 18, 2016, Special Agent BB requested a command authorization to search and seize the same items Maj CB had previously authorized. (J.A. 203-05.) Lieutenant Colonel BW authorized the search and seizure. (J.A. 203-05.)

That same day, Agents notified "the NCIS Cyber Agent and the USACIL to resume their examinations/analyses on the evidence" the Agents had previously seized from Appellee. (J.A. 218.)

C. In his Ruling denying Appellee's Motion to Suppress, the Military Judge made Findings of Fact and Conclusions of Law based on testimony and documentary evidence.

1. The Military Judge found Maj CB was the Acting Commanding Officer of the Remain Behind Element.

The Military Judge found that when LtCol BW deployed with approximately 300 Marines from MWSS-373, Maj CB was the officer-in-charge of the Remain Behind Element of approximately 175-275 Marines. (J.A. 286.)

Prior to his deployment, LtCol BW discussed with, and received approval from Col WS how the Remain Behind Element would function in his absence. (J.A. 287.) Major CB would have "'full authorities' as commanding officer" and she would "make all the decisions normally reserved to the commanding officer." (J.A. 287.) Lieutenant Colonel BW "also designated" Major CB "in writing as the 'acting' commanding officer of MWSS-373" in a delegation letter that set the terms of her "authority to sign official correspondence as the acting commanding officer." (J.A. 287.) Major CB's authority as acting commanding officer was limited: she lacked authority to hold nonjudicial proceedings and convene courts-martial. (J.A. 287.)

During LtCol BW's deployment, Maj CB "was responsible for supervising the company commanders of MWSS-373 and reported directly to the MAG-11 Commanding Officer." (J.A. 287.) Major CB received "tasking from higher headquarters and execute[d] the mission without having to get approval from

[LtCol BW]." (J.A. 287.) Major CB "signed reenlistment packages, awarded certificates of commendation, awarded Navy-Marine Corps Achievement medals and issued Military Protective Orders as the acting commanding officer of MWSS-373." (J.A. 287.)

Law enforcement agents drafted Maj CB's signature block on the accompanying probable cause affidavits for the July 25th and July 26th search authorizations as "Maj [CB], USMC, Commanding Officer, MWSS-373, MAG-11, 3D MAW." (J.A. 285-86.)

2. The Military Judge concluded Maj CB had authority to authorize search authorizations, and even if she did not, the exclusionary rule did not apply.

a. The Military Judge concluded Maj CB had authority to grant search authorizations.

The Military Judge concluded that the United States proved by a preponderance of the evidence that Maj CB "was more than just the OIC," she "was in fact a commander for [Mil. R. Evid.] 315 purposes," and that she had authority to issue command authorizations for search and seizure "in her capacity as the acting commanding officer of MWSS-373." (J.A. 290, 292-93.)

When LtCol BW deployed with a portion of MWSS-373, the command "was effectively split into two organizations." (J.A. 292.) The splitting of the organization "in order to achieve multiple missions in 2 parts of the world was planned for and executed by" Col WS, LtCol BW, and Maj CB. (J.A. 292.)

Major CB "had complete responsibility and authority to receive tasking directly from MAG-11 and employ the companies of the MWSS-373 as she saw fit to meet the mission requirements without prior approval from LtCol [BW]." (J.A. 292-93.) "Additionally, the company commanders within the [Remain Behind Element] portion of MWSS-373 were responsible to her directly." (J.A. 293.) Major CB "was employed in substantially the same manner as the other squadron commanders within MAG-11." (J.A. 293.)

The Military Judge reasoned, "the ability to convene courts-martial and hold Nonjudicial punishment is not the test of whether someone qualifies as a commander." (J.A. 293.)

The Military Judge concluded that LtCol BW's delegation letter "was but one part of the steps taken by the chain of command to establish Maj [CB] as not just [a Remain Behind Element] OIC, but to establish Maj [CB] as a commander." (J.A. 293.)

b. The Military Judge concluded that Mil. R. Evid. 311(a)(3) and the good-faith exception to the exclusionary rule applied.

The Military Judge concluded that even if Maj CB lacked authority to approve search and seizure authorizations, "NCIS reasonably relied in good-faith on the warrants [sic] signed by her on 25 and 26 July." (J.A. 294.) The Agents "presented their affidavits of probable cause to an officer who, based on their

interactions, they reasonably concluded had the authority to authorize a CASS in this case." (J.A. 294.)

Citing to Mil. R. Evid. 311(a)(3), the Military Judge concluded that the exclusion of the evidence recovered from Appellee's person, wall locker, cell phone, and car "would not result in appreciable deterrence of future unlawful searches, nor would the benefit outweigh the costs to the justice system." (J.A. 294.)

D. The lower court overturned the Military Judge's ruling, found Maj CB lacked authority to approve the search and seizure, suppressed all evidence, and dismissed all but one Specification.

The lower court held the Military Judge abused his discretion denying Appellee's Motion to Suppress Evidence because Maj CB had no authority to authorize the search of Appellee's person, office, car, or phones. (J.A. 16.) The lower court held the good-faith exception to the exclusionary rule did not apply and that exclusion of the evidence would deter future unlawful searches. (J.A. 18, 24.) The lower court found the inadmissible evidence prejudiced all of Appellee's convictions, except for fraternization. (J.A. 32.) The lower court set aside Appellee's convictions for wrongful use of government property, sexual assault by bodily harm, abusive sexual contact, and adultery. (J.A. 32.)

E. The U.S. Navy Regulations and Marine Corps Manual permit an executive officer to succeed to command in the "absence" of the commanding officer.

"An officer who succeeds to command due to . . . detachment without relief or absence due to orders from competent authority of the officer detailed to command, has the same authority and responsibility as the officer whom he or she succeeds." U.S. Navy Regulations, Article 1026 (1990).

An "executive officer . . . shall succeed to command in the event of the transfer, death, or incapacity of the commander of the unit, and . . . during the absence of such officer." Marine Corps Manual (CH 1-3), para. 1007.2a(1) (1996). "An officer who succeeds to command assumes command responsibility for the unit . . . ." Marine Corps Manual, para. 1007.2c.

"When a commander is absent and has not directed succession to command during that absence, the officer who would otherwise succeed to command [i.e. executive officer] . . . shall be the commander for purposes of military justice, emergencies, and other unforeseen situations requiring action." Marine Corps Manual, para. 1007.2b. "The executive officer shall be an officer of the organization who is eligible to succeed to command, and normally will be the officer next in rank to the commander." *Id*. at 1007.5.

## Argument

I.

THE MILITARY JUDGE CORRECTLY FOUND MAJ CB COULD GRANT SEARCH AUTHORIZATIONS. MAJ CB EXERCISED FUNCTIONAL ASPECTS OF COMMAND AND LAW ENFORCEMENT LOOKED TO HER FOR SEARCH AUTHORIZATIONS. *KALSCHEUER* SUPPORTS THE FOURTH AMENDMENT REASONABLENESS OF THE SEARCH AUTHORIZATION.

A. Standard of review.

"When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling," this Court "pierce[s] through that intermediate level and examine[s] the military judge's ruling, then decide[s] whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Sheldon*, 64 M.J. 32, 37 (C.A.A.F. 2006).

Appellate courts review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Eppes*, 77 M.J. 339, 344 (C.A.A.F. 2018). An abuse of discretion occurs where the military judge's findings of fact are clearly erroneous or where he misapprehended the law. *Id*. In reviewing a ruling on a motion to suppress evidence, appellate courts "consider the evidence in the light most favorable to the prevailing party." *Id*.

B. It is reasonable under the Fourth Amendment and *Kalscheuer* for the acting commander exercising general command responsibilities to grant search authorizations.

1. A competent and impartial "commissioned officer in command" may issue search authorizations. Service regulations here permitted the executive officer to assume command in the "absence" of the commanding officer.

A commander is competent to issue a search and seizure authorization as long as he or she is "impartial." Mil. R. Evid. 315(d)(1); 316(c)(5)(A); *United States v. Ezell*, 6 M.J. 307, 325 (C.M.A. 1979). A commander is a "commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise." R.C.M. 103(5).

A commander who has control over the place or person to be searched may authorize a search authorization. Mil. R. Evid. 315(d)(1). Alternatively, a "person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command" may also authorize a search authorization. Mil. R. Evid. 315(d)(1).

Frequently, military regulations provide that an executive officer shall succeed to command and act "in the commander's stead when he is absent or otherwise unavailable." *United States v. Kalscheuer*, 11 M.J. 373, 377 (C.M.A. 1981). That is the case here. *See* U.S. Navy Regulations, Article 1026; Marine Corps Manual, para. 1007.2a(1).

When the commander is absent, the executive officer who succeeds to command "shall be the commander for purposes of military justice, emergencies, and other unforeseen situations requiring action." Marine Corps Manual, para. 1007.2b; *see also* U.S. Navy Regulations, Article 1026.

2. A search granted by the executive officer who assumes command in the absence of the commanding officer at the time and place law enforcement requested a search authorization is reasonable.

The Fourth Amendment "proscribes only unreasonable searches." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (citations omitted). "What is unreasonable depends substantially on the circumstances of the intrusion." *United States v. Thatcher*, 28 M.J. 20, 22 (C.M.A. 1989). The ability of a military commander to search persons or property within her control is consistent with the Fourth Amendment's "fundamental inquiry" of reasonableness. *United States v. Ezell*, 6 M.J. 307, 310 (C.M.A. 1979) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

In *Kalscheuer*, the court held that a commanding officer could not delegate search authorization authority. 11 M.J. at 378. Because many actions in military justice "derive their validity from the command relationship and are performed 'by order of' or 'by command' of a named commander," a "blanket delegation" of search authority with "almost no standards" is not reasonable. *Id*. at 376-78.

But, while delegation of search authority is not reasonable, devolution of search authority is reasonable. *Id*. 379-80. *Kalscheuer* reasoned it "is reasonable" for an executive officer to grant search authorizations at the time and place when law enforcement requests a search authorization, the commanding officer is absent, and the executive officer is exercising command responsibilities. *Id*. at 379-80; *see also* Manual for Courts-Martial, Analysis of Mil. R. Evid. 315(d)(1), app. 22, at A22-33 (2016 ed.) (non-officer may grant search authorizations after assuming command by express appointment or devolution of command).

The *Kalscheuer* court did not discuss the parameters of a commanding officer's "absence" for purposes of devolution of search authority, declaring it "need not examine the minutiae of Service directives which concern the devolution of command." *Kalscheuer*, 11 M.J. at 380. Instead, the court emphasized, "we are chiefly concerned with the functional aspects of command" of the acting commander who succeeds to command. *Id*.

3. Like *Kalscheuer*, authority to grant search authorizations passed to Maj CB as the subordinate exercising "functional aspects of command" at the "relevant time and place" law enforcement requested a search authorization.

In *Kalscheuer*, the base commander was a few kilometers away on a tour of two satellite military installations, both under his command responsibility. 11 M.J. at 374. The base commander left a portable two-way radio, "a symbol of authority," to his deputy base commander. *Id*. at 379. While the commanding

officer was absent, the deputy base commander authorized a search request by law enforcement. *Id*. at 374.

The *Kalscheuer* court declined to look to the "minutiae" of the regulations regarding devolution of command, but found the base commanding officer was absent and the deputy base commander "*was* the person making command decisions" at the time and place law enforcement requested the search authorization. *Id*. at 379 (emphasis in original). The deputy base commander was "the officer whom foreseeably an investigator . . . would have approached to obtain a search authorization." *Id*. at 379. "Since, at the time and place," the deputy base commander was "functioning as the commander in connection with the command decisions then being made[,]" the deputy base commander could authorize the search. *Id.* at 380.

Maj CB's search authorizations follow the *Kalscheuer* precedent in four ways. First, when law enforcement officials requested to search Appellee, his office, and his car the same day the Victim made her sexual assault allegation, LtCol BW was absent from the installation. (J.A. 285); 11 M.J. at 379.

Second, LtCol BW left Maj CB a "Delegation Letter" similar to the "symbol of authority" in *Kalscheuer*. (J.A. 293); 11 M.J. at 379. The Military Judge found the letter "was but one part of the steps taken by the chain of command to establish

Maj [CB] as not just [a Remain Behind Element] OIC, but to establish Maj [CB] as a commander." (J.A. 293.)

Third, Maj CB functionally acted as the Remain Behind Element commanding officer by "making command decisions." *Kalscheuer*, 11 M.J. at 379. She received direct tasking from the unit's senior commands and executed those missions without prior approval from LtCol BW. (J.A. 96, 103, 287, 292.) Major CB signed awards, reenlistment packages, correspondence, and military protective orders involving members of her unit. (J.A. 104, 287.) The company commanders "were responsible to her directly." (J.A. 293.) Members of both the higher and junior chain of command "equated" Maj CB with "other squadron commanders within MAG-11." (J.A. 293); *Kalscheuer*, 11 M.J. at 380.

Fourth, because Maj CB functioned as the commanding officer at the time and place law enforcement needed a search authorization, she was the officer whom they would have, and did, approach to grant their request. (J.A. 285); 11 M.J. at 379. Thus, because Maj CB assumed command responsibilities in LtCol BW's absence, it was "reasonable" for her to grant search authorizations at that time. *See Kalscheuer*, 11 M.J. at 380.

The Military Judge did not abuse his discretion concluding, and specifically relying on *Kalscheuer*, that Maj CB "was functioning as the commander" when law enforcement officials made the search request. (J.A. 290, 292); 11 M.J. at 380.

C. The lower court misapplied *Kalscheuer*.

1. The lower court improperly found, and relied on, an additional fact that contradicted the Military Judge's Findings of Fact.

Appellate courts are "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (citing *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)). The lower court does not have authority to find additional facts. *Gore*, 60 M.J. at 185.

The Military Judge found Maj CB "had complete responsibility and authority" over the Remain Behind Element "without prior approval from [LtCol BW]." (J.A. 292.) But, the lower court found that LtCol BW "was actively involved in commanding MWSS-373 as the squadron carried out both its deployed and garrison missions," and relied on this additional fact to hold that Maj CB "did not have command authority" to grant search authorizations. (J.A. 16.)

In contrast to the lower court's conclusion, the Record supports the Military Judge's finding that Maj CB had functional command when law enforcement requested search authorization. First, LtCol BW had "no visibility on tasking to the squadron" during his deployment. (J.A. 96.) Because LtCol BW deployed to four countries during the six-month deployment and had unstable communication capabilities, tasking him directly would not have been operationally feasible. (J.A. 98, 99, 286.)

Second, the higher chain of command tasked Maj CB directly as the Acting Commanding Officer, and she "made all" the decisions regarding the Remain Behind Element. (J.A. 95-96, 287.) Major CB would then, at non-regular intervals, "back brief" LtCol BW "simply" to make him "aware of what was going on," not to ask for his approval. (J.A. 95, 102, 292-93.)

2. The lower court erred under *Law* and *Kalscheuer* by conflating the technical aspects of command devolution with the reasonableness of Maj CB's authority to grant search authorizations as the Commanding Officer.

The military has hierarchical sources of rights: the Constitution, federal statutes including the Uniform Code of Military Justice, Executive Orders containing the Military Rules of Evidence, Department of Defense directives, service directives, and federal common law. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). Section III of the Military Rules of Evidence codifies the constitutional rules. *Id*.

"[N]ot every regulation which deals with the administration of justice or with investigative procedures is designed to create rights enforceable by the accused when he is brought to trial." *United States v. Law*, 17 M.J. 229, 240 (C.M.A. 1984) (quoting *United States v. McGraner*, 13 M.J. 408, 415 (C.M.A. 1982)). Application of the Fourth Amendment may "take into account the exigencies of military necessity and unique conditions that may exist within the military society." *Middleton*, 10 M.J. at 127; *see also United States v. Huntzinger*,

69 M.J. 1, 5 (C.A.A.F. 2010) (noting "unique powers of search and seizure granted to military commanders" under Fourth Amendment application to armed forces).

In *Law*, the court validated an acting commander's search authorization, focusing once again on the functional aspects of command. 17 M.J. at 240-41. The commanding officer left his executive officer "in charge" while the commanding officer was about twenty-seven kilometers away and unreachable by phone. 17 M.J. at 234. During the commanding officer's absence, the executive officer granted law enforcement's request to search and seize Law's property. *Id*. at 233. The *Law* court held that authority to grant search authorizations had devolved to the executive officer as "acting commander" because he exercised command authority at the time of law enforcement's search request. *Id.* at 240-41 (citing *Kalscheuer*, 11 M.J. 373).

The lower court's holding requiring full command authority contradicts *Kalscheuer*. (J.A. 15-16). The focus in *Kalscheuer* is on the reasonableness of an acting commander, who is exercising command responsibilities, to grant search authorizations in the absence of the commanding officer. 11 M.J. at 380.

Neither *Kalscheuer* nor *Law* require the acting commander to have authority to convene courts-martial or hold nonjudicial punishments for search authority to devolve, as the lower court required. (J.A. 15-16). In some "individual" or "types of cases," a superior authority mey withhold courts-martial convening authority

from commanders who otherwise have search authority under Mil. R. Evid. 315. R.C.M. 401(a). Thus, a commander's search authority may be independent from the authority to dispose of cases. R.C.M. 401(a). *Kalscheuer* and *Law* instead relied on the fact that the deputy base commander (*Kalscheuer*) or executive officer (*Law*), like Maj CB here, exercised "command responsibilities when the search authorization [was] requested." 11 M.J. at 380; (J.A. 287.)

The lower court misapplied this Court's precedent.

II.

THE MILITARY JUDGE CONDUCTED A COMPLETE MIL. R. EVID. 311(a)(3) ANALYSIS IN RULING THAT THE EVIDENCE SHOULD NOT BE EXCLUDED WHILE THE LOWER COURT ATTEMPTED TO DETER CONDUCT THAT IS, AT MOST, SIMPLE NEGLIGENCE, AND FAILED TO CONSIDER THE COSTS TO THE JUSTICE SYSTEM.

A. Standard of review.

This Court reviews a military judge's ruling on a motion to suppress evidence, including any Mil. R. Evid. 311 analysis, for abuse of discretion. *United States v. Wicks*, 73 M.J. 93, 98 (2014).

B. Exclusion of evidence requires appreciable deterrence of future unlawful searches and that the benefits from that deterrence outweigh the costs to the justice system.

Evidence obtained from an unlawful search or seizure is only inadmissible if its exclusion: (1) results in "appreciable deterrence" of future unlawful searches or seizures; and, (2) "the benefits of such deterrence outweigh the costs to the justice

system." Mil. R. Evid. 311(a)(3); *Herring v. United States*, 555 U.S. 135, 141 (2009).

The exclusionary rule's "sole purpose . . . is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37 (2011). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144. Excluding evidence pursuant to the exclusionary rule is "drastic and socially costly," and the rule's "heavy costs" should be "limited to situations in which [its] purpose is thought most efficaciously served." *Eppes*, 77 M.J. at 349.

C. The Military Judge did not abuse his discretion in concluding the exclusionary rule did not apply.

1. The Agents' conduct was not wrongful.

a. The Record does not show that the Agents violated Appellee's Fourth Amendment rights recklessly, deliberately, or with gross negligence.

The Supreme Court has "'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis*, 564 U.S. at 240 (quoting *Herring*, 555 U.S. at 144). Because the purpose of the exclusionary rule is to deter future Fourth Amendment violations, evidence should only be suppressed if "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under

the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (citations omitted).

In *Davis*, officers complied with *New York v. Belton*, 453 U.S. 454 (1981) when they handcuffed Davis, placed him in the patrol car, and searched the car in which he was passenger. 564 U.S. at 235. During Davis' appeal, the Court overruled *Belton* in *Arizona v. Gant*, 556 U.S. 332 (2009). *Id*. at 236. Focusing on the conduct of the officers, the Court held the exclusionary rule did not apply because the officers "acted in strict compliance with binding precedent" and "their behavior was not wrongful." *Davis*, 564 U.S. at 240. The officers "did not violate Davis' Fourth Amendment rights deliberately, recklessly, or with gross negligence" and the case did not involve "'any recurring or systematic negligence.'" *Id*. (quoting *Herring*, 555 U.S. at 144).

Like *Davis*, the Agents here did not deliberately, recklessly, or with gross negligence violate the Appellee's Fourth Amendment rights. 564 U.S. at 240. The Agents obtained a search authorization from the officer they believed was the commanding officer with authority to grant their search and seizure request. (J.A. 118, 294.)

At every investigatory step thereafter, the Agents sought prior search authorization. When the Agents saw a cell phone inside Appellee's car during their execution of the first search authorization, they called Maj CB for a verbal

authorization to seize the cell phone. (J.A. 258, 268.) When the Agents obtained new information about a possible obstruction of justice offense, they again requested a second search and seizure authorization to seize Appellee's phone. (J.A. 286.) Agents told the forensic analysts to stop their examination of the evidence when they became aware that Maj CB may not have had authority to grant the search authorizations. (J.A. 218.)

The Agents knew they could have obtained a search authorization from the installation commander or the commanding officer of Marine Aircraft Group 11 commanding officers. (J.A. 118.) Their only error, if one was committed, was having a reasonable, but mistaken, belief Maj CB had authority to grant their requests. (J.A. 294.) Like *Davis*, the law enforcement Agents' conduct cannot be characterized as a reckless, deliberate, or grossly negligent violation of Appellee's Fourth Amendment rights. 564 U.S. at 240.

b. The lower court failed to assess the flagrancy of the conduct and therefore attempted to deter conduct that is, at most, simple negligence—conduct outside the ambit of the exclusionary rule.

The deterrence benefits vary with the culpability of the police misconduct. *Herring*, 555 U.S. at 143. Thus, "an assessment of the flagrancy of the police misconduct" is important: the exclusionary rule seeks to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence"—circumstances "sufficiently deliberate" to warrant "the price paid by

the justice system." *Id*. at 143-44. The focus of the inquiry must therefore be "on the flagrancy of the police misconduct at issue." *Davis*, 564 U.S. at 238 (citation and quotation marks omitted).

In *United States v. Wicks*, this Court assessed law enforcement's conduct and noted that the "gravity of government overreach" found in that case prominently factored in its decision to uphold exclusion. 73 M.J. 93, 103-05 (C.A.A.F. 2014) (citing *Herring*, 555 U.S. at 137).

Unlike *Davis* and *Wicks*, the lower court failed to assess the flagrancy of police misconduct or determine the gravity of any government overreach. (J.A. 23-28.) The lower court did not find the conduct in this case was deliberate, reckless, or grossly negligent nor did it find that any conduct amounted to "recurring or systemic negligence." *Herring*, 555 U.S. at 143. Nor could it. Nothing in the Military Judge's Findings of Fact or the Record demonstrates that law enforcement Agents deliberately sought search authorizations from an officer they knew lacked authority to grant their requests. In fact, it is just the opposite—every individual involved in the investigation to include Maj CB reasonably believed at the time of the search, that she had authority to grant the search authorizations. (J.A. 118, 294.)

Without determining that any government actor acted in a culpable manner, the lower court first sought to "deter future commanders from impermissibly

delegating their inherent command authorities." (J.A. 24.) But *Kalscheuer* already holds that commanding officers may not delegate search authority. 11 M.J. at 378. Thus, any future deterrence by commanding officers stems from *Kalscheuer*'s holding rather than from exclusion of the evidence in this case. *See also United States v. Lopez*, 35 M.J. 35, 48 (C.M.A. 1992) (deterrence from exclusionary rule does not apply to "authorizations issued by commanders who are neutral and detached.").

The lower court next sought to deter "those who are *not commanders*" from approving search authorizations, (J.A. 24), but this is error as the focus of the exclusionary rule inquiry is on law enforcement conduct. *Davis*, 564 U.S. at 238.

Finally, the lower court sought to ensure investigators only obtain authorizations from commanders with proper authority. (J.A. 24.) But, as discussed *supra* Part II.C.1.a., law enforcement officials here reasonably believed they sought authorization from a commander who had authority to grant their request and the Military Judge concluded as much. (J.A. 104, 118, 294.) This conduct is not wrongful and is not the type of conduct the exclusionary rule seeks to deter. *See Davis*, 564 U.S. 240-42.

The lower court erred in overturning the Military Judge's decision not to apply the exclusion rule and excluding the evidence.

2. Even if this Court finds the Agents erred, their conduct is at most simple negligence. Any benefit of deterrence does not outweigh the costs to the justice system.

Deterrence of law enforcement conduct is a necessary, but insufficient, condition for exclusion of evidence. *Hudson v. Michigan*, 547 U.S. 586 (2006). The exclusionary rule analysis "must also account for the 'substantial social costs' generated by the rule." *Davis*, 564 U.S. at 237 (citations omitted). Thus, to the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against the "substantial social costs exacted by the exclusionary rule." *Krull*, 480 U.S. at 352-53 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

When police misconduct shows a deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, "the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis*, 564 U.S. at 238 (citation omitted). "But when the police act with an objectively reasonable good-faith belief their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id*. at 229 (citations and quotation marks omitted).

In *Herring*, due to a computer database error, a law enforcement officer executed an outstanding arrest warrant that he subsequently learned had been recalled. 555 U.S. at 137. The Supreme Court held that the officer's error did not

rise to the level of deliberate, reckless, or grossly negligent conduct nor did it constitute "recurring or systemic negligence" as to trigger the exclusionary rule. *Id*. at 144. Thus, in cases where "evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant," the marginal benefits from excluding evidence "cannot justify the substantial costs of exclusion." *Herring*, 555 U.S. at 146 (quoting *Leon*, 468 U.S. at 922.)

Even if this Court finds law enforcement erred in requesting a search authorization from Maj CB, the benefits of any appreciable deterrence do not outweigh the costs. Here, law enforcement Agents knew they could have obtained a search authorization from the commanding officer of the installation or the commanding officer of Marine Aircraft Group 11. (J.A. 118.) They did not do so because they reasonably believed Maj CB was Appellee's commanding officer with authority to grant their search authorization request at the time based on LtCol BW's unavailability—not because they wanted to circumvent Appellee's Fourth Amendment rights. (J.A. 118, 294.) Perhaps excluding the evidence in this case would arguably result in "incremental deterrence" since the Agents here already knew they had other legal options to obtain a search authorization. *Krull*, 480 U.S. at 353. But the benefit of that incremental deterrence does not outweigh the costs of setting aside Appellee's sexual assault convictions—convictions he received after a full and fair contested Members court-martial.

Therefore, the Military Judge did not abuse his discretion in ruling that "[o]n the facts of this case," exclusion of the evidence "would not result in appreciable deterrence of future unlawful searches, nor would the benefit outweigh the costs to the justice system." (J.A. 294) (citing Mil. R. Evid. 311(a)(3)).

a. The lower court erred by neglecting to analyze and balance the cost that exclusion would impose upon the justice system.

The Supreme Court has "abandoned the old, reflexive application of the [exclusionary rule] doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Davis*, 564 U.S. at 238. "[T]he benefits of deterrence must outweigh the costs." *Herring*, 555 U.S. at 141 (citations omitted). Deterring simple negligence, however, "is not worth the cost" of exclusion. *Id.* at 144 n.4; *see also Davis*, 564 U.S. at 238.

Unlike *Herring*, the lower court failed to balance the benefits of deterrence against the costs to the military justice system. (J.A. 23-28.) The lower court held exclusion "would deter unlawful searches" by: (1) reinforcing that search authorizations must come from competent individuals and (2) preventing drafting errors in the documents—including scrivener's errors that the lower court acknowledged were not Fourth Amendment violations and errors that Appellee waived by not raising at trial or on appeal. (J.A. 24-28); *see United States v. Robinson*, 77 M.J. 303, 307 (C.A.A.F. 2018) (finding waiver of suppression

grounds first raised on appeal). As a result, the lower court did not determine whether the benefits of deterrence outweighed the substantial costs of setting aside Appellee's convictions of sexual assault and "letting [a] guilty . . . defendant[] go free." *Herring*, 555 U.S. at 141.

In doing so, the lower court adopted a "reflexive application" of the exclusionary rule by omitting the required "more rigorous weighing" of the costs to the justice system, as the Supreme C ourt required. *Davis*, 564 U.S. at 238.

III.

UNDER THIS COURT'S PRECEDENT, THE GOOD-FAITH EXCEPTION APPLIES BECAUSE LAW ENFORCEMENT REASONABLY BELIEVED MAJ CB WAS AUTHORIZED TO ISSUE SEARCH AUTHORIZATIONS, EVEN IF SHE IN FACT LACKED AUTHORITY UNDER MIL. R. EVID. 315(d)(1).

A. Standard of review.

As discussed *supra* Parts I and II, this Court reviews a military judge's ruling on a motion to suppress evidence for abuse of discretion. *United States v. Darnall*, 76 M.J. 326, 330 (C.A.A.F. 2017).

B. This Court should interpret the codified good-faith exception under Mil. R. Evid. 311(c) in light of Fourth Amendment case law.

The good-faith exception codified at Mil. R. Evid. 311(c)(3) provides that evidence obtained from an unlawful search or seizure may be used if:

(A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

Mil. R. Evid. 311(c)(3).

In determining Fourth Amendment search and seizure issues, military courts rely on "a number of principles" from: (1) the Manual for Courts-Martial; (2) Court of Appeals for the Armed Forces precedent; and (3) United States Supreme Court precedent. *United States v. Eppes*, 77 M.J. 339, 345 (C.A.A.F. 2018); *see also United States v. Perkins*, 78 M.J. 381 (C.A.A.F. 2019) (interpreting codified good-faith exception in light of Supreme Court precedent); *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001) (same).

In *Perkins*, this Court reaffirmed its longstanding interpretation of Mil. R. Evid. 311(c) as an attempt to "codify the good-faith exception as stated in *United States v. Leon*, 468 U.S. 897 . . . (1984), and *Massachusetts v. Sheppard* 468 U.S. 981 . . . (1984)." 78 M.J. at 387. The court then interpreted the good-faith exception in light of Supreme Court precedent that focused on the reasonable

beliefs of law enforcement officials. *See id.* at 387-39 (interpreting Mil. R. Evid. 311(c)(3)(B)-(C)).

C. Consistent with then-existing federal case law, this Court previously held the good-faith exception applies even where an individual lacked authority to grant the search authorization.

"[T]he exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid." *Davis*, 564 U.S. at 238-39 (quoting *Leon*, 468 U.S. at 922). "The error in such a case rests with the issuing magistrate, not the police officer, and 'punishing the errors of judges' is not the office of the exclusionary rule." *Davis*, 564 U.S. at 239 (quoting *Leon*, 468 U.S. at 916).

The good-faith exception exists because, "where the [police] officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way." *Leon*, 468 U.S. at 919-20. The exception "specifically applies regardless whether the search authorization is by a judge, a magistrate, or a commander." *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992); *see also* Manual for Courts-Martial, Analysis of Mil. R. Evid. 311(c)(3), app. 22, at A22-20 (2016 ed.) (noting "[t]he exception applies to search warrants and authorizations to search or seize issued by competent civilian authority, military judges, military magistrates, and commanders").

In *United States v. Chapple*, 36 M.J. 410, 413 (C.A.A.F. 1993), this Court held the good-faith exception applied even where the commanding officer did not have authority to grant the search authorization. There, the commanding officer did not have authority over Chapple, his fiancé, or their off-base apartment, located in Naples, Italy. *Id*. In holding the good-faith exception applied, this Court found: (1) the commanding officer had general authority to authorize searches; (2) he acted on the advice of a judge advocate; and (3) Agents acted on the erroneous belief he had authority to authorize the search of the apartment. *Id*. The commanding officer's lack of authority over the off-base apartment, oand over Chapple, did not make the evidence inadmissible. *Id.* (citing *Leon*, 468 U.S. at 916 (exclusionary rule designed to deter police misconduct rather than errors of judges and magistrates)); *see also Lopez*, 35 M.J. at 48 (deterrence from the exclusionary rule does not apply to neutral and detached commanders).

This Court aligned its opinion with federal case law holding "the good-faith exception applies when a magistrate authorizes a search over a place outside his jurisdiction, if the officers executing the warrant reasonably believe that the magistrate has authority." *Chapple*, 36 M.J. at 414.

D. This Court's precedent in *Chapple* is consistent with every federal circuit that has addressed the application of the good-faith exception to warrants that are *void ab initio* based on the issuing magistrate's lack of authority.

1. Eleven federal circuits apply the good-faith exception even where the authorizing official lacked authority to issue a particular warrant.

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." *Herring*, 555 U.S. at 140. Thus, "whether a Fourth Amendment violation exists and what type of violation is present are separate and distinct questions from the question of whether the sanction of exclusion is appropriate." *United States v. Ganzer*, 922 F.3d 579, 586 (5th Cir. 2019) (citing *Leon*, 468 U.S. at 906).

Eleven federal circuits have recently held the good-faith exception applies to cases stemming from a single warrant issued by a federal magistrate who lacked authority to issue the warrant as outside his jurisdiction. *See e.g.*, *Ganzer*, 922 F.3d at 580.[1]

[1] *United States v. Eldred*, No. 17-3367-cr, 2019 U.S. App. LEXIS 23766, at *2 (2nd Cir. Aug. 5, 2019); *United States v. Moorehead*, 912 F.3d 963, 968-69 (6th Cir. 2019); *United States v. Kienast*, 907 F.3d 522, 527-28 (7th Cir. 2018); *United States v. Henderson*, 906 F.3d 1109, 1118-19 (9th Cir. 2018); *United States v. Werdene*, 883 F.3d 204, 216-17 (3rd Cir. 2018), *cert denied*, 139 S. Ct. 260 (2018); *United States v. McLamb*, 880 F.3d 685, 691 (4th Cir. 2018), *cert denied*, 139 S. Ct. 156 (2018); *United States v. Horton*, 863 F.3d 1041, 1050-51 (8th Cir. 2017), *cert denied*, 138 S. Ct. 1440 (2018); *United States v. Workman*, 863 F.3d 1313,

The defendants in those cases moved to suppress the evidence, arguing that the good-faith exception did not apply because the warrant issued was *void ab initio*. *See, e.g., Ganzer*, 922 F.3d at 583. But, as the Fifth Circuit explained, the focus of the good-faith exception is not on "the character of the underlying Fourth Amendment violation." 922 F.3d at 586 (citing *Herring*, 555 U.S. at 143); *see also United States v. Moorehead*, 912 F.3d 963, 969 (6th Cir. 2019). Rather, application of the exclusionary rule focuses "on the behavior of the law enforcement officials involved." 922 F.3d at 587. Thus, "there is no reason to distinguish warrants that are void *ab initio* from warrants that are later invalidated or recalled, or even from later-invalidated precedent or statutes." *Id*. (citing *Leon*, 468 U.S. at 900; *Herring*, 555 U.S. at 137-38; *Davis*, 564 U.S. at 232; *Illinois v. Krull*, 480 U.S. 340, 342 (1987)).

Here, there is no reason for this Court to distinguish between alleged Fourth Amendment violations because the good-faith inquiry addresses only whether a reasonably well-trained officer would have known that the search was illegal under the circumstances. *United States v. Horton*, 863 F.3d 1041, 1051 (8th Cir. 2017) (citing *Herring*, 555 U.S. at 145). This Court has already held that the good-faith exception can apply in cases where the issuing commanding officer lacked

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1317-19 (10th Cir. 2017), *cert denied*, 138 S. Ct. 1546 (2018)); *United States v. Levin*, 874 F.3d 316, 324 (1st Cir. 2017).

jurisdictional authority to grant search authorizations. *Chapple*, 36 M.J. at 413. Even if this Court finds that search authority had not devolved to Maj CB, "there is no reason to distinguish" between search authorizations that lack jurisdictional authority, *Ganzer*, 922 F.3d at 587, and search authorizations that lack authority by proper devolution of command authority. Regardless of the type of violation, the good-faith exception would apply where "the [police] officer's conduct is objectively reasonable" and "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way." *Leon*, 468 U.S. at 919-20.

2. By relying on a Sixth Circuit case that has since been called into question, the lower court erroneously focused on the Fourth Amendment violation, rather than on officer misconduct in rejecting application of the good-faith exception.

In holding the good-faith exception did not apply, the lower court distinguished this case from the federal circuits' application of the good-faith exception to warrants that are *void ab initio*. (J.A. 19-20.) In doing so, the lower court erroneously relied on *United States v. Scott*, 260 F.3d 512 (6th Cir. 2001). (J.A. 19.)

In *Scott*, the Sixth Circuit held that the good-faith exception did not apply to a warrant signed by a retired judge who lacked the requisite legal authority. 260 F.3d at 515. However, in light of *Herring*, 555 U.S. 135, the Sixth Circuit subsequently "rejected a broad interpretation" of *Scott* and held that "the good-faith exception is not categorically inapplicable to warrants found to be void ab

initio." *Moorehead*, 912 F.3d at 968-69. A reevaluation of *Scott* was necessary because *Herring* upset the "foundational assumption" in *Scott* by clarifying that the "exclusionary rule was crafted to curb police rather than judicial misconduct." *United States v. Master*, 614 F.3d 236, 242 (6th Cir. 2010) (quoting *Herring*, 555 U.S. at 142).

By relying on the questionable reasoning in *Scott*, the lower court failed to articulate a reason to distinguish between one type of void warrant from another—because there is none. (J.A. 19.) The focus of the exclusionary rule is on law enforcement conduct, not the Fourth Amendment violation itself. *See Master*, 614 F.3d at 242 (decision to exclude evidence "divorced from whether a Fourth Amendment violation occurred"). Relying on *Scott* despite the Sixth Circuit's subsequent repudiation of its analysis in *Master*, the lower court ignored the central and binding holding in *Herring* that the purpose of the exclusionary rule is to "deter deliberate, reckless, or grossly negligent conduct" by law enforcement. *See Master*, 614 F.3d at 242 (citing *Herring*, 555 U.S. at 144) *remanded and aff'd*, 491 F. App'x 593 (6th Cir. 2012).

The lower court erred by ignoring the current state of legal underpinnings applicable to warrants that are *void ab initio* and failing to apply *Herring*, as reflected in every federal circuit that has addressed this issue.

E. The Military Judge did not abuse his discretion in ruling that law enforcements Agents believed Maj CB had authority to grant search authorizations.

A search authorization must be issued by "an individual competent to issue the search authorization under Mil. R. Evid. 315(d)." Mil. R. Evid. 311(c)(3)(A). A commander is competent to issue a search authorization so long as he or she is "impartial" and "has control over the place where the property or person to be searched is situated or found." Mil. R. Evid. 315(d)(1). The commander must perform his or her function in a neutral and detached manner, and cannot "merely serve as a rubber stamp for the police." *See Carter*, 54 M.J. at 419; *see also United States v. Leedy*, 65 M.J. 208, 212-18 (C.A.A.F. 2007).

The exclusionary rule was "adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Sheppard*, 468 U.S. at 990 (internal quotations omitted). Officials lack objective good-faith where they "know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective." *Carter*, 54 M.J. at 421.

Here, the lower court did not find any of the Military Judge's Findings of Fact related to the Agent's good-faith reliance on Maj CB's authority to be clearly erroneous. The Military Judge found law enforcement Agents routed all of their investigations to Maj CB as the Acting Commanding Officer. (J.A. 104, 286.) The Agents knew that they should coordinate with Maj CB for all criminal MWSS-

373 investigations during LtCol BW's deployment. (J.A. 118.) Accordingly, Maj CB signed military protective orders and the Agents drafted the July 25th and 26th probable cause affidavits for her signature as "Commanding Officer, MWSS-373." (J.A. 285, 287.) The Military Judge found Maj CB was "employed in substantially the same manner as other commanders. (J.A. 96, 293.)

The Military concluded the Agents "presented their affidavits of probable cause to an officer who, based on their interactions, they reasonably concluded had the authority to authorize a CASS in this case." (J.A. 294.) Under these circumstances, a "reasonable law enforcement official" would have believed Maj CB had authority to issue the search authorizations as the person making command decisions while LtCol BW was absent. *See Carter*, 54 M.J. at 420-22; *Perkins*, 78 M.J. at 388. The Military Judge did not abuse his discretion in concluding that the Agents "reasonably relied in good-faith on the warrants signed by [Maj CB] on 25 and 26 July." (J.A. 294.)

## Conclusion

The United States respectfully requests that this Court reverse the lower court's decision and remand this case back to the lower court to complete its review under Article 66, UCMJ.

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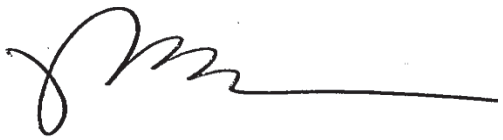

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on September 23, 2019.

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