12 April 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*, v. Airman Basic (E-1), ROBERT J. HERNANDEZ, USAF, *Appellee.*	))))))))	UNITED STATES' REPLY TO APPELLEE'S ANSWER Crim. App. Dkt. No. 39606 USCA Dkt. No. 21-0137/AF

UNITED STATES' REPLY TO APPELLEE'S ANSWER

JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

MARY ELLEN PAYNE,
Associate Chief
Government Trial and
Appellant Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

SHAUN S. SPERANZA, Col, USAF
Chief
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

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UNITED STATES, *Appellant*,	)	UNITED STATES' REPLY TO APPELLEE'S ANSWER
v.	)	
	)	Crim. App. Dkt. No. 39606
Airman Basic (E-1), ROBERT J. HERNANDEZ, USAF, *Appellee.*	)	USCA Dkt. No. 21-0137/AF

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

Pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States submits this reply to Appellee's answer.

ADDITIONAL ARGUMENT

I.

APPELLEE WAIVED A CHALLENGE TO THE SEARCH AUTHORIZATION ON THE BASIS OF RECKLESS MISCONDUCT BY LAW ENFORCEMENT OFFICERS.

Appellee argues that by attaching factual matters to his motion to suppress, and by making argument at the conclusion of a motions hearing, he preserved an objection to the search authorization under Mil. R. Evid. 311(d)(4)(B). (App. Ans. at 19-20.) While acknowledging that trial defense counsel was inarticulate, Appellee attempts to argue that this very lack of specificity preserved his objection. (*See* App. Ans. at 19-20.) Such an argument runs counter to the very reasons for

which waiver exists, and contradicts the Supreme Court's holding in Franks v. Delaware, 438 U.S. 154 (1978) and the plain language of Mil. R. Evid. 311(d)(4)(B).

In Franks, the Supreme Court noted that "the bulwark of Fourth Amendment protection" lies with the Warrant Clause, which requires police to obtain a warrant from a neutral and detached magistrate before beginning a search. 438 U.S. at 154. It then noted that the Warrant Clause necessarily requires good faith on behalf of the affiant. Id. The Court noted, in the same paragraph, that this good faith does not require that "every fact recited in the warrant affidavit is necessarily correct." Id. at 165. It need only be "truthful" in the sense that the information is believed by the affiant to be true – and therefore an agent may not make "a deliberately or recklessly false statement." Id. The Court thereby created a judicial rule allowing a defendant to challenge a probable cause warrant based upon an affiant's deliberately false statements – but it simultaneously noted the ruling did *not* "extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard." Id. at 169-70. In short, the Court stated that a defendant can never reach his burden merely by demonstrating that information is missing, or incorrect, in an affidavit for probable cause. He must allege deliberate or reckless conduct on the part of the law enforcement agent. Id.

In Franks, the Court reiterated the presumption of validity of warrants still exists, and that:

> to mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof . . . allegations of negligence or innocent mistake are insufficient.

Id. at 172.

Appellee fails to point to any statement in his motion filing or in his oral argument alleging Investigator AM, the affiant, made a deliberate misstatement in his affidavit, or that he omitted material statements with a reckless disregard for the truth. Appellee argues the issue was preserved when trial defense counsel argued Investigator AM provided "inaccurate" and "misleading" information (App. Ans. at 20)– but here Appellee conflates merely alleging inaccuracies with alleging a wrongful intent. The Supreme Court has expressly held mere inaccuracies in an affidavit are insufficient to entitle an accused to a Franks hearing. The Court has recognized there may be good faith errors in an affidavit, or even negligent errors in an affidavit, and that is insufficient to meet the preliminary showing to obtain a Franks hearing. In levying an objection based upon an affiant's inaccurate statements, an accused must levy the allegation against the affiant's own perjury or bad faith – something which Appellee expressly disclaimed in this case.

In codifying the Franks standard, Mil. R. Evid. 311(d)(4)(B) also focuses the inquiry not upon whether a statement in an affidavit is false, or whether an affidavit omitted material information, but upon a required showing that an affiant "knowingly and intentionally or with reckless disregard for the truth" provided the false information. It then reiterates the defense's burden at the hearing to prove "the allegation or knowing and intentional falsity or reckless disregard for the truth." (Id.) In other words, neither Franks nor Mil. R. Evid. 311(d)(4)(B) creates a basis for suppression merely because an affidavit contains false information or omits material information. Rather, the basis for suppression exists only when there is an allegation and supporting evidence that an affiant acted in some level of bad faith in drafting the affidavit. By failing to ever allege any intentional, deliberate, or reckless action on the part of Investigator AM personally, Appellee failed to assert this as a ground for suppression.

a. Appellee waived an allegation of reckless disregard for the truth because the standard of "recklessness" requires looking at the affiant's subjective intent.

While Appellee properly notes that there is not a uniform definition in federal circuit courts of the word "reckless" under the Franks standard, the vast majority of the circuits apply a test looking at the affiant's personal state of mind to determine whether he drafted an affidavit with a reckless disregard for the truth. Specifically, the Courts look to whether the affiant himself doubted the truth of the

statements in his affidavit. *See* Miller v. Prince George's County, Md., 475 F.23d 621, 627 (4th Cir. 2007) (affiant must have "serious doubts" about the accuracy of his allegations); United States v. Ranney, 298 F.3d 74, 78 (1st Cir. 2002) (recklessness shown by proving the affiant had serious doubts about veracity); Beard v. City of Northglenn, 24 F.3d 110, 116 (10th Cir. 1994) (adopting "serious doubts" definition); United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984) (affiant must entertain serious doubts as to the truth of his allegations); United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979) (finding that defendant had not made the "requisite preliminary showing" under Franks because he failed to offer evidence to prove the affiant's "state of mind.")

Appellee briefly argues that this Court should adopt an old Third Circuit definition of reckless disregard, and hold that an affiant acts with reckless disregard when he withholds a fact that a reasonable person would have known was the kind of thing the judge would wish to know. (App. Ans. at 18, *citing* Wilson v. Russo, 212 F.3d 781 (3d. Cir. 2000).) However, this standard was clarified within the Third Circuit to reflect that of the other circuits – that a determination of recklessness is a determination of the subjective mind of the affiant. The current Third Circuit definition of recklessness is that of subjective intent, which may be proven by showing either that the affiant himself entertained serious doubts about the truth of the allegation; or by showing the evidence should

so obviously be included that a finder of fact could infer that same subjective intent. United States v. Brown, 631 F.3d 638, 645 (3d. Cir. 2011) (explaining the previous ruling in Wilson v. Russo). In Brown, the Third Circuit established that the standard for determining whether material omissions were made with a reckless disregard for the truth was not a negligence standard, but that a court must find subjective recklessness. Id. Thus, even under the Third Circuit precedent, the question is not whether the affidavit contains material omissions or false statements, but whether the affiant himself doubted that the facts in the affidavit were sufficiently reliable. The Third Circuit held that a police officer "need not waste his time on needlessly duplicative fact-checking; all that is required is that his belief in the facts to which he swears have a sufficient grounding." 631 F.3d at 649. When a police officer "negligently misspeaks" to the officer who serves as an affiant, or when the affiant "negligently misheard" the other officer, that would be only "negligently false" and "not subject to exclusion under Franks." Id. at 650.

The Ninth Circuit similarly stated that "[o]missions or misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause." United States v. Smith, 588 F.2d 737, 740 (9th Cir. 1978) (upholding a warrant that included "erroneous assumptions" and "misstatements" because there was no reckless conduct).

This Court should not stand alone in holding that a court may find an affiant acted with reckless disregard for the truth merely by withholding evidence that a reasonable person would think a judge would want to know. In fact, such a standard would be inconsistent with this Court's own precedent. In United States v. Cravens, this Court noted that the question of whether an affiant acting knowingly and intentionally, or with a reckless disregard for the truth, was one of the affiant's "state of mind." 56 M.J. 370, 375 (C.A.A.F. 2002).

Furthermore, Appellee's suggestion that the proper definition of "reckless disregard" as "withholding a fact that any reasonable person would have known was the kind of thing the judge would wish to know" (App. Ans. at 18) appears to be presenting a negligence standard. However, Franks explicitly held negligence alone is insufficient to warrant suppression on this basis. (*See* United States' Brief at 18.)

Requiring a recklessness standard that looks at the subjective state of mind of the affiant is in line with both the requirements of Mil. R. Evid. 311(d)(4)(B) and the holding in Franks. When trial defense counsel chose to focus upon the language in the affidavit in this case, and to disclaim "any improper conduct" on the part of the affiant, she necessarily waived the question of whether Investigator AM acted with a reckless disregard for the truth. It would certainly be "improper conduct" for Investigator AM to have deliberately excluded material information,

or to have done so when he had "serious doubts" about the reliability of the information he included in the affidavit. By stating that this was not a concern, trial defense counsel waived the issue.

b. Application of waiver is appropriate based upon the intensive fact-finding necessary to determine the subjective mindset of an affiant acting with a reckless disregard for the truth.

The doctrine of waiver is firmly rooted in our justice system. As the Supreme Court has noted, our criminal justice system:

> Contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941).

This same requirement that appellate courts apply the doctrine of waiver has been adopted in the Manual for Courts-Martial, in order "to promote the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined." United States v. Inong, 58 M.J. 460, 464 (C.A.A.F. 2003) (holding that the principle of waiver is essential to the continued effectiveness of the judicial system).

Because a determination of intentional conduct or reckless disregard for the truth requires a subjective inquiry, it is necessarily best left to the trial courts to assess whether the evidence results in a finding of such subjective malfeasance. After all, it is the trial judge who has the opportunity to observe the witnesses and make assessments about their credibility – determinations which are more difficult to make at the appellate level. *See* United States v. Pulley, 987 F.3d. 370, 377-78 (4th Cir. 2021). Subjective intent is a necessarily fact-intensive inquiry and requires a determination of credibility. As noted by the Third Circuit, this determination is "likely to turn in substantial part on observations of the demeanor during the Franks hearing of the allegedly reckless officer himself." Brown, 631 F.3d at 645. It is for this reason that the determination of whether an affiant acted recklessly or intentionally in omitting facts is a finding of fact that is binding upon an appellate court unless it is clearly erroneous. United States v. Mason, 59 M.J. 416, 422 (C.A.A.F. 2004). When an appellee fails to state his Franks objection with sufficient particularity to make both the government and military judge aware of the basis of his objection, he deprives the government of the opportunity to explain the officer's mindset in omitting facts, deprives the military judge of knowledge of the requirement to make these findings of fact, and ultimately deprives appellate courts of a complete record for review.

The appropriate forum to litigate Investigator AM's subjective state of mind in drafting the affidavit was during a Franks hearing, but Appellee never requested one, and one was never held. Thus, when AFCCA overturned Appellee's conviction on the ground of a reckless affidavit, the United States was left "surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *See* Hormel, 312 U.S. at 556.

Appellee wrongly argues the military judge's failure to make findings of fact as to Investigator AM's subjective state of mind was clearly erroneous. (App. Ans. at 29.) By failing to orient the military judge to Mil. R. Evid. 311(d)(4)(B) as a basis for suppression or to even request a hearing under that Rule, the lack of fact-finding was not the fault of the judge, but rather the natural result of Appellee's waiver. *See* United States v. Rascon, 922 F.2d 584, 588 (10th Cir. 1990) ("Having failed to bring this issue to the attention of the district court at the appropriate time, the defendant may not now complain that the court failed to make findings on the issue.")

Appellee's reliance on this Court's opinions in Bavender and Blackburn is misplaced. First, in United States v. Blackburn, there was no question that the appellee had not raised Mil. R. Evid. 311(d)(4)(B) as a basis for suppression. 80 M.J. 205, 209-210 (C.A.A.F. 2020). Rather, that case dealt exclusively with whether the appellee had preserved a claim that the good faith exception should not

apply. Id. Meanwhile, in Bavender, while the appellant did not utter any "talismanic" words, he did at least allege the affiant behaved "improperly" by omitting certain information in the affidavit. 80 M.J. 433, 435 (C.A.A.F. 2021). In his initial filing, the appellant in Bavender also unquestionably challenged whether there were material omissions in the affidavit – a fact in marked contrast to this case, where the omissions were belatedly mentioned only in an argument about the good faith exception, after Appellee challenged the search authorization as not being supported by probable cause.

Given Appellee's initial motion filing and presentation of evidence in this case, neither the military judge nor trial counsel were on notice of the need to analyze or defend against an allegation that Investigator AM acted recklessly or intentionally in omitting certain information from his affidavit. Despite having a mechanism to do so under Mil. R. Evid. 311(d)(4)(B), Appellee never requested a Franks hearing to explore the veracity of the affidavit. And when trial defense counsel stated that she was not alleging any "improper conduct" on the part of the affiant, she disclaimed as a basis for suppression any bad faith action on the part of the affiant. If this Court were to hold that, even in the existence of such a disclaimer, an issue is still preserved for appeal, it would essentially require the government to defend against any possible basis for suppression under Military Rule of Evidence 311 – an untenable requirement. It is also a requirement contrary

to the plain language of the Manual for Courts-Martial, which places a different burden on the parties, based upon the asserted deficiency in the search authorization. *Compare* Mil. R. Evid. 311(d)(4)(a) *with* Mil. R. Evid. 311(d)(5)(A) (burden on defense to establish by a preponderance of the evidence the allegation of reckless disregard for the truth, as opposed to the burden on the government to prove by a preponderance of the evidence that the good faith exception applies).

While this Court has consistently held an appellee need not use "talismanic" words in preserving an objection, it has also consistently held that the defense's objection must be particularized so that a prosecutor may respond to the objection and a military judge rule upon it. *See* Blackburn, 80 M.J. at 210. This Court should hold that, going forward, in order to preserve an objection under Mil. R. Evid. 311(d)(4)(B), the defense must follow the dictates of that Rule: the defense must request[1] a hearing and attempt to "make a substantial preliminary showing" of an intentionally false statement or reckless disregard for the truth. This is consistent with what the Supreme Court required in Franks, when it held that, in order to challenge the veracity of a search affidavit, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." It is also consistent with how other

[1] Mil. R. Evid. 311(d)(4)(B) states that if the defense can make a "substantial preliminary showing" of falsity or recklessness in the affidavit, it is entitled to a hearing "*upon request*." (emphasis added.)

federal courts of appeals require the defense to raise a Franks issue. *See e.g.*, Smith, 588 F.2d at 739-740; United States v. Powell, 847 F.3d 760, 770 (6th Cir. 2017).

Applying this analysis to this case, this Court should determine Appellee never made a particularized objection under Mil. R. Evid. 311(d)(4)(B) based upon allegations of bad faith or recklessness on the part of the officers. In addition to having waived the issue by failing to brief or raise it under Mil. R. Evid. 311(d)(4)(B), this Court should find Appellee affirmatively waived the objection when trial defense counsel stated that she did not allege any "improper conduct" on the part of Investigator AM, thereby waiving a claim that he subjectively had "serious doubts" about the veracity of his sworn statements and affidavit.

c. Appellee did not preserve a challenge to the good faith exception based solely upon his comments at the conclusion of argument on the motion.[2]

Appellee's arguments should also fail to persuade this Court that he preserved an objection to the good faith exception based on a false or reckless

[2] If this Court determines that Appellee waived an objection under Mil. R. Evid. 311(d)(4)(B), it should then proceed to apply appropriate deference to the military judge and magistrate, and determine whether probable cause exists. Only if it determines that probable cause, on the face of the affidavit, does not exist, should it proceed to analyze whether the good faith exception applies and whether Appellee preserved that objection. While the Supreme Court made clear in Leon that a Court could proceed to analyze good faith without first establishing whether there was some other infirmity in the case, in order to clarify the question of waiver, this Court should decline to do so.

affidavit. For the reasons discussed below, with respect to the good faith exception, the accused bears the burden of showing, by a preponderance of the evidence, that a material omission was made with either subjective intent to mislead, or was omitted with a reckless disregard for the truth. By merely pointing out inaccuracies and omissions in the affidavit without asserting a bad faith or reckless subjective intent, Appellee failed to preserve this objection to good faith.

As discussed in the United States' opening brief (United States Br. at 29), the law is less than clear as to whether an accused may preserve an objection to the good faith exception based on a false or recklessly drafted affidavit without first challenging the affidavit for lack of probable cause under Mil. R. Evid. 311(d)(4)(B) and Franks . The burden of proof is on the Government to establish objectively reasonable reliance under Leon. *See* Mil. R. Evid. 311(d)(5)(A); *see also* United States v. Voustianiouk, 685 F.3d 206, 215 (2d Cir. 2012).

Despite this burden of proof, the federal courts suggest that if an accused does raise a false or reckless affidavit for the first time when challenging the good faith exception, he still must meet the same burden under Franks. *See* Powell, 847 F.3d at 770 ("Having failed to make 'a substantial preliminary showing' that would have entitled defendants to a Franks hearing, this claim [of reckless omissions] cannot overcome the good-faith exception"); United States v. Jarman, 847 F.3d 259, 264-65 (5th Cir. 2017) ("the initial burden" in establishing reckless disregard

is on the defendant, even when contesting the good faith exception); United States v. Corral-Corralu, 899 F.2d 927, 933-35 (10th Cir. 1990).

Corral-Corralu, in fact, addressed a situation very similar to Appellee's case. The Tenth Circuit noted it was "unclear whether [appellant] even requested a Franks hearing. . . [a]lthough he made allegations of false statements at the suppression hearing, the Franks issue is mentioned only in the most cursory fashion. . ." Id. at 933. Then, despite finding errors in the affidavit, the Tenth Circuit held appellant failed to meet his burden under Franks and the good faith exception therefore applied.

In short, whether a defendant challenges the warrant based upon false or reckless statements, or claims the good faith exception does not apply because of false or reckless statements, it is still the defendant who carries the burden of alleging and proving the subjective intent of the affiant.

Thus, by failing to allege a reckless subjective intent and failing to present evidence on it, Appellee waived his objection to the good faith exception under the "first prong" in Leon – that the affiant misled the magistrate with false or reckless information.[3] *See* 468 U.S. 897, 914 (1984). He further affirmatively waived the argument by disclaiming any "improper conduct" on the part of the affiant.

[3] Trial defense counsel objected to application of the good faith exception "because the second and third prongs" of Leon were not met. (JA at 189.)

For the foregoing reasons, this Court should hold Appellee waived a Franks claim with respect to both probable cause and the good faith exception. Since Appellee waived an allegation of reckless or deliberate misconduct by the affiant in this case, the Air Force Court erred when it: (1) held that the magistrate had been misled by reckless statements and omissions; (2) considered the allegedly material omissions in assessing whether the authorization was supported by probable cause; (3) declined to grant deference to the military magistrate's determination of probable cause; and (4) refused to apply the good faith exception due to the allegedly reckless statements and omissions.

II.

THE MILITARY JUDGE PROPERLY ADMITTED THE EVIDENCE DERIVED FROM APPELLEE'S URINALYSIS.

a. The affidavit provided a substantial basis for determining probable cause.

As discussed above and in the United States' initial brief, the Air Force Court erred when it held that Appellee preserved the question of whether the affiant recklessly omitted material facts which would have destroyed probable cause, and thus failed to grant appropriate deference to the military magistrate. Appellee makes only three arguments that probable cause was not supported based upon the facts in the affidavit, while the remainder of his brief addresses the allegedly material omissions.

Appellee argues the authorization was not supported by probable cause because: (1) military drug detection dogs are "prohibited from searching people;"[4] (2) that a military drug detection dog's alert to a drug odor would establish probable cause only for an external search of Appellee; and (3) the failure of investigators to find any drugs or paraphernalia on Appellee's person should not be used by the government to support probable cause. (App. Ans. at 39, 42.) Each argument is unpersuasive. As SSgt PO explained, and as the military magistrate understood, the prohibition on military working dogs being used to search persons is based upon a safety concern – not because such a search would be unreliable or inaccurate. (JA at 139-140; JA at 156.) To the extent Appellee raises an allegation the government acted in bad faith, the record is clear that SSgt PO did not direct Jager to perform a search of Appellee, but rather that as he and the canine passed by Appellee, the military working dog alerted. (JA at 106, 131.) As the magistrate explained, military working dogs alert to the odor of drugs – and as SSgt PO explained, he was extremely confident that when Jager alerted to Appellee he was giving a positive alert to the scent of drugs. (JA at 126.)

[4] Investigator AM's affidavit did not address the limitations on military working dogs. Therefore, any limitations on the search abilities of a military working dog should be considered as part of the analysis of the materiality of omissions. Because Appellee addresses it under the "substantial basis" portion of his brief, the Government addresses it here as well.

Appellee also argues a drug dog alert cannot contribute to probable cause for a search of urine. Again, however, this Court need not decide that a drug detection dog's alert alone is sufficient to establish probable cause to order a urinalysis. Rather, a reviewing court looks to whether under "the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found" in the place to be searched. United States v. Rogers, 67 M.J. 162, 163-64 (C.A.A.F. 2009) (*citing* Illinois v. Gates, 462 U.S. 213, 238 (1983)). Here, the magistrate was presented not only with evidence that a drug dog had alerted, twice, to Appellant's person, but also that residents of the dorm had smelled marijuana after he had moved into the dorms, and he had a prior conviction for drug use. Given that Jager did not alert to any other person or location in the dorm, other than in the hallway due to the saturation of the air, a common-sense judgment would lead to the conclusion that there was a fair probability Appellee recently used drugs and evidence of his drug use would be found in his urine.

Appellee also argues the government had to prove he used marijuana in his dorm room in order to establish probable cause, but that is putting the cart before the horse. Appellee ignores the possibility that he could have used the marijuana in the hallway, the stairwell, or a day room – and that provided the reason that the hallway air was saturated. Even at trial, the Government would not have been

required to prove the exact location where Appellee ingested a drug – it certainly was not required to know the location of Appellee's use in order to obtain probable cause to search his urine.

Finally, contrary to Appellee's claims, in deciding whether a substantial basis to find probable cause existed, it is appropriate to consider that investigators found no drugs or paraphernalia on Appellee's person after Jager's alert. A probable cause determination considers the totality of the circumstances. One of the circumstances in this case was that investigators searched Appellee, but no contraband was found. That circumstance allowed the inference that Appellee had no drugs on his person because he had already consumed them, and Jager was alerting to the drug residue on Appellee's person.

b. Even if not waived, Appellee did not establish at trial that Investigator AM acted recklessly, and the alleged omissions were not material to a finding of probable cause.

Appellee focuses upon only two alleged omissions in his response: that Investigator AM did not include the fact that a dorm resident said she had smelled marijuana before Appellee moved in, (App. Ans. at 45), and Investigator AM's failure to include information that military working dogs do not ordinarily alert to people. (App. Ans. at 54.) First, however, before even addressing the materiality of either alleged omission, it was Appellee's burden to demonstrate Investigator

AM omitted either fact with a reckless disregard for the truth. Mil. R. Evid. 311(d)(4)(B).

Appellee failed to meet his burden of showing recklessness – especially where he disclaimed "improper conduct." As discussed above, failure to consult with another officer will rarely constitute reckless behavior – particularly in a case like this, where Investigator AM was present for the entire search. *See* Brown, 631 F.3d at 650. At best, Appellee may have been able to argue Investigator AM's reliance on his own memory was negligent, but without presenting additional evidence, Appellee failed to meet his burden to demonstrate the omission was made with a subjective reckless disregard for the truth. Moreover, this Court should decline Appellee's apparent invitation to find that it is *per se* reckless if an officer makes errors in drafting an affidavit after failing to consult with other investigators. Notably, since Appellee failed to properly raise this issue, the reasons why Investigator AM did not consult with other officers to resolve apparent inconsistencies in memory were never fully explored. AFCCA should not have found recklessness without first hearing from Investigator AM, especially when it was bound to consider the evidence in the light most favorable to the government. *See* Blackburn, 80 M.J. at 211.

Furthermore, even if Appellee met the burden of demonstrating the reckless subjective intent of Investigator AM in omitting certain facts, those omitted facts

would not have defeated probable cause. The fact that another person had used marijuana before Appellee moved into the dorm in no way diminishes the probability that Appellee himself used drugs, especially given the circumstances on the day of the search – and especially given the fact that the working dog alerted to Appellee's person, and not to any other specific objection or location.[5] The Government relies upon its initial briefing on the lack of materiality of this omission.

Similarly, including information in the affidavit about the unusual nature of Jager's alert would not have defeated probable cause. Appellee avers SSgt PO was "less confident than the Government asserts" that Jager had alerted. (App. Ans. at 54.) However, this is not an accurate characterization of the testimony. SSgt PO testified that "the way Jager responded, I know for certain there was not a false response to me that day, that was a positive response." (JA at 124.) SSgt PO later testified he had "no concerns" Jager had given a false positive, and he was "very, very confident in that dog." (JA at 126.)

Given SSgt PO's testimony that he was confident Jager had positively alerted to Appellee's person, the fact that this alert was unusual did not defeat

[5] While Jager sat upon opening the doors to the dorm hallways, it was SSgt PO's opinion that this was not a true alert, but was the result of saturation in the air. (JA at 81, 112.)

probable cause. Regardless, Investigator AM testified he did not know much about drug detections dogs and relied upon SSgt PO to tell him whether the dog alerted. (JA at 94.) Given that SSgt PO knew "for certain" that Jager alerted positively to Appellee's person, Investigator AM reasonably relied upon that information. In sum, Appellee failed to meet his burden that the alleged omissions, even if recklessly made, were material to a finding of probable cause.

c. The Government met its burden of proving the good faith exception applied.

Finally, Appellee argues the military judge failed to make additional findings of fact related to good faith. However, when the Supreme Court issued its opinion in Leon, it noted that this would likely be the case. 468 U.S. at 924 ("When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.") In fact, an officer's decision to obtain a warrant is prime facie evidence that he was acting in good faith. United States v. Koerth, 312 F.3d 862, 868 (7th Cir. 2002); *see also* Messerschmidt v. Millender, 565 U.S. 535, 546 (2012) ("the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith").

As addressed in the Government's initial brief, there were additional factors supporting the objective good faith of the officers, including their consultation with

the on-base legal office prior to conducting the search; the fact that they sought and obtained a warrant; that even after an initial verbal authorization, Investigator AM followed up with a written affidavit and authorization; and the fact that he omitted facts which would have been helpful to establishing probable cause, and did not only omit facts which allegedly cut against a finding of probable cause.[6] (United States Br. at 50-51.)

Even if Appellee didn't waive a claim with respect to the good faith exception that Investigator AM had recklessly disregarded the truth, he failed to meet his burden under Franks to prove Investigator AM's recklessness or deliberate actions by a preponderance of the evidence. When he failed to prove this, the presumption of good faith reattached. *See* United States v. Lickers, 928 F.3d 609, 619 (7th Cir. 2019) ("Overcoming the presumption of good faith is no small feat. . ."). Because Appellee failed to even attempt to meet the Franks standard, the military judge appropriately concluded the good faith exception applied.

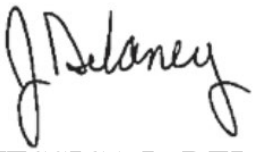
[6] Appellee incorrectly states that Investigator AM did not consult with the legal officer prior to drafting an affidavit. (App. Ans. at 5.) The record is silent on this issue. While the Air Force Court noted that "there is no evidence [Investigator AM] discussed his affidavit with the legal office or that [the military magistrate] sought legal advice before providing search and seizure authorization," the lack of evidence does not mean that such consultation did not occur. (*See* JA at 4.) Had the issue of recklessness been properly raised, this factual question could have been resolved.

Appellee fails to offer any other reason why the good faith exception should not apply. Even if this Court were to agree with Appellee that a substantial basis for probable cause was lacking, the search authorization was not "so lacking in indicia of probable cause that . . . no reasonable officer would have relied on it." United States v. White, 874 F.3d 490, 497 (6th Cir. 2017). In fact, for the good faith exception not to apply, reliance on a warrant must be "entirely unreasonable." Leon, 468 U.S. at 923. As the Eighth Circuit has noted, "'[e]ntirely unreasonable' is not a phrase often used by the Supreme Court, and we find nothing in Leon or in the Court's subsequent opinions that would justify our dilution of the Court's particularly strong choice of words." United States v. Carpenter, 341 F.3d 666, 670 (8th Cir. 2003).

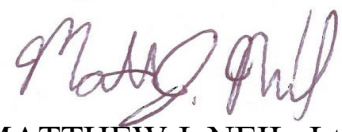
Here, it was not "entirely unreasonable" for the officers to infer that where they smelled recently smoked marijuana and their drug dog alerted twice to the person of a convicted drug user, and to no one else, that evidence of drugs would be found in that known drug user's urine. This is especially true where no court has ever held that those particular circumstances were insufficient to establish probable cause. Consequently, the military judge did not abuse his discretion in applying the good faith exception, and this Court should uphold the search of Appellee's urine.

CONCLUSION

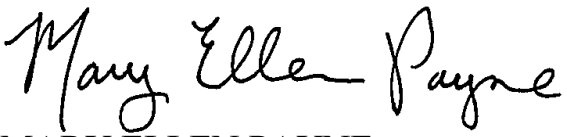
For the foregoing reasons, and those addressed in the initial filing, the United States respectfully requests that this Court reverse the Air Force Court's ruling, hold that the results of Appellee's urinalysis were properly admitted, and remand the case for completion of Article 66 review consistent with this Court's opinion.



JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177



MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

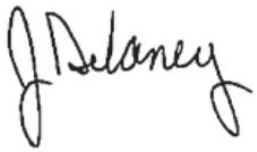


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 12 April 2021.



JESSICA L. DELANEY, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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/s/_____

JESSICA L. DELANEY, Maj, USAF

Attorney for USAF, Government Trial and Appellate Operations

Dated: 12 April 2021