15 June 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	UNITED STATES ANSWER TO SUPPELEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
	)	USCA Dkt. No. 20-0262/AF
Airman First Class (E-3), KALEB S. GARCIA, USAF, *Appellant.*	)	Crim. App. Misc. Dkt No. 2019-07

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED IN FINDING THAT THE MILITARY JUDGE ABUSED HER DISCRETION IN SUPPRESSING EVIDENCE OBTAINED AS A RESULT OF A SEARCH AND SEIZURE OF APPELLANT'S DNA.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("AFCCA") reviewed this case pursuant to Article 62, UCMJ; 10 U.S.C. § 862. This Court has jurisdiction to review the issues in this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct.

STATEMENT OF FACTS

On 3 February 2019, A1C JL reported to her First Sergeant that she believed Appellant had sexually assaulted her at her apartment. (App. Ex. LIX.) She was interviewed that same day by Agent RB and Agent RD from the Air Force Office of Special Investigations ("AFOSI"). (Id.) During that interview she recounted drinking with Appellant and a friend, SrA CG, and ultimately blacking out. (Id.) She awoke to the accused "trying to have sex with her." (Id.) She blacked out again, and next woke up around 0300 and remembered Appellant telling her to take a shower. (Id.) A1C JL could not remember any penetration but consented to a Sexual Assault Forensic Exam. (Id.) Vaginal swabs were taken during the examination and forwarded to a forensic laboratory for analysis. (Id.) A search authorization was also obtained to seize buccal swabs from Appellant. (Id.)

Prior to trial, trial defense counsel moved the military judge to suppress evidence obtained from Appellant's sexual assault forensic examination, conducted by law enforcement agents pursuant to a February 2019 search authorization. (App. Ex. XXII.) The seized evidence included Appellant's penile and buccal swabbing, among other forensic evidence. (*See* id.) The military judge suppressed the evidence obtained pursuant to the February 2019 search authorization in her ruling, dated 26 August 2019. (App. Ex. XXIV.)

She determined the government agent who sought the search authorization, Agent RB, provided the qualified commander search authority with a false statement made knowingly and intentionally or with reckless disregard for the truth, and absent Agent RB's falsehoods, probable cause would not have supported the search. (*See* id.) On 3 November 2019, the military judge further denied the government's motion to reconsider her ruling suppressing the February 2019 search. (App. Ex. XLIV.) The government did not appeal the military judge's denial of this first search authorization.[1]

Meanwhile, on 4 October 2019, the government sought a second search authorization for Appellant's DNA in the form of a buccal swab. (*See* App. Ex. LVII at 21.) This time, the government requested an independent military judge to act as the search authority, avoiding any conflict with the military judge detailed to the court-martial. (*See* id.) The government provided the search authority two affidavits for consideration—an affidavit from Agent RD, describing AFOSI's investigative steps, including information derived from interviews of SrA CG and A1C JL, and an affidavit from Mr. MT, a forensic biologist who tested vaginal swabs collected from A1C JL's sexual assault

[1] Though the Government did not appeal this ruling through Article 62, it does not concede that the military judge's ruling did not constitute an abuse of discretion. While the Government agrees that the agent acted recklessly in including information, the affidavit still contained sufficient evidence to support probable cause, even after the erroneous information was excised.

forensic examination and identified "an unknown male individual" contributor to the resulting DNA mixture. (*See* id. at 24–30.) Agent RB was not involved in the October 2019 search authorization. (Id.) With the information contained in the two affidavits, the search authority found probable cause existed and approved search and seizure of Appellant's DNA on 8 October 2019. (*See id.* at 23.)

On 28 October 2019, trial defense counsel moved the military judge to suppress evidence obtained as a result of the October 2019 search and seizure of Appellant's DNA. (App. Ex. LVII.) Following an Article 39(a), UCMJ, session on 5 November 2019, in which the parties presented evidence and argument on the October 2019 search, the military judge again suppressed the evidence derived from Appellant's DNA. (App. Ex. LIX.) The military judge suppressed the evidence obtained through the second search because she found that Mr. MT and Agent RD's affidavits contained material omissions. (Id.) Specifically, she suppressed the evidence because she found that Agent RD had made material omissions in his affidavit in support of probable cause, and that the second search, conducted in October 2019, was derived from the first search, conducted in February 2019. (Id.) The military judge also held that the good faith exception did not apply in the case, that inevitable discovery did not apply, and that exclusion was appropriate under the Mil. R. Evid. 311 balancing test. The

Government appealed the military judge's second ruling, pursuant to Article 62, UCMJ.

On appeal, AFCCA determined that the military judge abused her discretion when she found that the allegedly material omissions destroyed probable cause and when she concluded that the second search was derivative of the first search. United States v. Garcia, Misc. Dkt. No. 2019-07 (A.F. Ct. Crim. App. 10 April 2020) (unpub. op.) Because the case was resolved by finding that the military judge abused her discretion on the first two issues, AFCCA did not address the good faith exception or inevitable discovery.

The Air Force Court first determined that the search authority was presented with sufficient evidence to support a finding of probable cause. Id. at 25. As AFCCA noted, "great deference is given to the probable cause determination, and the military judge erred in not giving the deference that was due." Id. The Air Force Court then reviewed the affidavits submitted in support of the authorization and found that there was probable cause based on Appellant's statements to SrA CG in which he expressed a sexual interest in A1C JL, and A1C JL's independent recollection. Id. Specifically, A1C JL remembered waking up twice during the night with Appellant, once when he was on top of her "trying to have sex" and once when she recalled waking up sometime later, standing naked with Appellant, who was trying to convince her

to shower and became angry when she refused. Id. A forensic medical examination had revealed that A1C JL had semen from two men in her vagina – one of the men was SrA CG and the other was "unidentified." Id. at 26.

The Air Force Court aptly noted that this information supported a fair probability that the seizure of Appellant's DNA would identify him as the unidentified contributor of semen. Id. The Air Force Court noted that the probable cause would still exist even if Agent RD had fully conveyed A1C JL's uncertainty about penetration and whether she was clothed or unclothed during her memory of Appellant being "on top of her trying to have sex." Id. at 28.

The Air Force Court then proceeded to analyze the issue of whether there were material omissions in the affidavits, assuming without deciding that the military judge's determination that Agent RD had acted recklessly was not clearly erroneous. Id. The Air Force Court found that the "military judge applied an erroneously heightened legal standard for probable cause." Id. at 27. Further, AFCCA concluded that the military judge erred when she required the government agents to present a "full picture" of the investigation rather than determining whether the omissions were material and necessary to the finding of probable cause. Id. The Court then appropriately applied the "totality of the circumstances" test and determined that, even if the "omitted material" had been

presented to the search authority, probable cause would still have existed. Id. at 28.

Finally, AFCCA assessed the military judge's erroneous application of the independent source doctrine. The Air Force Court held that it was an erroneous view of the law to conclude that, because the second search authorization was sought as a result of her adverse ruling, that government agents had "exploited the initial illegality." Id. at 30-31. The Air Force Court noted that the initial search was suppressed, not because of illegalities in the evidence supporting probable cause, but because one of the agents had misrepresented facts. Id. at 31. However, the facts which had been previously misrepresented, "and the authorizing official who relied on them, played no part in the investigation after the military judge granted [Appellant's] first motion to suppress." Id. at 30. As AFCCA further noted, "there is no evidence in the record" that, in obtaining the second search authorization, any government actor attempted to exploit the misrepresentations of the first search authorization or the subsequent information revealing Appellant as the second contributor of semen. Id. at 32.

SUMMARY OF ARGUMENT

Appellant has failed to show good cause for grant of review. Appellant first asks this Court to consider whether the military judge's findings of fact were clearly erroneous – a finding that the lower court explicitly declined to address,

given that the issue was resolved on purely legal grounds. Appellant next argues that the lower Court erred by not considering the "cumulative error" of the multiple alleged omissions – however, AFCCA explicitly considered the question of whether inclusion of all omissions would have detracted from a finding of probable cause, and found that it did not. When the Court assessed the materiality of the various "omitted" statements, it appropriately found that the omissions were either cumulative, or of limited relevance, and that under a totality of the circumstances test were not material to a determination of probable cause. Finally, AFCCA correctly applied the independent source doctrine, reviewing whether the illegality of the first search was exploited in the second authorization – unlike the military judge, who found, despite the lack of any evidence on the record, that the government was only interested in obtaining a second search authorization because of the discovery of Appellant's DNA during the first, suppressed search. The Air Force Court's analysis and reversal of the military judge's suppression is supported by applicable law and precedent. Further, the military judge's additional abuses of discretion in erroneously finding as fact that Agent RD had been reckless and the subsequent error in application of the good faith doctrine and the exclusionary rule balancing test, counsel against further review by this Court. Appellant has pointed to no particularized error committed by AFCCA, nor any law or precedent contrary to the Courts' opinion.

ARGUMENT

THE COURT SHOULD DENY APPELLANT'S PETITION AS THE AIR FORCE COURT DID NOT ERR IN FINDING THAT THE SEARCH WAS LAWFUL.

Standard of Review

An appellate court reviews a military judge's evidentiary ruling on a motion to suppress evidence for an abuse of discretion. United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995); United States v. Wallace, 66 M.J. 5, 7 (C.A.A.F. 2008).

Since this is an Article 62 appeal by the United States, this Court may not make findings of fact, but may determine whether the military judge's factual findings are clearly erroneous or unsupported by the record. United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995). Matters of law in an Article 62 appeal are reviewed de novo. United States v. Terry, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008), *review denied* 66 M.J. 380 (C.A.A.F. 2008).

Law and Analysis

The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause." U.S. CONST. AMEND. IV. Probable cause exists when there is sufficient information to provide the authorizing official "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2); United States v. Cowgill, 68 M.J. 388, 390–91 (C.A.A.F. 2010).

Probable cause requires only a "fair probability," and not an actual showing that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238 & 243 n.13 (1983)). Probable cause calculations are not technical; "they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id. at 231. That's why "[p]robable cause 'is not a high bar.'" District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Kaley v. United States, 571 U.S. 320, 338 (2014)). In fact, probable cause "merely requires that a person 'of reasonable caution' could believe that the search may reveal evidence of a crime; 'it does not demand any showing that such a belief be correct or more likely true that false.'" United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)). It "does not require officers to rule out a suspect's innocent explanation for suspicious facts." Wesby, 138 S. Ct. at 588. "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." Id. (quoting Gates, 462 U.S. at 243 n.13). A warrant application is "judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." United States v. Allen, 211 F.3d 970, 975 (6th Cir. 2000) (en banc).

When the defense alleges false information in a search authorization, the defense has the burden of establishing by a preponderance of the evidence that a

government agent included a false statement knowingly and intentionally or with reckless disregard for the truth. Mil. R. Evid. 311(d)(4)(B). This rule was adopted following Franks v. Delaware, 438 U.S. 154 (1978). Once it has been determined that a false statement was included in support of probable cause, then the reviewing court strikes the false statements to determine if "sufficient content" remains to support a finding of probable cause. Franks, 438 U.S. at 171-172. In other words, "where there are misstatements or improperly obtained information, we sever those from the affidavit and examine the remainder to determine if probable cause still exists." United States v. Gallo, 55 M.J. 418, 421 (C.A.A.F. 2001).

The same general rationale for false statements extends to "material omissions." United States v. Mason, 59 M.J. 416, 422 (C.A.A.F. 2004). "'Franks protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." Id. (quoting United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990)) (emphasis in original). If probable cause still exists after an omission is corrected, then the evidence obtained from the search need not be suppressed. Gallo, 55 M.J. at 421.

The Air Force Court conducted its analysis based upon an assumption that the defense had met the burden of establishing a knowingly false statement.[2] However, even if the first prong of Franks is met, and a court determines that there was a reckless disregard for the truth, the second step still requires looking to whether the false or omitted facts are material and necessary to a finding of probable cause. 438 U.S. at 156. Put another way, the omission must be such that "inclusion in the affidavit would defeat probable cause[.]" Colkley, 899 F.2d at 301 (citing Reivich, 793 F.2d at 961).

In such an evaluation, courts "should bear in mind that 'a grudging or negative attitude by reviewing courts towards warrants' . . . is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." United States v. Gallo, 55 M.J. at 421 (quoting Gates, 462 U.S. at 236). Courts shouldn't "invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." Gates, 462 U.S. at 236.

[2] "With the issue of probable cause resolved, we nonetheless assume *arguendo* that SA RD recklessly or deliberately left information out of his affidavit as found by the military judge. Although the evidence of record raises questions about the military judge's factfinding, we need not decide whether her determination of SA RD's intent was clearly erroneous." Garcia, unpub. op. at 27.

The Air Force Court did not err when it found that the omitted statements were not material, and thus their omission did not impact the search authority's finding of probable cause.

The Air Force Court focused its analysis on the second prong of the Franks analysis to determine whether the omitted material would have extinguished probable cause, had it been included. Appellant argues that "the CCA only considered each omission individually in evaluating materiality." While AFCCA did assess the value of each omission independently, it also considered collectively whether "inclusion of the omitted information in a corrected affidavit" would have resulted in a legally deficient authorization. The Air Force Court clearly stated that it utilized the totality-of-the-circumstances test authorized in Illinois v. Gates, 462 U.S. 213. *See* Garcia, unpub. op. at 28. The Court further stated that "a practical, common sense reading of a 'corrected' October 2019 affidavit" would still establish probable cause. Id. The Air Force Court then proceeds to explain why each omission was not relevant to a probable cause analysis, before concluding that "the hypothetical inclusion of the omitted information would not have prevented a finding of probable cause if it had been presented to the search authorizing official." Id. at 30. The plain language of the court's ruling negates Appellant's argument that they did not consider the inclusion of all "omissions."

Regardless, AFCCA did not err in determining that the "omissions" were not material. The alleged omissions fall essentially into two general categories: first,

evidence that A1C JL had a poor memory of the night; and second, that there were alternate possible explanations for the "unidentified male" semen in A1C JL's vagina. However, the affidavits were replete with information that A1C JL's memory was significantly impaired, thereby rendering additional information about her poor memory cumulative. The second category of "omissions" addresses alternate explanations, which do not eliminate or negate the probable cause that existed for the seizure of Appellants' own DNA, particularly where the alternate explanations were speculative at best. *See* Wesby, 138 S. Ct. at 588.

Appellant argues that the Air Force Court incorrectly assessed the materiality of a statement that A1C JL made to the Sexual Assault Nurse Examiner that she was clothed when Appellant tried to convince her to take a shower. However, as AFCCA noted, this was not clearly inconsistent with her earlier statements to AFOSI, and further, only demonstrated the overall inconsistent nature of her memory – which was already on full display to the search authority. This is particularly true as the affidavit already included evidence of JL's inconsistencies and lack of certainty regarding her state of dress throughout the night. (*See* App. Ex. LIX at 56.) The search authority was presented with facts regarding A1C JL's level of intoxication, her lack of certainty about what happened, and her inconsistencies in providing explicit details. Through these facts alone, the search authority easily could have suspected A1C JL would make

additional unclear and inconsistent statements during her forensic nurse examination. *See* United States v. Reivich, 793 F.2d 957, 963 (8th Cir. 1986) ("After all, we expect such judicial officers to be only neutral and detached – not naïve and ingenuous."). Appellant has not pointed to anything in the record to indicate that the Court did not appropriately use a totality-of-the-circumstances to analyze the importance of omitted information. While Appellant argues that SA RD "cherry-picked" facts, he fails to explain why additional facts about A1C JL's inconsistent memory would have eliminated probable cause.

Further, as AFCCA noted, the fact that A1C JL might have been clothed later in the night does little to discount her statements that Appellant tried to have sex with her earlier in the night – nor does it discount statements that earlier in the night she was not certain she was clothed. While A1C JL's credibility is an important factor in the totality of the circumstances test, the affidavit captured her "fragmented and inconsistent recollection about being clothed during the sexual assault." Garcia, unpub. op. at 28. While Appellant states that the omitted facts "obscured the fact" that JL did not remember penetration, he fails to demonstrate how the "omitted evidence" disproved penetration – particularly in light of A1C JL's fragmented memory, SrA CG's knowledge of Appellant's desire to have sex with A1C JL, and the presence of an unidentified male's semen discovered in her vagina.

Appellant fails to demonstrate that omission of one of SrA CG's statements to investigators "created a misleading narrative." (App. Supplement to Petition at 21.) As Appellant acknowledges, the affidavit included SrA CG's statement that he had sex with A1C JL – Appellant fails to demonstrate how the failure to include his statement that JL did not remember having sex with *him* undercuts the probable cause to seize Appellant's DNA in light of the other evidence. The military judge, and Appellant, seemed to require that the Government include both of SrA CG's statements indicating he had sex with A1C JL despite failing to indicate how a cumulative statement changes the probable cause calculus. The search authority was well aware that SrA CG had sex with A1C JL on the night in question – he had not only SrA CG's statement, but also the confirmatory results from the DNA analysis. Certainly, the search authority was not misled about SrA CG's involvement.

Appellant next argues that SrA CG's statement that Appellant and A1C JL were clothed when they left the bedroom was material. However, as the Air Force Court noted, omission of SrA CG's statements that Appellant and A1C JL were clothed when not alone in the room together was not relevant – the investigation was focused upon what happened within the room when SrA CG was not present. A1C JL's state of dress when she left the bedroom has little to no impact on whether she was vaginally penetrated without her consent while in the room alone

with Appellant. Although the fact may be marginally relevant, the law does not require search affiants to include every piece of information gathered in the course of an investigation. Tate, 524 F.3d at 455.

Finally, Appellant argues that the failure to notify the search authority that A1C JL was living with her ex-boyfriend was material because it provided "a plausible explanation for the third source of DNA." (App. Br. at 33.) However, that statement is speculative at best. Probable cause requires merely a fair probability – it does not require law enforcement to investigate every potentially exculpatory lead prior to obtaining authorization to seize evidence for which they have probable cause. *See* Kansas v. Glover, 140 S. Ct. 1183, 1191 (2020) (using the totality of the circumstances test to uphold the "seizure" of a vehicle stop based upon facts known to the officer at the time, regardless of whether exculpatory evidence might exist.)

Appellant's arguments that AFCCA erred are best characterized as a request that this Court require a quantum of evidence greater than probable cause before upholding a search authorization. Appellant argues, in essence, that the omitted evidence demonstrates that there was another "plausible explanation" – however, probable cause does require that an authorizing official "rule out a suspect's innocent explanation for suspicious facts." Wesby, 138 S. Ct. at 588. Probable cause is a far lower threshold than beyond a reasonable doubt, and the affidavit

need not include "every piece of information gathered in the course of an investigation." United States v. Tate, 524 F.3d 449, 455 (4th Cir. 2008).

Given that the omissions were either cumulative or not material to a finding of probable cause, the Air Force Court did not err when it determined that, even if they were added to the affidavit in support of probable cause, it would not have impacted the authorization. A reasonable reading of the Air Force Court's opinion demonstrates that the Court did precisely what Appellant requests – consider whether all of the omissions collectively would have extinguished probable cause.

While Appellant appears to argue that where there are multiple omissions, there is some new or different "cumulative omission" standard, he cites to no case that supports his proposition. The two cases he cites in his supplement to the petition for review do not address a "cumulative omission" test. In United States v. Perkins, the Ninth Circuit Court of Appeals reviewed a search warrant which was supported by an affidavit consisting of conclusory statements, subjective determinations which should have been left to the magistrate, and omissions which converted technically true statements into misleading statements. 850 F.3d 1109, 1118-1119 (9th Cir. 2017). The Court held that the law enforcement official's "incomplete and misleading recitation of the facts" demonstrated that the agent was acting with, at least, a reckless disregard for the truth. Id. at 1119. However, after determining that the agent had acted with a reckless disregard for the truth,

the Court then proceeded to assess the second prong of the Franks test and to assess whether the "omitted fact is 'material;' that is, whether it is 'necessary to the finding of probable cause.'" Id. (*citing* Franks, 438 U.S. at 159). The Ninth Circuit in Perkins did not announce any new or difference test – rather, it did precisely what the Air Force Court did; look to the misleading or wrongfully omitted evidence, and determine its materiality to the probable cause calculus.

Appellant also cites to United States v. Stevenson, 2009 CCA LEXIS 445 (N.M. Ct. Crim. App. 10 Dec. 2009), an unpublished Navy-Marine case in support of the argument that there is some "cumulative error" doctrine in assessing material omissions. However, the Navy-Marine Court was assessing a misleading document in which a victim stated that she "heard nothing to indicate the perpetrator disrobed before the rape or redressed after the rape" but also stated that she saw the accused wearing "very dark clothes" and heard "wet suit material, like Goretex" during the attack. Id. at 19-20. The affiant in that case used the victim's statement that the accused was not clothed, but did not address her two statements that she was aware of clothing during the attack itself, thereby leading to a false impression. That affidavit also conflated the rape with a previous complaint of a "peeping tom." The Court found that these omissions were "misleading." Again, however, after finding that an agent recklessly omitted material, the Court proceeded to the second step of the Franks analysis to see "whether probable cause

would have been extinguished" had the agent included the recklessly omitted facts. Id. at 24.

Neither Perkins nor Stevenson are binding upon this Court. Yet, even if they were, they stand for no new proposition, nor does the analysis in those cases depart in any way from the analysis performed by the Air Force Court. The Franks test is not novel, and the Air Force Court applied its clear precedent by determining whether the omitted facts were material to a determination of probable cause.

Finally, AFCCA used the proper standard for Article 62 appeals, acknowledging that the military judge's decision was viewed in the light most favorable to the party prevailing at trial. Garcia, unpub. op. at 21. The Air Force Court also applied the appropriate standard for review under the abuse of discretion standard, appropriately stating that it could not reverse based on mere disagreements with the trial judge's findings. Garcia, unpub. op. at 21-22. In finding that inclusion of the "omitted" evidence would not have extinguished probable cause, the Air Force Court noted that "[t]he military judge applied an erroneously heightened legal standard" and rather than requiring a demonstration of probable cause, required a "complete picture." Garcia, unpub. op. at 27. This heightened requirement constituted a clear abuse of discretion, given the decades of precedent establishing that investigators need not provide every piece of information known to them. *See* Garcia, unpub. op. at 27 (*compiling cases*). The

Air Force Court found that the military judge, then, had applied incorrect legal principles when she determined that the investigators had erred by not providing a "complete picture" despite the lack of materiality of the "omitted" material. It appropriately reversed for an abuse of discretion. *See* United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (a military judge abuses his discretion when "incorrect legal principles were used or . . . if his application of the correct legal principles to the facts was clearly unreasonable.")

As Appellant has failed to identify any erroneous application of law by AFCCA, this Court should not grant review of the asserted issue.

The Air Force Court Did Not Err in Determining That the Independent Source Doctrine Applied

"Evidence derivative of an unlawful search, seizure, or interrogation is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." United States v. Conklin, 63 M.J. 333, 334 (C.A.A.F. 2006) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). When evidence is initially discovered during, or as a consequence of, an unlawful search, however, it may still be admissible if it is later obtained independently from activities untainted by the initial illegality. *See* Murray v. United States, 487 U.S. 533, 537 (1988); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The ultimate question is whether the search pursuant to a warrant was in fact a genuinely independent source of the information. Murray, 487 at 542. A search is

not independent where the agents' decision to seek the warrant was prompted by what they had seen during the initial unlawful search or if information from the unlawful search is presented to the search authority. *See* id. The valid warrant search must be a "means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963).

"The evil which the exclusionary rule is guarding against is the use of illegally obtained information to support a search warrant." Moreno, 23 M.J. at 625 (citing Wong Sun, 371 U.S. 471). "This goal of basing searches on untainted information is reached just as readily when the magistrate is given only information which was known before the illegal search as it is when the magistrate is given information which is discovered later, but from a different source." Id.

Here, the only evidence "derived" from the initial alleged illegality was Appellant's DNA. When that evidence was suppressed, the Government then sought a new search authorization supported by probable cause from the evidence which had been lawfully obtained. Appellant's DNA, the "tainted evidence," was not mentioned by either affiant, and was not presented to the search authority when he made his determination of probable cause. Further, AFCCA noted the inherent contradiction in the military judge's analysis, where she acknowledged that the forensic analyst "conducted an independent examination of the buccal swabs." By

performing an independent examination, the analyst necessarily performed an "untainted" examination.

Appellant argues that the Government only sought search authorization for Appellant's DNA because it already knew that Appellant was a DNA contributor, but fails to point to *any* evidence in support of that contention. Indeed, the Air Force Court acknowledged that "there is no evidence in the record that government attorneys or investigators sought to exploit" the illegally obtained evidence. Garcia, unpub. op. at 32. Appellant does not point to any evidence in the record to contradict the Air Force Court's finding. The Air Force Court correctly acknowledged that the "operative facts in SA RD's and Mr. MT's affidavits were all in the possession of the authorities before the fruit of the first search authorization that was suppressed, and those facts constitute probable cause to support the second authorization." Id. Considering the agents already had evidence constituting probable cause, it is unreasonable to suppose, as Appellant does, that they would have abandoned their investigation after the evidence was initially suppressed, rather than seeking a second search authorization. And given the available evidence, it is equally unreasonable to believe that the *only* reason the agents continued to pursue their investigation into Appellant was because they had learned about the original DNA results.

The Air Force Court conducted its analysis using an appropriate abuse of discretion standard. In analyzing the independent source doctrine, the military judge found that the Government's decision to seek a new search authorization was prompted by the suppression of the first search, and relied upon that finding to conclude that the independent source doctrine did not apply. The Air Force Court noted that this was "an erroneous view of the law" to conclude that, merely because evidence was suppressed, a second search was derivative of the first. The Air Force Court then stated the proper test, which was to determine whether the second search was derivative of the *illegality* of the first search, rather than looking to what prompted a second search. Garcia, unpub. op. at 31. The Air Force Court did not "merely disagree" with the military judge, but pointed to both the incorrect legal principles used by the military judge and to her unreasonable application of legal principles to the fact in the case.

Appellant has failed to demonstrate that the Air Force Court erred in application of the Franks doctrine or its analysis of independent source doctrine. Accordingly, this Court should deny review.

Additional Factors Counsel Against Granting Review In This Case

While AFCCA assumed, without deciding, that Agent RD had acted recklessly in omitting information, it also noted that there were some concerns with the military judge's findings of fact in her ruling suppressing the evidence from the

February 2019 search. The military judge's erroneous findings of fact further support AFCCA's reversal of her decision, and indicate that further review is unnecessary in this case. Specifically, the military judge concluded that Agent RD "deliberately and recklessly omitted information from the search warrant affidavit." (App. Ex. LIX at ¶ 63.) She based this finding primarily upon the omissions addressed above.

The state of mind of the affiant, and the question of whether he knowingly and intentionally, or with reckless disregard for the truth, misled the search authority, is a question of fact for the trial judge. Mason, 58 M.J. at 422; United States v. Cravens, 56 M.J. 370, 375 (C.A.A.F. 2002). To prove an affiant acted with reckless disregard for the truth, "the reviewing court must be presented with credible and probative evidence that the omission of information was designed to mislead or was made in reckless disregard of whether it would mislead," and not necessarily just that the omitted information is "clearly critical" in the reviewing court's judgment. United States v. Rajaratnam, 719 F.3d 139, 154 (2d Cir. 2013) (citation and internal quotation marks omitted).

However, Agent RD may well have had rationales for not including much of the omitted information, including that he believed it was cumulative. The record does not address many of Agent RD's justifications, because the defense raised no allegation of reckless omission for some of the facts which the military judge

found had been omitted. She did so despite the fact that the record is devoid of any evidence that Agent RD intentionally withheld information in order to mislead the search authority. To the contrary, the record demonstrates that after drafting his affidavit, Agent RD sought a review from the legal office. (R. at 430.) As a result of that consultation, Agent RD added additional information before submitting his affidavit to the search authority. (Id.) There is no evidence that Agent RD removed anything from his draft affidavit. (Id.) Without any evidence of a subjective intent to mislead, the military judge clearly erred in determining that Agent RD had a reckless intent in "omitting" certain facts.

The military judge's clearly erroneous findings of fact, and erroneous conclusions of law as to probable cause and the independent source doctrine, further infected her failure to appropriately apply the exclusionary rule. Even in the event of a Fourth Amendment right violation, the question of whether the exclusionary rule should be applied is a separate question. Gates, 462 at 223. The Supreme Court has cautioned that "exclusion 'has always been our last resort, not our first impulse.'" Herring v. United States, 555 U.S. 135, 140 (2009) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). The Military Rule of Evidence governing exclusion states that unlawfully searched or seized evidence may be inadmissible if its exclusion "results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the

justice system." Mil. R. Evid. 311(a)(3). Evidence obtained as a result of an unlawful search or seizure may still be admissible if the search or seizure resulted from an authorization issued by a search authority who had a substantial basis for determining the existence of probable cause, and the officials seeking and executing the authorization reasonably and with good faith relied on the authorization. Mil. R. Evid. 311(c)(3).

Because the military judge in this case made a clearly erroneous finding regarding Agent RD's supposedly reckless conduct, she found that the good faith exception did not apply and that "the conduct [was] sufficiently deliberate that exclusion can meaningfully deter it." (App. Ex. LIX.) However, the totality of the military judge's clearly erroneous findings of fact, and her clearly erroneous decisions regarding the materiality of the "omitted" information infected her analysis on the good faith exception and the exclusionary rule balancing test, as well. The use of the improperly heightened standard for probable cause infected the totality of her ruling.

While the Air Force Court reversed based solely upon the military judge's erroneous application of the probable cause standard and her erroneous application of the independent source doctrine, her decision could have also been reversed based upon her clearly erroneous findings of fact as to Agent RD's subject state of mind, the improper application of the good faith doctrine, and the improper

balancing test under Mil. R. Evid. 311. Given the clear abuses of discretion in the military judge's ruling, AFCCA correctly reversed her ruling. Further review by this Court is unnecessary, and this Honorable Court should deny Appellant's request for review.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny Appellant's petition.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 15 June 2020.

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