IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 201700338
Roberto ARMENDARIZ, Master Sergeant (E-8) U.S. Marine Corps 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

REGULATIONS, RULES, OTHER SOURCES

A. The standard of review.

1. Because the lower court examined the Military Judge's Ruling, this Court first examines the Military Judge's Ruling, then decides whether the lower court erred in its examination of that ruling.

"The focus of [this Court's] analysis is the ruling of the military judge." *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). This Court routinely pierces the intermediate level decision to examine the military judge's ruling, and then decides if the lower court "was right or wrong in its examination of the military judge's ruling." *See, e.g., Shelton*, 64 M.J. at 37 (citing *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)).

Although how a second-level court "reviews an intermediate appellate review of a trial court" can be "difficult to determine," *Siroky*, 44 M.J. at 399, it is not difficult here. "Piercing-through" the intermediate appellate level is the norm—not a limited practice, as Appellee argues. The Supreme Court "most often" goes "through the Court of Appeals in order to re-review the trial court" and "determine[s] from that whether the Court of Appeals review was right or wrong." *Id*. This substitution of "judgment for that of the Court of Appeals . . . makes sense because the application of the standard of review is a pure question of law," reviewed de novo. *Id*.

The *Siroky* court examined whether to review the trial or lower court's factual findings for clear error. 64 M.J. at 398. The opinion "pierced through that

intermediate level" and "examined the military judge's ruling for clear error; then, on the basis of that examination, . . . decided whether the Court of Criminal Appeals was right or wrong in its own examination for clear error." *Id*. at 399. The *Siroky* court held, "regardless of the wording of the certified issue—the appropriate inquiry" examined the military judge's ruling. *Id*.

Here, the Military Judge made a Ruling. Thus, this Court determines if the Military Judge abused his discretion and then whether the lower court erred in its examination of the Military Judge's Ruling. As *Siroky* notes, and despite Appellee's argument to the contrary, this standard of review persists regardless of whether the United States certified the case. (Appellee's Answer at 9, Nov. 6, 2019); *see Siroky*, 64 M.J. at 399. Because Article 67 permits this Court to act, *inter alia,* on "the findings and sentence . . . as . . . set aside as incorrect in law *by the Court of Criminal Appeals,"* asking this Court to review the lower court's decision is not only unremarkable, but part of the statutory scheme itself. Article 67, UCMJ (emphasis added).

2. Where a court of criminal appeals exercises its unique Article 66(c), UCMJ, powers, this Court reviews that court for abuse of discretion. The lower court here merely reversed the trial judge for legal error, and did not exercise its unique Article 66(c) powers.

Article 66, UCMJ, "indicates that Congress intended a Court of Criminal Appeals to act as a factfinder in an appellate-review capacity and not in the first instance as a trial court." *United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F 1997).

The United States has identified only two situations that support Appellee's claim that this Court may not pierce through to the trial level decision, and instead must review the lower court's ruling for abuse of discretion. First, this Court reviews the courts of criminal appeals' exercise of their broad, unique, and "awesome and plenary" Article 66(c), UCMJ, powers "to prevent obvious miscarriages of justice or abuses of discretion," including, *inter alia,* sentence appropriateness, unreasonable multiplication of charges, and mooting errors in the post-trial process, for abuse of discretion. *See, e.g., United States v. Nerad,* 69 M.J. 138 (C.A.A.F. 2010) (discussing lower courts' exercise of unique Article 66(c) powers); *United States v. Kelly,* 77 M.J. 404 (C.A.A.F. 2018) (sentence appropriateness). Unlike most cases before this Court, such an exercise of Article 66 powers, which must be "cabined in practice," are typically made without reference to trial level rulings. *Cf. Nerad,* 69 M.J. at 143-44.

Second, in *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000), this Court reviewed the trial judge's ruling on a defense challenge for cause to a member. The trial judge ruled on actual bias, but the record was unclear whether the trial judge had tested for implied bias. *Id.* The *Armstrong* court cited the Article 66 "awesome, plenary, *de novo* power of review" and held that "[i]n this situation [where the trial judge apparently had not tested for implied bias] the court below was empowered, indeed obligated, to make its own judgment if it believed that implied bias warranted granting the challenge for cause." *Id.* The *Armstrong* court then reviewed the lower court's decision on implied bias for abuse of discretion. *Id.*

Here, the lower court did not exercise its unique Article 66 powers. Rather, the trial judge clearly ruled, and the lower court reversed the trial judge. Even if *Armstrong* were a correct statement of the law—that anytime a trial judge does not clearly rule, no deference is given even to relevant findings—it would not apply here: the trial judge issued a Ruling.

Further, Appellee's suggestion that this Court reviews the trial judge's Ruling only in "three situations"—rather than as a matter of course—misconstrues this Court's precedent and practice. (Appellee's Answer at 10.) Consistent with *Shelton*, *United States v. Keefauver* exemplifies this Court piercing the lower court's opinion to review the military judge's ruling, in support of its consideration

of the lower court's decision. 74 M.J. 230, 233 (C.A.A.F. 2015) (finding lower court erred in affirming military judge's ruling).

Similarly, in *United States v. Meghdadi*, this Court pierced through the lower court's summary disposition to review the military judge's ruling on a mistrial motion. 60 M.J. 438, 441 (C.A.A.F. 2005). This was because the lower court disposed of a petition for a new trial, which is reviewed for abuse of discretion, not because it was a summary disposition. *Id.*; *see United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982).

Here, the lower court did not decide an issue not previously considered by the Military Judge such as sentence appropriateness, sentence reassessment, or a petition for a new trial. It considered and reversed the Military Judge's Ruling.

This Court should, as is routine, pierce the lower court's opinion, review the Military Judge's Ruling for an abuse of discretion, and determine if the lower court's assessment was correct. *Shelton*, 64 M.J. at 37.

B. Search authority devolved to Major CB.

1. Appellee's reliance on *Bunting* is misplaced. *Bunting* and *Kalscheuer* demonstrate that a subordinate can succeed to command with only some functions of command devolving to that subordinate.

Appellee's citation to *United States v. Bunting*, 4 C.M.A. 84 (C.M.A. 1954), is misplaced for three reasons. First, *Bunting* did not involve authority to grant search authorizations by devolution. Instead, the issue hinged on the absence of

the general courts-martial convening authority, Admiral Joy, and whether his chief of staff, Admiral Ofstie, had succeeded command and appropriately referred charges to a court-martial. *Id*. at 86, 90.

Second, *Bunting* does not support Appellee's claim that an officer succeeding command must possess "*all* of the authorities held by his or her predecessor." (Appellee's Answer at 15.) *Bunting* made clear that, under the relevant Navy Regulations and in the absence of specific guidance from the absent commander, the chief of staff assumed control over administrative, *but not operational*, functions of the command. *Id*. at 89. Because "the court-martial function is administrative rather than operational in character," Admiral Ofstie "had the power to convene a general court-martial in his own right." *Id*. at 90. This was true "even though he could not succeed to all functions of command under" Article 1369. *Id*. at 89.

Finally, the holdings in both *Bunting* and *Kalscheuer* illustrate that devolution of command is not an all-or-nothing proposition as Appellee argues. (Appellee Answer at 15.) For example, there is no evidence that the executive officer in *Law* had courts-martial convening authority despite this Court finding he had "the authority to allow [the] search." *United States v. Law*, 17 M.J. 229, 240 (C.M.A. 1984).

Consistent with *Kalscheuer*, the Court in *Law* determined search authority had devolved "because, at the time of the search, [the executive officer] was exercising command authority over the unit." *Id*. Indeed, *Bunting* demonstrates that a subordinate can succeed to command and refer charges even though only some functions of command, but not all of command, devolves under Navy Regulations. 4 C.M.A. at 89.

2. Full succession to command is not required—reasonableness under the Fourth Amendment limits devolution of search authority to the subordinate exercising functional aspects of command while the commander is absent *at the time and place* law enforcement requests a search authorization.

The United States agrees with Appellee and the Military Judge that Maj CB was not designated as a commander under U.S. Navy Regulations. However, Maj CB succeeded to command and search authority devolved to her at the time and place law enforcement requested the search authorization under *United States v. Kalscheuer*, 11 M.J. 373, 380 (C.M.A. 1981).

In *Kalscheuer*, this Court concluded that, because it is reasonable for a commander to authorize searches "in light of his overall responsibilities, it is also reasonable for a search authorization to be granted by a person who is exercising general command responsibilities when the search authorization is requested." 11 M.J. at 380.

In all of the cases *Kalscheuer* cites in support for the devolution of search authority, none hold that nonjudicial punishment or courts-martial convening authority is a prerequisite for search authority to devolve to the subordinate exercising command function while the commander is absent. *See United States v. Murray*, 31 C.M.A. 20, 24 (1961); *United States v. Azelton*, 49 C.M.R. 163 (A.C.M.R. 1974); *United States v. Bradley*, 50 C.M.R. 608 (N.C.M.R. 1975); *United States v. Gionet*, 41 C.M.R. 519 (A.C.M.R. 1969).

Rather than limiting search authorization authority to those who exercise nonjudicial punishment or courts-martial convening authority, *Kalscheuer*, the cases upon which it relies, and *Law* all emphasize the narrow circumstances in which devolution of search authority meets the reasonableness requirement under the Fourth Amendment. *Kalscheuer*, 11 M.J. at 380.

A subordinate who temporarily succeeds to command under applicable service regulations due to the commander's absence and then exercises functional aspects of command at the time and place law enforcement requests a search authorization may grant the request. *Kalscheuer*, 11 M.J. at 380; *Murray*, 31 C.M.A. at 436 ("Mulhaney was acting as the unit commander at the time of his search"); *Azelton*, 49 C.M.R. at 167 (command devolved "[o]n the morning of 28 June 1973); *Bradley*, 50 C.M.R. at 617 (command devolved "at the time [the

executive officer] authorized the search"); *Gionete*, 41 C.M.R. at 520 (unit commander continued to function as commander at the time); *Law*, 17 M.J. at 240.

Here, the Military Judge did not abuse his discretion in concluding search authority devolved to Maj CB because she exercised command and control over the unit at the time law enforcement requested the search authorizations. (J.A. 290, 292–93.)

C. The reasonableness of search authority devolution focuses on the commander's absence at the time and place law enforcement requested a search authorization. Appellee does not, and cannot, provide facts in the Record that show LtCol BW was available at the time of the search.

1. Under *Bunting* and *Kalscheuer*, devolution of command need not be permanent. Command can be succeeded to and divested, depending on the absence of the commander.

"Court of Military Appeals cases make more of a functional than a geographic and temporal measure of 'absence' of a commander." *Kalscheuer*, 11 M.J. at 379 (quoting *Azelton*, 49 C.M.R. at 166). A subordinate who functions as the commander while the commanding officer is absent at the time and place law enforcement seeks a search authorization may authorize that request. *Murray*, 12 C.M.A. at 438; *Kalscheuer*, 11 M.J. at 379.

The *Bunting* court considered whether Admiral Joy was "absent from his command" while serving as the Senior United Nations Delegate in Korea for purposes of devolution of courts-martial convening authority. 4 C.M.A. at 88.

Admiral Joy, the convening authority, was primarily in Korea, but at times went back to the location of his headquarters in Tokyo. *Id*. at 86. The *Bunting* court concluded Admiral Joy was absent, finding "some basis for a succession of command" when the commanding officer is "unable to give his undivided attention and considered judgment to the functions of command." *Id*. at 88. "The efficient operation of a military unit, especially in combat, requires that the commanding officer be in full and effective control of his organization." *Id*.

As to Admiral Joy's return to his command: "he necessarily resumed command" during those times and the subordinate "would then be divested of his authority." *Id*. at 90.

Similarly, the executive officers in *Murray*, 12 C.M.A. at 438, *Kalscheuer*, 11 M.J. at 379, and *Law*, 17 M.J. at 240, succeeded to command on a temporary basis while their commanding officers were briefly unavailable. As *Bunting* and *Kalscheuer* demonstrate, succession to command need not be permanent and can be divested upon the reoccurring presence or availability of the commanding officer.

2. The Record does not support Appellee's assertion that LtCol BW was "reachable almost instantaneously." Lieutenant Colonel BW's availability to refer charges in April and May has no impact on this Court's analysis of his functional absence at the time and place law enforcement requested the search authorizations in July.

This Court "shall take action only with respect to matters of law." Article 67(c), UCMJ. Consistent with that statutory limitation, this Court does not exercise "fact-finding authority," and normally will not consider facts outside of the record as established at trial and the Court of Criminal Appeals. *United States v. Harris*, 61 M.J. 391, 396 (C.A.A.F. 2005); *see* C.A.A.F. R. 30A(a).

Appellee fails to cite to the Record to support his assertion that "Lieutenant Colonel BW was reachable almost instantaneously" because there is none. (Appellee's Answer at 21.) Rather, the Record belies his claim.

Lieutenant Colonel BW deployed in March of 2016 for six months. (J.A. 95.) In August, while LtCol BW was still deployed, Maj CB testified in another case that in April and May she signed the charge sheet on behalf of LtCol BW after speaking with LtCol BW about the charges while he was either in Bahrain or Kuwait. (J.A. 191, 193.)

Contrary to Appellee's argument, LtCol BW's availability in April and May to speak with Maj CB about referring charges in another case has no bearing on whether he was absent from his command on July 25th and 26th, the days law enforcement requested the search authorizations in this case. (J.A. 117, 200–01;

Appellee's Answer at 19.) The test under *Kalscheuer* and *Law* requires absence of the commanding officer at the time and place law enforcement requested the search authorizations. *Kalscheuer*, 11 M.J. at 379. Devolution of search authority considers the functional, not geographical, absence of the commander at the time and place of the request. *Kalscheuer*, 11 M.J. at 379 (quoting *Azelton*, 49 C.M.R. at 166).

Like the convening authority in *Bunting*, LtCol BW resumed command in April and May to refer charges. 15 C.M.A. at 88. But that temporary resumption does not mean that LtCol BW permanently resumed command during the remainder of his deployment, nor does it impact whether he was functionally absent in July.

The Record is unclear whether LtCol BW was in Kuwait, or near his office, on July 25th and 26th. Lieutenant Colonel BW testified he was in Kuwait "around July the 20th or so" and stayed "for about six or seven days," but he could not remember what day he left Kuwait since the days he spent in Kuwait always varied. (J.A. 98.)

Even if LtCol BW was in Kuwait on July 25th and 26th, nothing in the Record indicates law enforcement could reach LtCol BW or that LtCol BW was in his office at the time law enforcement sought the search requests. Before his deployment with the Special Purpose Marine Air-Ground Task Force, Crisis

Response-Central Command (J.A. 94), LtCol BW knew there would often be "no way to get in touch with [him]." (J.A. 95.) Because LtCol BW was forward deployed in a different time zone than the Remain Behind Element, he testified it was not operationally feasible to contact him for tasking due to time constraints and location. (J.A. 96.)

Like the commanding officers in *Kalscheuer* and *Law*, LtCol BW was absent from his command while Maj CB functioned as the commander at the time and place law enforcement sought their search requests.

3. Modern technology has not changed the continued applicability of *Kalscheuer*. Moreover, Appellee cannot show LtCol BW had access to communication technology at the time law enforcement requested a search authorization.

Contrary to Appellee's request, this Court need not reconcile *Kalscheuer* with modern technology because *Kalscheuer* already contemplates technology as a factor in assessing a commander's functional absence. (Appellant Answer at 21.)

In *Kalscheuer*, the commander left his portable two-way radio with his executive officer while he visited other installations. 11 M.J. at 374. The commander was with a wing commander, who usually did have a portable radio, but no one attempted to contact the commander. *Id*. In *Kalscheuer*'s discussion about delegation of search authority, this Court noted the then "widespread use of portable two-way radios by commanders is designed to facilitate making [] decisions expeditiously even when they are away from their offices." *Id*. at 376.

Thus, despite the possibility of contacting the commanding officer in *Kalscheuer* through the wing commander's radio, and despite the "widespread" trend of commanders using technology to make command decisions, *Kalscheuer* nevertheless held devolution of search authority is reasonable under the Fourth Amendment. *Id*. at 380. The Court emphasized the functional absence of the commander. *Id*.

The applicability of *Kalscheuer* has not changed even with modern technology, as this case demonstrates. Like the two-way radio in *Kalscheuer*, even with the "widespread" use of phone and email, LtCol BW was still functionally absent at the time and place law enforcement requested the search. As discussed above in Part C.2., Appellee cannot show that on July 25th and 26th, LtCol BW was in Kuwait, in his office, or that his phone and email functioned at the time of the search request. To the contrary, the Record demonstrates that LtCol BW was functionally absent at the time of the request due to time constraints and LtCol BW's deployment to four different countries with Special Purpose Marine Air-Ground Task Force, Crisis Response-Central Command. (J.A. 94–96.)

D. Neutral and detached commanders are not the target for Fourth Amendment deterrence.

The exclusionary rule is "historically designed 'to deter police misconduct rather than to punish the errors of judges and magistrates.'" *Arizona v. Evans*, 514 U.S. 1, 11 (1995) (quoting *Illinois v. Krull*, 480 U.S. 340, 348 (1987)). The

rationale in *Leon* and *Massachusetts v. Sheppard* "that the deterrence basis of the exclusionary rule does not apply to magistrates extends with equal force to search or seizure authorizations issued by commanders who are neutral and detached" as defined in *Ezell*. *United States v. Lopez*, 35 M.J. 35, 39–40 (C.A.A.F. 1992) (citing *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)).

Consistent with *Evans* and *Lopez*, this Court should focus on the conduct of law enforcement—not Maj CB or LtCol BW—in deciding whether to apply the exclusionary rule as the rule "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systemic negligence." *United States v. Herring*, 555 U.S. 135, 144 (2009). Like the court clerks in *Evans* who "have no stake in the outcome of particular criminal prosecutions," application of the exclusionary rule to commanders who are neutral and detached will have no deterrent effect on their conduct. 514 U.S. at 15.

E. This Court should not consider the Fourth Amendment issues Appellee raises for the first time on appeal in determining whether Mil. R. Evid. 311(a)(3) or the good-faith exception applies.

1. Appellee did not have to wait for the United States to argue that the exclusionary rule does not apply to raise the commander's impartiality, the particularity of the search authorization, and the scope of the search authorization he now raises for the first time on appeal.

This Court does not review waived issues, for "a valid waiver leaves no error to correct on appeal." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). "When evidence has been disclosed prior to arraignment . . . the defense must make any motion to suppress or objection under this rule prior to submission of a plea." Mil. R. Evid. 311(d)(2)(A). "Failure to so move or object constitutes a waiver of the motion or objection." *Id*.

In *United States v. Robinson*, Robinson filed a motion to suppress evidence obtained from his phone alleging two specific grounds at trial. 77 M.J. 303, 307 (C.A.A.F. 2018). On appeal, Robinson challenged the search on a new ground not previously raised. *Id*. This Court found "that the arguments Appellant now seeks to first raise on appeal" are "waived" and "are therefore extinguished." *Id*.; *see also United States v. Stringer*, 37 M.J. 120, 125 (C.M.A. 1993).

Similarly, in *United States v. Perkins*, this Court recently declined to consider a waived Fourth Amendment issue in its determination whether the good-faith exception applied. 78 M.J. 381, 389 (C.A.A.F 2019). The appellant argued,

for the first time on appeal, that the good-faith exception did not apply because the commander abandoned his judicial role and rubber-stamped law enforcement's search authorization request. *Id*. at 389. This Court noted that the appellant could have argued in the first instance that the search authorization was invalid because the commander rubber-stamped the government's application. *Id*. at 390 n.13. The appellant did not have to wait for the United States to argue "the agents acted in good faith before raising a rubber-stamping objection." *Id.* Finding waiver, this court did not address the argument on the merits. *Id*. at 390.

At trial, Appellee filed a Motion to Suppress alleging three specific grounds, including that search authority had not devolved to Maj CB. (J.A. at 180–82.) Appellee now argues for the first time on appeal that Maj CB was not neutral or detached, that the search authorization was not sufficiently particular, and that the agents exceeded the scope of the search authorization. (Appellee's Answer at 28–31.) Appellee did not raise these Fourth Amendment issues before the Court of Criminal Appeals, arguing instead that there was no probable cause and that the searches were not reasonable. (Appellee's Brief at 35–45, July 10, 2018.) The only Fourth Amendment violation that was both preserved by Appellee and found by the lower court is Maj CB's lack of authority to grant search authorizations by devolution. (J.A. at 180–82).

Like *Perkins*, Appellee did not have to wait for the United States to argue that the exclusionary rule does not apply to commanders to argue the Fourth Amendment issues he now raises for the first time. (Appellee Answer at 27–28 n.5); 37 M.J. at 390 n.13. As *Perkins* notes, "a particularized objection is necessary so that the government has the opportunity to present relevant evidence that might be reviewed on appeal." 73 M.J. at 390 (citing *Stringer*, 37 M.J. at 132). This Court should decline Appellee's invitation to evaluate alleged Fourth Amendment violations that were not raised and litigated at trial. Because Appellee waived these issues, this Court should decline to consider Appellee's arguments in determining whether Mil. R. Evid. 311(a)(3) or the good-faith exception applies.

2. Regardless, commanders are not *per se* disqualified to act as neutral and detached magistrates.

"[I]n the military, . . . the official empowered by law to issue search warrants under the Fourth Amendment must be neutral and detached and must perform his duties with 'a judicial rather than a police attitude.'" *Ezell*, 6 M.J. at 315 (citation and internal quotation omitted). But where a "commander becomes personally involved as an active participant" in the investigation or "demonstrates personal bias or involvement in the investigative or prrosecutorial [sic] process against the accused, that commander is devoid of neutrality and cannot validly" authorize a search authorization. *Id*. at 318–19.

"In deference to the President's designation of the commander as the authorized person to issue [] search authorization[s]," this Court has declined "to hold that military commanders are *per se* disqualified to act as neutral and detached magistrates." *Id*. at 318.

This Court should decline Appellee's invitation to hold that Maj CB was *per se* disqualified "because commanders are more akin to law enforcement agents than to judges or magistrates." (Appellee Answer at 25 (citing *United States v. Queen*, 26 M.J. 136, 141–42 (C.M.A. 1988)).

F. This Court should disregard Appellee's citation to *Tienter*, as the lower Court did, because Appellee failed to raise *Tienter* at trial.

An abuse of discretion review "is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that *appellate* defense counsel now wishes *trial* defense counsel had submitted." *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (in the context of a Mil. R. Evid. 412 issue) (emphasis in original). In *United States v. Lloyd*, this Court held "the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level." 69 M.J. 95, 100–01 (C.A.A.F. 2010) (ruling on request for expert assistance).

Whether this Court reviews the Military Judge's Ruling or the lower court's opinion, it should disregard Appellee's factual assertions that are outside of the

Record and found in *United States v. Tienter*, 2014 CCA LEXIS 700 (N-M. Ct. Crim. App. Sept. 23, 2014). (Appellee's Answer at 6, 28–30, 33.)

As Appellee notes, "[t]he military judge was not aware of *Tienter*." (Appellee's Answer at 43.) Appellee therefore asserts in his Brief factual allegations and legal conclusions that were not presented at trial before the Military Judge. (Appellee's Answer at 6, 28–30, 33.) The lower court did not cite to *Tienter* and did not adopt Appellee's factual allegations based on *Tienter* in its Opinion. (J.A. 1–32.) This Court should do the same.

G. <u>If this Court finds Appellee did not waive consideration of the additional Fourth Amendment issues because the lower court considered them in applying the exclusionary rule, this Court should find the lower court abused its discretion by considering conduct unrelated to the Fourth Amendment violation</u>.

"'[A]dmittedly drastic and socially costly,' the exclusionary rule should only be applied where 'needed to deter police from violations of constitutional and statutory protections.'" *United States v. Eppes*, 77 M.J. 339, 349 (C.A.A.F. 2018) (quoting *Nix v. Williams*, 467 U.S. 431, 442–43 (1981)). "The exclusionary 'rule's sole purpose . . . is to deter future Fourth Amendment violations.'" *Id*. (quoting *Davis v. United States*, 564 U.S. 229 (2011)). "As such, its use is limited to situations in which this purpose is thought most efficaciously served." *Id*. (citation and internal quotations omitted). "For exclusion to be appropriate, the deterrence

benefits of suppression must outweigh [the rule's] heavy costs." *Id*. (citation and internal quotations omitted).

This Court has examined the conduct constituting the Fourth Amendment violation to determine if exclusion would appreciably deter that conduct. In *United States v. Wicks*, 73 M.J. 93, 101 (C.A.A.F. 2014), this Court reviewed a military judge's suppression of evidence where agents violated the appellant's Fourth Amendment rights. In deciding if exclusion would result in appreciable deterrence, and whether the benefits of deterrence outweighed the costs, this Court considered the nature of the misconduct underlying the Fourth Amendment violation. *Id.*

There specific conduct deterred was the agents: (1) exceeding the scope of the private search; (2) executing the search without a search authorization and in reliance on legal advice; (3) regularly conducting searches without search authorizations; and, (4) ordering an exhaustive analysis of the phone while Wick's Fourth Amendment rights were litigated at trial. *Id*. at 105. Accordingly, this Court held the exclusionary rule applied. *Id*. at 106.

Similarly in *Herring*, after the Supreme Court reiterated that the exclusionary rule served to deter deliberate, reckless, or grossly negligent conduct, the Court determined that "[t]he error in this case does not rise to that level." 555 U.S. at 144. The *Herring* court explained: "the conduct at issue was not so

objectively culpable as to require exclusion." *Id*. at 147. "If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified." *Id*.

Contrary to *Wicks* and *Herring*, the lower court abused its discretion by considering conduct unrelated to the Fourth Amendment violation the Court found and that stemmed from issues Appellee waived on appeal. (J.A. 24–28.)

As in *Wicks*, *Herring*, and *Perkins*, this Court should confine its Mil. R. Evid. 311(a)(3) evaluation to whether the deterrent effect of exclusion will prevent an un-waived Fourth Amendment violation: requesting a search authorization from an individual without authority. In determining if the good-faith exception applies, this Court should likewise determine if the law enforcement's conduct in requesting a search authorization from Maj CB was objectively reasonable. *See Leon*, 468 U.S. at 919–20.

This Court's analysis should determine: (1) if excluding the evidence will deter law enforcement from seeking search authorizations from officials with no authority; and, (2) if law enforcement's conduct in asking Maj CB for a search authorization was objectively reasonable such that the good-faith exception should apply.

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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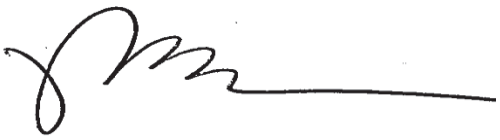

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