IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

ROBERT J. HERNANDEZ,
Airman Basic (E-1), USAF
Appellee.

Crim. App. No. 39606

USCA Dkt. No. 21-0137/AF

BRIEF ON BEHALF OF APPELLEE

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STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016). Joint Appendix ("JA") at 1–23. This Honorable Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

STATEMENT OF THE CASE

Airman Basic (AB) Robert J. Hernandez, Appellee, generally accepts the United States' statement of the case.

STATEMENT OF FACTS

The Search of the Titan Dormitory

On April 3, 2018, four members of Security Forces (SF)—Investigator

A.M., Investigator J.M., SSgt P.O., and SrA A.C.—conducted a sweep of the Titan Dormitory. JA at 47, 81. SSgt P.O also brought Jager, his Military Working Dog (MWD). JA at 47. The sweep was based on SrA A.C.'s report that he smelled marijuana in the hallway of the Titan dormitory a few days prior. JA at 160.

Upon arriving at the dormitory, the SF team entered through the front and proceeded through the common areas. JA at 81. According to SSgt P.O., the smell of marijuana was noticeable as soon as they walked into the building. JA at 102. SrA A.C. similarly reported that he smelled marijuana on all three floors of the dormitory. JA at 161. After finding nothing during their initial walk-through, the SF team moved to the hallways of each floor. JA at 81. Jager then alerted to the presence of drugs when the SF team reached the second floor hallway. JA at 81, 103.

Investigator A.M. was not a MWD handler and was unaware of what drugs Jager could smell. JA at 86, 94. Accordingly, he relied on SSgt P.O. to gauge Jager's abilities. JA at 94. SSgt P.O. indicated to Investigator A.M. that Jager's alert to the second floor hallway may have occurred "because the area was so saturated in the scent of a drug." JA at 81. SSgt P.O. later confirmed that he was "very certain [Jager] was alerting to the saturated smell" in the hallway. JA at 112.

After Jager's alert, Investigator A.M. contacted the on-duty judge advocate (JAG). JA at 82. The JAG advised there was no probable cause to search anyone,

but that the SF team could perform consensual searches of the dorm's occupants. *Id.* The SF team then began seeking consent to conduct searches. JA at 104–05.

Appellee's room was located "at the very end" of the second floor hallway where Jager first alerted. JA at 129. Shortly after the SF team began searching the dorm's residents, Appellee exited his room. JA at 83. According to Investigator A.M., he waved Appellee down and informed him of the searches, at which point Appellee consented to having his room searched. *Id*. When SSgt P.O. later joined them with Jager, the dog sat down and stared at Appellee. *Id*.

SSgt P.O. had not trained Jager to alert on or search people; in fact, Air Force regulations prohibited MWDs from searching people and SSgt P.O. knew that a MWD was unable to detect drugs in a person's body. JA at 106, 114-16. SSgt P.O. had also never seen Jager, or any other MWD, alert on a person. JA at 106. Nevertheless, he was "pretty sure" that Jager was responding to Appellee, and he assumed Appellee either possessed a drug or had its residue on him. *Id*. Following the alert, he told Investigator A.M. the alert was "not normal." *Id.* Appellee subsequently consented to a search of his person and his backpack, which revealed nothing incriminatory.[1] JA at 83-84. In addition, Investigator A.M. did not smell marijuana in Appellee's room or on his person (JA at 95), and

[1] According to SSgt P.O., Appellee was not searched until after Jager's second alert on Appellee. JA at 107, 110.

SSgt P.O. likewise did not smell marijuana on Appellee. JA at 133. Investigators also did not find any drug paraphernalia in Appellee's room, and when Jager searched it, he did not alert to the presence of any drugs despite the fact that it was "very possible" for residual drug odors to last up to a month. JA at 107, 117.

Upon exiting Appellee's room, Jager again alerted on Appellee. JA at 107. SSgt P.O. told the SF investigators, "[t]here he goes again. It's not usual," (JA at 136), and then SSgt P.O. proceeded to search the rest of the dormitory. JA at 109. Jager later alerted to the entryway of the third floor hallway. JA at 85, 111, 119.

At some point, the dorm cleared out for lunch while the SF team continued its sweep. JA at 85. It was during this time, according to Investigator A.M., that Jager alerted to Appellee's door. JA at 85. However, SSgt P.O. was certain that Jager never alerted to Appellee's door, either during the initial search or thereafter. JA at 117, 136-37. SSgt P.O. ultimately did not participate in Investigator A.M.'s request for search authorization from the military magistrate, nor did Investigator A.M. reach out and ask any follow-up questions of him prior to seeking the authorization. JA at 123.

SrA A.C., the SF team member whose report had initiated the dorm sweep, interviewed a resident of the third floor (Airman D), who recalled smelling marijuana on March 10th and March 2nd. JA at 165. Immediately after speaking with Airman D, SrA A.C. annotated her name and the dates she had provided in

in his notes. JA at 54, 172. Airman D posted a Snapchat on March 10, 2018, which helped her remember she smelled marijuana on that date. JA at 86. She also provided this Snapchat to the SF investigators. *Id.* SrA A.C. subsequently notified Investigator A.M. of Airman D's recollections, which Investigator A.M. then provided to the dorm manager to determine if anyone had moved in around those dates. JA at 86, 168. Investigator A.M. then learned Appellee had moved in around that time. JA at 87. Investigator A.M. was also aware Appellee had recently been confined due to his involvement in a drug ring. JA at 93.

Following the dorm sweep, Investigator A.M. prepared a search affidavit. JA 47–48. While he had consulted a JAG when conducting the sweep of the dormitory, he did not consult with the legal office prior to drafting the affidavit. JA at 4. Investigator A.M. explained that a sweep of the Titan Dormitory was initiated after SrA A.C. reported smelling marijuana in the dormitory on March 31, 2018. JA at 47. He described the results of the sweep: Jager alerted to the second floor hallway, the third floor hallway, and twice to Appellee's person. *Id.* Jager's first alert to Appellee's person occurred prior to the consensual sweep of his room, and his second alert occurred after Appellee's room was searched. *Id.* Investigator A.M. also claimed that Jager alerted to Appellee's door three times. *Id.* He indicated a third floor resident stated she first smelled marijuana in the hallway on March 10, 2018. *Id.* Investigator A.M. included that Appellee had

moved into the dormitory on March 9, 2018. JA at 48. At the end of the affidavit, he informed the magistrate that Appellee "was previously serving punitive actions for drug related charges . . ." *Id.*

Search Authorization

On April 4, 2018, Colonel P.N., the military magistrate, granted search authorization for Appellee's urine. JA at 49, 149. Colonel P.N. was aware that Appellee's person had been searched and that nothing was found. JA at 147. Colonel P.N. was also told that Appellee's room had been searched, and Jager swept the room without alerting to anything. *Id.* Colonel P.N. considered these facts when granting the search authorization. JA at 149. However, he did not seek legal advice prior to granting the search authorization. JA at 4. Colonel P.N. ultimately found sufficient probable cause existed based on:

> The fact that the dog sat on his floor, and sat when he came out, and sat each time it passed his room, and then on the second floor that someone actually could -- said that the smell of marijuana started the day after he moved back into the dorms.

JA at 149.

In discussing Appellee's previous drug-related convictions, Colonel P.N. testified "I believe it was cocaine and marijuana, I believe, but again, they all blended together after a while . . ." JA at 150.

In April 2018, Colonel P.N. was responsible for certifying the MWDs. JA at 148. Colonel P.N. did not recall Investigator A.M. telling him that Jager had

never alerted to a person before. JA at 156. Colonel P.N. was asked about Jager's ability to detect drugs on a person, and he responded:

> The dogs aren't necessarily trained to detect on individuals. They are trained to detect marijuana, so you can't say that they were trained to detect on a car or a table or a person. They are trained to detect the scent, so I'm not sure if that's accurate to say they aren't trained to detect on a person.

JA at 156.

Colonel P.N. explained that he believed Jager was alerting to some scent on Appellee's person in "his clothes, his hair, his skin. I couldn't say, but he was hitting on something." JA at 157. Colonel P.N. testified that he was not told that Appellee was "exhibiting any signs of intoxication" nor was he told that Appellee was "being cagey or evasive or anything." *Id.*

Appellee's urinalysis revealed the presence of cocaine in his urine. JA at 51.

Appellee's Motion to Suppress

Appellee moved to suppress his urinalysis due to a lack of probable cause. JA at 31. In the written motion, Defense Counsel highlighted the discrepancy between Investigator A.M. and SSgt P.O. regarding whether Jager ever alerted on Appellee's door. JA at 32. Defense Counsel also noted how the previous occupant of Appellee's room, Amn F.M., had been court-martialed for drug-related charges, and attached Amn F.M.'s Report of Result of Trial and a court-martial

excerpt. JA at 32, 36. Defense Counsel further explained that MWDs are not authorized to search people and cannot detect substances in a person's body. JA at 33, 37. This latter fact, according to Defense Counsel, meant that there was "no logical connection between [Jager's] alert to [Appellee] and a reasonable belief that he would return a positive urinalysis for a controlled substance." JA at 35. Combined with the lack of any evidence retrieved from Appellee's room or person, Defense Counsel contended that there was insufficient probable cause to support a search of Appellee's urine. *Id*.

Defense Counsel repeated many of these arguments during motions practice, contending that "there was not a reasonable belief that [Appellee's] urinalysis would be positive based on the evidence before Investigator [A.M.] and the facts and circumstances of the search." JA at 163. For example, she highlighted how Jager alerted to the second and third floor hallways, and that these alerts were likely because the air was saturated with marijuana. JA at 182. She also emphasized how Colonel P.N. relied on the fact that Jager alerted to Appellee's door, noting that SSgt P.O. explicitly denied that such an event occurred and that the MWD paperwork similarly failed to document it. *Id.* Defense Counsel asserted that deference should be given to SSgt P.O. since "he's the dog handler," and he conducted the search. *Id.*

Defense Counsel also attacked the lack of any physical evidence

implicating Appellee, emphasizing how Jager did not alert to anything in Appellee's room. JA at 183. Absent any such alert, Defense Counsel contended that "there was no logical connection" or "link besides that alert [on Appellee's person] that leads us to believe that [Appellee] had recently used drugs." *Id.* And to the extent that Jager alerted to Appellee's person, Defense Counsel countered that, per Air Force regulations, MWDs and their handlers are "not trained to search people." JA at 184. Moreover, SSgt P.O. had never previously observed Jager or any other MWDs alert to a person; thus, SSgt P.O. should not have equated this unusual event with a positive alert. *Id.*

Defense Counsel did not limit her argument to the facts contained in Investigator A.M.'s affidavit or those relied upon by the magistrate. Rather, she also attacked Investigator A.M.'s omission of key facts. For example, SSgt P.O.'s knowledge that residual odors can last up to a month "was not put in Investigator A.M.'s affidavit." JA at 186. Defense Counsel opined that the length of time a residual odor can last was "an important point" that Colonel P.N. should have considered, particularly since no drugs were found on Appellee. *Id*. If the search was based solely on residual odors which can last for such long periods, then there would be no reasonable belief Appellee's urine would come back positive. *Id.*

Appellee also did not exhibit any signs of being under the influence of a drug. JA at 187. Defense Counsel noted how this fact was similarly missing in

Investigator A.M.'s affidavit to the magistrate, as was Airman D's report of smelling marijuana in the dorm as early as March 2, 2018—a date which preceded Appellee's move-in. JA at 187. Defense Counsel contended that this information "left out from the affidavit, not told to Colonel [P.N.] is really important, because it really kills this idea" that Appellee was the origin of the marijuana smelled in the dormitory. *Id.* Defense Counsel continued that any implication that marijuana was smelled only after Appellant moved in was "just not true" (JA at 187), and that Investigator A.M.'s sole inclusion of the March 10, 2018 date was "extremely misleading." JA at 187-88.

Next, Defense Counsel argued that the good faith exception was not applicable, and posited that the magistrate did not have "a substantial basis for determining the existence of probable cause based on all the points that I just made to you." JA at 189. *Id.* She asserted that the Military Judge must conduct "an inquiry into what was included into the affidavit . . ." *Id.*

While Defense Counsel claimed she was not alleging "improper conduct," she immediately expressed having concerns regarding his affidavit. JA at 189. She contended that the affidavit was not a "fair picture" of the events on the day of the search. *Id.* Further, she argued that "some things included in this affidavit that are misleading" and that "Investigator [A.M.] left out a lot of important facts. . ." *Id.* She then went on to repeat many of the omissions she had earlier cited (JA

at 189-90), and added that "[n]owhere in this affidavit does it state that the dog doesn't normally alert to people, that this was odd." JA at 189.

Defense Counsel also criticized Investigator A.M. for failing to contact SSgt P.O prior to writing the affidavit or before briefing Colonel P.N. *Id.* This failure was concerning because "Investigator [A.M.] himself said that he didn't even know the drugs the dog could alert to." *Id.* Defense Counsel concluded by arguing the good faith exception did not apply:

> . . . I think that the affidavit was insufficient, I think that it just didn't include all of the facts and circumstances of what actually occurred. It included, you know, I don't want to say false, but misleading information and just didn't include the full picture.

JA at 190.

The Military Judge's Ruling

In his ruling, the Military Judge discussed how courts address erroneous information in an affidavit. JA at 197–98. In his analysis, he found, by a preponderance of the evidence, that the "military magistrate had probable cause when he authorized the seizure and search of the Accused's urine." JA at 199. The Military Judge found the following facts supported probable cause: (1) the second floor hallway of the Titan Dormitory smelled like marijuana on March 31, 2018; (2) Appellee moved into the second floor hallway on March 9, 2018; (3) a resident of the third floor said she smelled marijuana on March 10, 2018, and noted the date based on a Snapchat post she provided investigators; (4) Jager alerted to the

second floor hallway; and, (5) Jager alerted to the Appellee twice, when he passed Appellee prior to searching his room and when he passed Appellee after searching his room. JA at 199.

The Military Judge did not find by preponderance of the evidence Investigator A.M.'s claim that Jager alerted to Appellee's room three times. JA at 193. He excised this statement from the affidavit, but found that the "misstatements . . . were not fatal to a probable cause determination." JA at 200.

The Military Judge indicated that even if probable cause was lacking, the good faith exception would save the authorization. *Id.* He found that Colonel P.N. was competent to issue the authorization, that Colonel P.N. "had a substantial basis for finding probable cause," and that Investigator A.M. "reasonably and in good faith relied on the issuance of the authorization." *Id.* He determined that Investigator A.M., SSgt P.O., Colonel P.N., and SrA A.C. were credible. *Id.* He stated that "[n]o evidence has been presented that the four circumstances in *Leon* were present" finding that "the information in the authorization was not false or reckless." *Id.*

The Military Judge did not address Defense Counsel's argument that the affidavit was not supported by probable cause because key pieces of information had been omitted from Investigator A.M.'s affidavit such that the affidavit was "concerning," (JA at 186) "extremely misleading," (JA at 188), and that as a result

of the omissions the affidavit contained inferences which were "just not true" (JA at 187). *See* JA at 199–200. Nor did the Military Judge address her argument the affidavit "posed some concerns, (JA at 189), was "misleading" (*Id.*) and it contained "misleading information," (JA at 190) such that it did not include "the full picture) (*Id.*), which rendered the good faith exception inapplicable. *See* JA at 200.

SUMMARY OF THE ARGUMENT

Contrary to the Government's contention, Appellee preserved objections to: (1) the military magistrate's substantial basis for a finding of probable cause; and, (2) the good faith exception. These objections were preserved through Defense Counsel's arguments concerning the material false statements and omissions included/absent from Investigator A.M.'s affidavit.

The evidence and arguments Defense Counsel provided in her written filing and argument at trial demonstrate that Appellee met his burden of making a "substantial preliminary showing" that Investigator A.M. included and omitted statements with reckless disregard for the truth. Her claim that Investigator A.M.'s affidavit was "concerning," "extremely misleading," allowed inferences that were "just not true," and "posed concerns" because he "left out important facts," was sufficient to put the Government and the Military Judge on notice that she was alleging these facts had been included/omitted with reckless disregard for the truth

based upon this Court's holdings in *United States v. Blackburn*, 80 M.J. 205 (C.A.A.F. 2020) and *United States v. Bavender*, No. 20-0019, 2021 CAAF LEXIS 76 (C.A.A.F. 2021).

AFCCA did not err in finding that the military magistrate did not have a substantial basis for finding that probable cause existed to search Appellee's urine. AFCCA properly excised inaccurate information from Investigator A.M.'s affidavit, and considered material omissions in determining that the military magistrate did not have a substantial basis for finding probable cause existed. After determining that Investigator A.M. had prepared his affidavit with reckless disregard for the truth, AFCCA properly found that the good faith exception was inapplicable to Appellee's case.

The Military Judge failed to make any findings of fact regarding the material omissions raised by Appellee at trial, which was clearly erroneous. The Military Judge then failed to conduct any analysis of the effect of these material omissions when considering whether the military magistrate had a sufficient basis for finding probable cause and in determining whether the good faith exception applied. AFCCA did not err in holding that the Military Judge abused his discretion.

ARGUMENT

I.

APPELLEE DID NOT WAIVE A CHALLENGE TO THE SEARCH AUTHORIZATION FOR HIS URINE ON THE BASIS OF KNOWING AND INTENTIONAL FALSITY OR RECKLESS DISREGARD FOR THE TRUTH.

Standard of Review

This Court reviews whether an appellant/appellee has waived an issue relating to a motion to suppress de novo. *Blackburn*, 80 M.J. at 209 (citations omitted).

Law and Analysis

A suppression motion not raised at trial is waived pursuant to Mil. R. Evid. 311(d)(2)(A). An accused "must make 'a particularized objection' to the admission of evidence, otherwise the issue is waived and may not be raised on appeal." *United States v. Perkins*, 78 M.J. 381, 390 (C.A.A.F. 2019) (citations omitted). When determining whether an issue has been preserved, "of critical importance is the specificity with which counsel makes the basis for his position known to the military judge." *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (citations omitted). "[A] particularized objection is necessary so that the government has the opportunity to present relevant evidence that might be reviewed on appeal." *Perkins*, 78 M.J. at 390 (citations omitted).

This Court has applied a "presumption against finding waiver," when the

issue is of constitutional dimension. *Blackburn*, 80 M.J. at 209 (citations omitted). In *Blackburn*, this Court found that Blackburn had preserved an objection to the Government's claim that the good faith exception applied in his case despite his defense counsel's failure to utter "the talismanic words 'false' or 'reckless disregard for the truth.'" 80 M.J. at 210. While this Court found Blackburn's argument regarding the good faith exception "somewhat subtle," this Court found that Blackburn's arguments as a whole—which included his written motion and his arguments at the suppression hearing—"demonstrate[d] an accusation of at least recklessness in the search authorization request, which adequately preserved the issue on appeal." 80 M.J. at 210.

In *Bavender*, this Court found that Bavender had waived "the portion of his argument that [the Air Force Office of Special Investigations (AFOSI)] knowingly or recklessly misrepresented Appellant's statements" as this argument was not made at trial nor was it "inherent in the defense argument." 2021 CAAF LEXIS 76, at *5. However, this Court concluded that Bavender preserved his argument "that AFOSI intentionally or recklessly omitted material facts from the search authorization affidavit." *Id*. at *7. This Court then cited, as an example, the defense counsel's argument at trial that "so many of the substantive descriptions that [Appellant] gave that didn't support a finding of probable cause *were not put in that affidavit.*" 2021 CAAF LEXIS 76, at *7 (emphasis and

alteration in original). This Court further noted how the defense counsel affirmatively indicated its position that certain omitted facts should have been presented to the magistrate because they would have negated those facts actually provided by the Government. *Id*.

1. Challenging Probable Cause

An accused may challenge probable cause under Mil. R. Evid. 311(d)(4)(A) or Mil. R. Evid. 311(d)(4)(B). If challenging probable cause under Mil. R. Evid. 311(d)(4)(A), "the evidence is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer . . ."

If challenging probable cause under Mil. R. Evid. 311(d)(4)(B), the Defense "must make a substantial preliminary showing that a government agent included a false statement knowingly or intentionally or with reckless disregard for the truth in the information presented to the authorizing officer . . ." If it is determined that "the allegedly false statement is necessary to a finding of probable cause, the defense, upon request, is entitled to a hearing." *Id.* If the Defense "establishes by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth," the Government must demonstrate "by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing office was sufficient to establish probable cause." *Id.*

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that to attack the veracity of an 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." 438 U.S. at 171. The Supreme Court did not define "reckless disregard for the truth," but the High Court indicated that "[a]llegations of negligence or innocent mistake are insufficient." *Id.*

Courts have defined what amounts to "reckless disregard" in a variety of ways. Some federal courts have found that an affiant acts with "reckless disregard" when the affiant "had obvious reasons to doubt the veracity of the allegations." *United States v. Cowgill*, 68 M.J. 388, 392 (C.A.A.F. 2010) (quoting *United States v. Jones*, 208 F.3d 603, 607 (7th Cir. 2000)). In contrast, other federal courts have concluded that an affiant acts with "reckless disregard" by "withhold[ing] a fact . . . that any reasonable person would have known . . . was the kind of thing the judge would wish to know." *Blackburn*, 80 M.J. at 210 (quoting *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000)).

While *Franks* and Mil. R. Evid. 311(d)(4)(B) address false statements, this Court has addressed material omissions in the same manner. To be set aside, the omissions must be "designed to mislead," or must be "made in reckless disregard of whether they mislead, the search authority." *United States v. Garcia*, 80 M.J. 379, 385–86 (C.A.A.F. 2020) (quoting *United States v. Mason*, 59 M.J. 416, 422

(C.A.A.F. 2004)).

2. *Appellee did not waive a challenge to probable cause under Mil. R. Evid. 311(d)(4)(B)*

The Government contends that "Appellee did not allege any false statements, omission, or reckless conduct in his initial filing with the court." Government Brief (Gov. Br.) at 20. This contention fails to appropriately characterize Defense Counsel's motion. In asserting that probable cause was lacking, Defense Counsel did *not* simply focus on the information contained in the four corners of the affidavit. Rather, she identified a factual discrepancy in the affidavit relating to Jager's alerts on Appellee's room and included facts—Amn F.M.'s Report of Result of Trial, an excerpt from his court-martial, and an excerpt from the MWD AFI—in support of her argument which were not contained in the affidavit. JA at 36–37. She then argued the affidavit lacked probable cause as a result of the limitations of MWDs, information which was entirely absent from the affidavit. JA at 33–35. While Defense Counsel could have more clearly articulated her position regarding the reasons why probable cause was lacking, she requested oral argument on her motion, which the Military Judge granted. *See* JA at 163–174.

The Government argues that Defense Counsel did not attempt to make a "substantial preliminary showing" of recklessness (Gov. Br. at 20), but a review of the record proves this argument is inaccurate. While Defense Counsel's written

motion could have more clearly articulated Appellee's position on why probable cause was lacking, her supplemental argument during motions practice affirmatively established that Investigator A.M. provided inaccurate and misleading information, and omitted material facts.

For example, she argued that inaccurate information was provided in the affidavit, which was relied upon by Colonel P.N. (JA at 182, 189–90), and that material omissions had been made by Investigator A.M., which were also relied upon by Colonel P.N. JA at 186–188. She argued that material facts were: "not put in Investigator [A.M.]'s affidavit" (JA at 186), "absent from the affidavit" (JA at 187), and "left out from the affidavit" (JA at 187) such that the affidavit was "concerning" (JA at 186) "extremely misleading" (JA at 188) and "insufficient." JA at 190.

Defense Counsel's entire argument—regarding probable cause and the good faith exception—focused on whether Colonel P.N. had a substantial basis to find probable cause as a result of inaccurate information and material omissions contained in the affidavit. These arguments are intertwined and should be examined in their entirety. Defense Counsel articulated the interconnectedness of her arguments when—during her good faith argument—she reiterated that Colonel P.N. did not have "a substantial basis for determining the existence of probable cause *based on all the points I just made to you.*" JA at 189 (emphasis

added). This interconnectedness is further cemented during her arguments relating to good faith when she emphasized that "the *affidavit* poses some concerns for this case" and she argued that "the *affidavit* was insufficient . . ." JA at 190 (emphasis added).

Defense Counsel argued that Colonel P.N. relied on the fact that Jager alerted to Appellee's door, and emphasized that "Sergeant [P.O.] does not remember the dog alerting on the door of his room. It's also not in the military working dog's paperwork where he recorded that the dog alerted on both of the hallways." JA at 182. Defense Counsel asserted that SSgt P.O should be "given deference" as he was the dog handler and he conducted the sweep with Jager. *Id.* She later emphasized that there are "some things included in this affidavit that are misleading and that maybe if Sergeant [P.O.] has been consulted before writing this affidavit, that it would have been written differently." JA at 189. She further stated that "it's of a concern that Investigator [A.M.] did not contact Sergeant [P.O.] before he wrote the affidavit or before he briefed the military magistrate." JA at 190.

Defense Counsel detailed several material facts that were omitted from Investigator A.M.'s affidavit—which when included—extinguished probable cause. JA at 186–188. Based on SSgt P.O's testimony, Defense Counsel asserted that residual odors can last up to a month and stated it was "concerning" that this

information had been omitted from the affidavit. JA at 186. She questioned whether it was possible for Colonel P.N. to have had a reasonable belief that Appellee had ingested marijuana when the length of time a residual can last was not considered by him in his probable cause determination. *Id.*

Next, Defense Counsel focused on Investigator A.M.'s omission that marijuana was smelled on March 2, 2018, a date prior to Appellant moving into the dormitory. JA at 187–188. Defense Counsel emphasized that the information about the March 2, 2018 date was listed in SrA A.C.'s notes, but was "absent from the affidavit," and this information "left out from the affidavit, not told to Col [P.N.] is really important . . ." *Id.* She explained that Investigator A.M.'s assertion that marijuana was smelled only after Appellee moved in, was "just not true," and that the one possibility of where the smell was coming from that Investigator A.M. included in the affidavit, which Colonel P.N. "used and considered . . . is extremely misleading.'" JA at 188.

After arguing that probable cause was lacking, Defense Counsel concluded her argument by asserting that the good faith exception was inapplicable because Colonel P.N. did not have a substantial basis for finding probable cause "based on all the points I just made to you." JA at 189. She then circled back to the insufficiency of the affidavit, asserting: "the affidavit poses some concerns," "there are some things included in this affidavit that are misleading," and

"Investigator [A.M.] left out a lot of important facts." JA at 189. She then detailed the omitted material facts discussed during her probable cause argument and the fact that "the dog doesn't normally alert to people," and SSgt [P.O.] "found it odd and didn't quite know what to make of it." JA at 189–90.

Defense Counsel found it concerning that Investigator A.M. failed to contact SSgt P.O. "before he wrote the affidavit or before he briefed the military magistrate." JA at 189–90. She also alleged that Investigator A.M.'s lack of knowledge regarding the drugs that a MWD could alert to "seems like an issue." JA at 190. She summarized her argument regarding the affidavit by saying "I think the affidavit is insufficient . . . It included, you know, I don't want to say false, but misleading information . . ." such that the good faith exception should not apply. *Id.*

In *Bavender*, this Court held that Defense—in its written filing and oral argument—had "clearly argued that there were material omissions in the affidavit." 2021 CAAF LEXIS 76, at *6. This Court should conclude, as it did in *Bavender*, that Appellee preserved his argument regarding material omissions in the search affidavit. However, Appellee's facts are distinguishable from the facts in *Bavender*, such that this Court should hold that Appellee also preserved his argument regarding the inaccurate statements in Investigator A.M.'s affidavit.

While the Government argues that Defense Counsel's statement that she

was "not alleging any improper conduct on Investigator A.M," should be viewed as an explicit waiver (Gov. Br. at 21), in *Blackburn*, this Court held that the failure to utter "the talismanic words 'false' or 'reckless disregard for the truth'" was not fatal to Blackburn's preservation of the issue on appeal. 80 M.J. at 210. Here, AFCCA found that Appellee's arguments regarding the misleading nature of the affidavit, and her claim that parts of the affidavit were "just not true," were sufficient to challenge "the overall integrity of the affidavit and the affiant." JA at 17.

AFCCA did not find Defense Counsel's "disavowal of any 'improper conduct'" to have waived the issue. *Id.* Instead, AFCCA held that this claim "is not inconsistent with our conclusion," as AFCCA emphasized that intentional misrepresentations are distinguishable from reckless misrepresentations. JA at 18. While Defense Counsel did not claim that Investigator A.M. had made intentional misrepresentations, such that his conduct was "improper," she did argue that his actions in omitting material facts were "concerning," "misleading," and allowed inferences which were "just not true." This Court should find AFCCA's reasoning persuasive and hold that Appellee's failure to assert improper conduct did not waive preservation of his argument that Investigator A.M. acted with reckless disregard for the truth.

3. Investigator A.M.'s subjective intent was proven by circumstantial evidence

The Government argues that "Appellee never introduced any evidence of the subjective intent of Investigator [A.M.]." Gov. Br. at 22. Whether an affiant "provided evidence that was intentionally false or with a reckless disregard for the truth is a question of fact," which is reviewed for clear error. *Blackburn*, 80 M.J. at 211 (citing *United States v. Allen*, 53 M.J. 402, 408 (C.A.A.F. 2000)). A question of fact is "subject to demonstration in the usual ways, including inference from circumstantial evidence . . ." *United States v. Rajaratnam*, 719 F.3d 139, 153 (2d Cir. 2013) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

In her written filing, Defense Counsel identified a factual discrepancy in Investigator A.M.'s affidavit relating to Jager's alerts to Appellee's door. JA at 32. Investigator A.M. claimed Jager alerted to Appellee's door three times. JA at 47. At trial, Investigator A.M.'s testimony differed from what he asserted in his affidavit, as he claimed Jager "sat and stared at [Appellee's] room." JA at 85. At trial, SSgt P.O. testified that Jager "never responded on [Appellee's] door." JA at 117. When the Military Judge inquired how certain he was that Jager did not alert to Appellee's room, he said "I'm certain, sir." JA at 137. Moreover, SSgt P.O.'s records showed no alerts on Appellee's door. JA at 74.

This inaccuracy speaks for itself. Investigator A.M. prepared his affidavit and sought search authorization within a day of conducting the sweep. He failed

to contact SSgt P.O. to verify whether Jager alerted to Appellee's door at all, let alone three times, though SSgt P.O would have easily corrected this error once he was asked, just as SSgt P.O. corrected the Military Judge when he indicated that Jager "never hit on [Appellee's] room." JA at 137. He also failed to consult with the legal office prior to seeking search authorization. This failure to verify material facts—which Investigator A.M. knew that Colonel P.N. would rely on, and which Colonel P.N. *did*, in fact, rely on (JA at 149)—and the failure to seek legal advice, demonstrates his reckless disregard for the truth.

In his affidavit, Investigator A.M. included information that a resident of the third floor told SrA A.C. "she first smelled marijuana in the hallways on 10 March 2018." JA at 47. He then connected this to Appellee moving into the dorm on 9 March. JA at 48. Defense Counsel established that SrA A.C. spoke with this resident—Airman D—and the resident relayed she smelled marijuana on March 10th and March 2nd. JA at 165, 187. SrA A.C. took notes and wrote both of these dates down, which he then provided to Investigator A.M. JA at 54, 168.

During her argument, Defense Counsel emphasized that while *both* of these dates appeared in SrA A.C.'s notes, the March 2, 2018 date was "absent from the affidavit." JA at 187. While she could have asked Investigator A.M. why he omitted this fact, the request for a search authorization came within a day of the sweep, these notes were a part of Investigator A.M.'s file, and SrA A.C. testified

he provided both dates to Investigator A.M. Investigator A.M.'s failure to consult his notes, or his intentional choice—made without any legal guidance—to not provide this information when requesting search authorization demonstrates, at the very least, a reckless disregard for the truth. This is especially true given Investigator A.M. claimed Airman D "*first* smelled marijuana on 10 March 2018." JA at 47. Furthermore, just as Colonel P.N. relied on Investigator A.M.'s inaccurate claim that Jager alerted to Appellee's door, Colonel P.N. also relied on the fact that "the smell of marijuana *started* the day after [Appellee] moved back into the dorms." JA at 149 (emphasis added).

In conclusion, Investigator A.M.'s subjective intent was demonstrated by the circumstantial evidence adduced at trial, and Defense Counsel adequately demonstrated that his misstatement and his omission were "made in reckless disregard of whether they would mislead the search authority." *Garcia*, 80 M.J. at 385–86 (quoting *Mason*, 59 M.J. at 422)).

4. Trial Counsel and the Military Judge were on notice of Appellee's claims

The Government contends that "the record also demonstrates that neither trial counsel, nor the military judge were put on notice of [false statements or material omissions] as an alleged basis for suppression." Gov. Br. at 22. The record does not support this argument. While the Government did argue first—as required by Mil. R. Evid. 311(d)(4)(A), one of the bases for suppression alleged

by Defense Counsel—Trial Counsel first addressed whether the magistrate had a substantial basis for determining probable cause existed, and concluded by addressing the good faith exception. JA at 159–163. She claimed that "[t]here is no evidence that [Investigator A.M.] intentionally or recklessly admitted or failed to include any evidence here and the military magistrate was told everything that had happened in this case." JA at 181. After Defense Counsel argued that inaccurate information had been presented in the affidavit and that Investigator A.M. had omitted material facts, the Military Judge asked the Government for any rejoinder. JA at 190.

Trial Counsel addressed several of Defense Counsel's arguments and sought to counter her claim that the good faith exception was inapplicable. JA at 191–192. She asserted that "an error that arises from nonrecurring attenuated negligence is thus removed from the core concerns of the exclusionary rule." JA at 192. She then asserted that Appellee's case did not involve "recurring, deliberate intentional law enforcement problems" and therefore, the good faith exception should apply. *Id.*

The Military Judge was also on notice of this basis for suppression. The Government argues the Military Judge "did not address an argument that probable cause was lacking as a result of reckless omissions or misleading information in the affidavit . . ." as "Appellee never *made* the argument." Gov. Br. at 23

(emphasis in original). This statement is inaccurate as the Military Judge did address the misstatement in Investigator A.M.'s affidavit. First, in his findings of fact, the Military Judge did *not* find by a preponderance of the evidence that the MWD alerted to Appellee's door three times. JA at 193. In his law section, the Military Judge specifically discussed how to treat erroneous information in an affidavit. JA at 197–98. In his analysis, the Military Judge stated that "[t]he Court is not persuaded that the misstatements in the affidavit about Jager alerting to the accused's dorm door were fatal to a probable cause determination . . . JA at 200. Then, following "the rationale in *United States v. Cowgill*," the Military Judge set aside the misstatement and determined that the remaining statements in the affidavit were sufficient to support a probable cause determination. *Id.*

The Government is correct that the Military Judge failed to address the material omissions. Gov. Br. at 23. The Military Judge failed to make any findings of fact following Defense Counsel's assertions that material facts had been omitted from Investigator A.M.'s affidavit. His findings of fact were limited to the facts laid out in the affidavit and Defense Counsel's Motion to Suppress. JA at 193. Moreover, in his law section, the Military Judge did not discuss how to treat material omissions in an affidavit.

His failure to make findings of fact based upon the evidence adduced during the motions hearing is clearly erroneous based upon this Court's holding in

Blackburn and *Bavender*. In both *Blackburn* and *Bavender*, this Court examined Defense Counsel's entire argument as a whole—to include the written motion and arguments at the suppression hearing—to determine whether an issue was preserved on appeal. 80 M.J. at 210; 2021 CAAF LEXIS 76, at *7. The Military Judge's failure to make any findings of fact regarding the omissions identified by Defense Counsel during the suppression hearing was clearly erroneous given the language woven throughout her entire argument regarding these material omissions. *See Bavender*, 2021 CAAF LEXIS 76, at *7 (finding that "the defense clearly argued that there were material omissions in the affidavit.").

In *Bavender*, this Court cited to the Defense's claim that "so many of the substantive descriptions that Appellant gave that didn't support a finding of probable cause *were not put in that affidavit*." 2021 CAAF LEXIS 76, at *7 (emphasis in original). Here, Defense Counsel made similar arguments regarding the omissions in Investigator A.M.'s affidavit (*see* pages 21–23, *supra*), and it was clear error for the Military Judge to fail to make any findings of fact regarding these omissions, or to analyze whether these omissions were material, and, if set aside, would extinguish probable cause.

In discussing the good faith exception, the Military Judge stated he found the testimony of the witnesses, including Investigator A.M., credible and that "[n]o evidence has been presented that the four circumstances in *Leo*n are present

in this authorization." JA at 200. He then stated "the information in the authorization was not false or reckless." *Id.* The Government argues that this statement does not "indicate that the military judge understood Appellee to be objecting to good faith on the basis of reckless disregard or that he was responding to a defense argument." Gov. Br. at 24.

But in her argument regarding good faith, Defense Counsel contended that "the affidavit poses some concerns," that there were portions of the affidavit that were "misleading," and that the affidavit may have been written differently if SSgt P.O had been consulted. JA at 189. She went on to assert that Investigator A.M. "left out a lot of important facts." *Id.* She argued that "the affidavit was insufficient" because it "didn't include all the facts and circumstances of what actually occurred. It included, you know, I don't want to say *false*, but *misleading information* and just didn't include the full picture." JA at 190 (emphasis added). While Defense Counsel was not required to use "the talismanic words 'false' or 'reckless disregard for the truth,'" she adequately and clearly focused on the misleading nature of the information presented to the magistrate.

In *Garcia*, this Court emphasized that "*Franks* protect[s] against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead* the search authority." 80 M.J. at 385. Here, Defense Counsel articulated a basis for why the good faith exception would not apply as a result of

the misleading nature of the affidavit, which put the Military Judge on notice that she was arguing that Investigator A.M. had acted with reckless disregard for the truth. And that is precisely what AFCCA found. JA at 21. AFCCA found the good faith exception inapplicable because of the reckless disregard with which Investigator A.M. drafted his affidavit, and held "it was clear error for the military judge to conclude otherwise." JA at 21.

II.

THE MILITARY JUDGE IMPROPERLY ADMITTED EVIDENCE OF APPELLEE'S URINANALYSIS.

Standard of Review

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017) (citations omitted). A military magistrate's probable cause determination is assessed by examining "whether a military magistrate had a substantial basis for concluding that probable cause existed." *Id.* (quoting *United States v. Hoffman*, 75 M.J. 120, 125 (C.A.A.F. 2016)). If the military magistrate had a substantial basis for finding probable cause, the military judge did not abuse his discretion. *United States v. Leedy,* 65 M.J. 208, 213 (C.A.A.F. 2007).

"A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Erickson*, 76

M.J. 231, 234 (C.A.A.F. 2017) (citations omitted). This Court has held that an abuse of discretion may occur when a military judge "fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013)). "[T]he abuse of discretion is strict, 'calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Erickson,* 76 M.J. at 234 (citations omitted). Upon review of a motion to suppress, the evidence is considered in "the light most favorable to the prevailing party." *United States v. Macomber*, 57 M.J. 214, 219 (C.A.A.F. 2009) (citations omitted).

Law and Analysis

The Fourth Amendment protects against unreasonable searches and seizures by requiring that such searches and seizures be supported by probable cause. U.S. CONST. amend. IV. In *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the Supreme Court held that the issuing magistrate must "make a practical, common-sense decision" given the totality of the circumstances whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Mil. R. Evid. 315(f)(2) defines probable cause as "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." As probable cause "requires only a probability or substantial chance

of criminal activity, not an actual showing of such activity," *Gates*, 462 U.S. at 243–244 n.13, "[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)). Probable cause "does not require officers to rule out a suspect's innocent explanations for suspicious facts." *Wesby*, 138 S. Ct. at 588. Probable cause does, however, require "a sufficient nexus between the alleged crime and the specific item to be seized." *Nieto*, 76 M.J. at 106.

A search arising from the issuance of a search authorization is presumptively reasonable. *Hoffman*, 75 M.J. at 123. "A substantial basis exists 'when, based on 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 identified location.'" *Nieto*, 76 M.J. at 101 (quoting *United States v. Rogers*, 67 M.J. 162, 165 (C.A.A.F. 2009). In determining whether a magistrate had a substantial basis, courts look to the information the authorizing official had at the time he made his probable cause determination. *Cowgill,* 68 M.J. at 391. "Close calls will be resolved in favor of sustaining the magistrate's decision." *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000) (citations omitted).

In *Leon,* the Supreme Court held that evidence seized by "officers reasonably relying on a warrant issued by a detached and neutral magistrate," need

not be suppressed, even if the warrant is later found to be defective. 468 U.S. at 913. While reviewing courts must accord "great deference to a magistrate's determination," the Supreme Court recognized this deference is "not boundless," such "that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which the determination was based." *Id.* at 914 (citing *Franks,* 438 U.S. 154).

"Under *Franks*, an omission must do more than potentially affect the probable cause determination: it must be 'necessary to the finding of probable cause.'" *Garcia,* 80 M.J. at 388 (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)). "[W]hen there are misstatements or improperly obtained information, we sever those from the affidavit and examine the remainder to determine if probable cause still exists." *Cowgill*, 68 M.J. at 391 (quoting *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001)).

1. AFCCA did not err in finding the magistrate did not have a substantial basis for his probable cause determination

After determining Appellee had not waived the argument that Investigator A.M. made reckless omissions in the affidavit, AFCCA examined whether Colonel P.N. had a substantial basis for determining the existence of probable cause and authorizing the search of Appellee's urine after excising the inaccurate information and including pertinent information. JA at 12.

AFCCA determined that the key pieces of information presented to Colonel P.N. by Investigator A.M. were: (1) The smell of marijuana in Appellee's dorm started the day after he moved in; (2) Jager alerted to Appellee's hallway once, Appellee's person twice, and Appellee's door twice; and (3) Appellee had previously been convicted of drug-related offenses. JA at 12.

AFCCA found the significance of the March 10, 2018 date—the day after Appellee moved into the dormitory—was undercut when coupled with the fact that Investigator A.M. "omitted the fact that the witness who provided this information . . . supplied not one, but two dates, which indicated the dormitory had that same smell a week before [Appellee] moved in." *Id*. AFCCA found that the inclusion of this earlier date in the affidavit would have led to "[t]he more obvious conclusion [that] the marijuana odor that existed when [Appellee] moved in was caused by someone else, not [Appellee]." *Id.*

It was not error for AFCCA to consider this material omission as Defense Counsel focused at length on this omission during her argument. *See* JA at 187–188. In discussing the omission of the March 2, 2018 date, AFCCA determined that Investigator A.M.'s "[w]ithholding [of] such plainly relevant information in this case amounts to reckless disregard for the truth, which was that the odors preceded [Appellee's] arrival." JA at 19. AFCCA found that Investigator A.M.'s failure to include this date caused Colonel P.N. to be misled, such that Colonel

P.N. "incorrectly believed the odors were only noticed 'the day after [Appellee] moved back into the dorms.'" *Id.*

In considering Jager's alerts, AFCCA—like the Military Judge—found that Investigator A.M. had included inaccurate information in his affidavit regarding Jager alerting on Appellee's room. JA at 13. The Government's claim that Defense "did not mention, in either her written motion or motion argument, Jager's purported alerts on Appellee's door as erroneous" (Gov. Br. at 42), is inaccurate. Defense Counsel identified this factual discrepancy in her written filing (JA at 32), and she specifically referenced Investigator A.M's inaccurate statement during her argument regarding probable cause. JA at 182, 189–90. In his written ruling, the Military Judge did *not* find by a preponderance of the evidence that Jager alerted to Appellant's door twice. JA at 193. Moreover, he set the misstatement aside in determining whether the search authorization was supported by probable cause. JA at 200.

While AFCCA noted the inclusion of this inaccurate information suggested Jager was alerting to residual odors at the entry to Appellee's room, AFCCA found these alerts of less significance, "or at least more ambiguous" given that Jager did not alert within Appellee's room. JA at 13. In discussing probable cause, AFCCA indicated that Jager's alerts "immediately in front of [Appellee] are the most significant points here, because they indicate a controlled

substance or residual odor of a controlled substance existed either on or near [Appellee] himself." *Id.* After excising the inaccurate information and including the omitted date, "Col PN was left with Jager's alert on [Appellee's] hallway and his two alerts in front of [Appellee], along with the fact that [Appellee] had previously faced drug-related charges." JA at 13.

A drug dog's alert, in and of itself, provides sufficient probable cause to search for drugs. *United States v. Boisvert*, 1 M.J. 817, 819 (A.F.C.M.R. 1976). In order to provide a basis for a probable cause search, the drug dog must have a "proven capability" and have "demonstrated reliability." *United States v. Unrue*, 47 C.M.R. 55, 560 (C.M.A. 1973); *United States v. Jackson*, 48 M.J. 292, 296 (C.A.A.F. 1998).

Because Colonel P.N. certified the MWDs and understood the certification process, AFCCA inferred Jager "had a demonstrated capability to detect the five drugs he was certified on." JA at 14. In discussing Jager's alert, AFCCA emphasized that "[w]hat is entirely absent from the evidence and what we will not infer is Jager's capability to detect drugs inside of a person—specifically, the remnants or metabolites of drugs within a person's bodily fluids." JA at 14. Notably, Colonel P.N. did not testify he believed Jager could detect drugs inside a person, and SSgt P.O. stated he did not have this capability. *Id.* Instead, Colonel

P.N. testified that Jager was likely hitting on residual odor on Appellee's clothes, hair, or skin. JA at 157.

The Government argues that "[w]hen Jager, a reliable drug detection dog, signaled not once, but twice, at Appellee's person, it was a highly relevant factor in establishing probable cause." Gov. Br. at 36. This contention is problematic from the start, given that MWDs are prohibited from searching people.[2] However, even if Jager's alert was relevant in establishing probable cause, his alert would have been "highly relevant" to establishing probable cause for an *external* search of Appellee. This is the conclusion that AFCCA came to as well, stating that "Jager provided Col PN with probable cause to believe that [Appellee] had drugs or the residual odor of drugs on or near him." JA at 15. On the other hand, AFCCA was not persuaded, nor should this Court be, that Jager provided Colonel P.N. with probable cause to believe Appellee had drugs *in* him. *Id.*

The drug dog detection cases relied on by the Government and AFCCA discuss a drug dog's alert to physical locations—such as a car or speakers—and external physical searches. For example, in *Unrue*, the drug dog's alert to a vehicle provided "sufficient probable cause to search the [vehicle's] occupants."

[2] AFI 31-121, para. 4.2.2.1, provides "Detector dogs will never be used to search a person." JA at 53.

47 C.M.R. at 560. In *Jackson*, this Court held that the dog's alert to a stereo speaker provided "probable cause to open the speaker," where marijuana was discovered. 48 M.J. at 296–97. Here, Appellee provided consent to search his person, his backpack, and his room. JA at 88, 90. Nothing was found on his person and no drugs or drug paraphernalia were found in his backpack. JA at 90. Nor were any drugs, drug paraphernalia, or residual odors discovered in his room, as Jager did not alert to *anything* within Appellee's room. JA at 107. At that point, any potential probable cause arising from Jager's alert to Appellee was extinguished.

The Government provides no case law supporting the argument that a drug dog's alert on a person, standing alone, provides sufficient probable cause to search that person's urine.[3] And the facts of Appellee's case are distinguishable from other cases involving a drug dog's alert where sufficient probable cause for searching a military member's urine was found. For example, in *United States v. Jenkins*, 24 M.J. 846, 848 (A.F.C.M.R. 1987), the Air Force Court of Military Review held that a drug dog's alert to Jenkins' room, coupled with the marijuana

[3] The Government claims that it is not suggesting "that a drug dog's alert on a person will *always*, standing alone, establish probable cause to search that person's urine for evidence of drug use." Gov. Br. at 36 n.7 (emphasis added). This statement is concerning as it suggests the Government believes there *are* cases where a drug dog's alert, *standing alone*, will be sufficient to establish probable cause.

and drug paraphernalia found in his freezer "provided sufficient probable cause to issue a search authorization directing [Jenkins] to provide a urine sample."

The Government argues that Jager's alert to Appellee "provided an indication to law enforcement officials that he had recently handled drugs and, when coupled with the smell of marijuana in the dorms, supported the inference that no drugs were found because Appellee had already ingested them." Gov. Br. at 37. Essentially, the Government argues that because no drugs or drug paraphernalia were found on Appellee's person, belongings, or room, this lack of findings permitted Colonel P.N. to infer Appellee had ingested them. The Government claims this inference is permissible because the dorm smelled like marijuana. But the fact that the dorm smelled like marijuana provides no support for the Government's suggested inference given that Jager did *not* alert to *anything* in Appellee's room. If Appellee had recently smoked marijuana, such that it was permeating his hallway causing Jager to alert to his hallway, Jager—who is trained to detect residual odors—clearly should have alerted within Appellee's room.

Notably, the Government asserts that "[t]he government theory at trial was not specifically that Appellee used drugs inside his room . . . The government's theory was the Appellee used drugs *at some point shortly* before the sweep of the dorms." JA at 44 (emphasis added). This theory discounts the evidence presented

to the military magistrate. First, Appellee was in his dorm room prior to investigators conducting a sweep. The affidavit states that "[Appellee] was exiting his room" when investigators were conducting consensual searches. JA at 47. Probable cause was premised on the smell of marijuana in the dormitory. JA at 37. If Appellee used drugs *outside* of the dormitory then evidence about the smell of marijuana *in the dormitory* was not relevant to a finding of probable cause. It is the Government's burden to prove a nexus exists. The nexus is lacking here since Appellee was in his room shortly prior to the sweep and Jager did not alert to anything in his room.

Second, the *failure* of investigators to find *any* drugs or drug paraphernalia on Appellee's person, in his belongings, or in his room should not be used by the Government—or in this case, the military magistrate—to authorize a search of his urine. This *lack* of any findings should not be the nexus used by the Government to force an individual to provide the contents of their body, namely, their urine.

AFCCA correctly found the Government's argument unavailing. In discussing the Government's claim that Colonel P.N. deduced that Appellee ingested the drugs, the AFCCA stated, "Notably, Col PN did not testify he made that deduction." JA at 15. Additionally, AFCCA indicated "we are not convinced that a person who has the odor of controlled substances on or near them, without

more, gives rise to probable cause to believe the person has evidence of drug use in their urine." *Id.* The Government claims that AFCCA "erred by looking to 'innocent explanations' for Jager's alert." JA at 40. While AFCCA did discuss the many possible reasons why Appellee may have had the odor of drugs on or near him, AFCCA discussed these possibilities when determining the Government had failed to establish "a fair probability" that evidence of drug use would be found in Appellee's urine. JA at 15. In other words, in considering "the degree of suspicion that attaches to particular types of criminal acts," (*Wesby*, 138 S. Ct. at 588), AFCCA was not convinced that merely having residue on or about his person was sufficient for suspicion to attach, such that it established a "fair probability" that Appellee's urine would provide evidence of drug use.

Finally, Colonel P.N. mistakenly believed that Appellant had been convicted for using cocaine and marijuana. JA at 150. Investigator A.M.'s affidavit mentioned that Appellee "was previously serving actions for drug related charges . . ." JA at 48. The Government argues that "the general nature" of the offense "helped to draw a nexus between the fair probability that Appellee had residue due to possession and the fair probability he had ingested drugs." Gov. Br. at 38.

Considering that the military magistrate was making a probable cause determination relating to Appellant's *alleged use* of marijuana, the fact that the

military magistrate incorrectly believed that Appellant was *previously convicted* of use of marijuana is significant. The military magistrate did not rely on the general nature of Appellee's drug use in making his probable cause determination. He relied on his incorrect belief that Appellee used the *very* drug that Investigator A.M. was investigating Appellee for using.

Within the context of the totality of the circumstances, AFCCA noted that "a magistrate's failure to obtain evidence under oath when feasible to do so 'has neglected a simple means for enhancing the reliability of his probable cause determination,' which 'may prove fatal' to a finding of probable cause in a marginal case." JA at 15 (quoting *United States v. Stuckey*, 10 M.J. 347, 364–365 (C.M.A. 1981)).

In Appellee's case, Colonel P.N. could have clarified what drugs Appellant was convicted of using. If he had, Colonel P.N. would have learned Appellant was convicted of using cocaine, not marijuana. Moreover, with regards to his prior misconduct, AFCCA noted that "Appellant's prior misconduct terminated more than a year before Col P.N. provided his search authorization . . . provid[ing] negligible support for concluding Appellant's urine contained evidence of drug use a year later." JA at 15.

While a military magistrate's determination is usually given "great deference," AFCCA found that this "great deference" was inapplicable because

Investigator A.M. "prepared his affidavit with reckless disregard for the truth . . ." JA at 16. AFCCA did not err in finding that "Col PN was lacking probable cause to believe evidence of use would be found in [Appellee's] urine," and as such "the military judge abused his discretion in finding otherwise." *Id.* Requiring the Government to follow the law and holding the Government to its burden is not error.

2. AFCCA did not error in finding Investigator A.M. included and omitted material information from the affidavit

It was not error for AFCCA to excise the inaccurate information from Investigator A.M.'s affidavit. In discussing how to address inaccurate information, AFCCA relied on this Court's holding in *Cowgill,* 68 M.J. at 391, that "we will serve that information and determine whether the remaining information supports a finding of probable cause." JA at 9 (citing *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001)). While the Government focuses on the failure of Defense Counsel to ask Investigator A.M. why he included that Jager alerted to Appellee's door twice (Gov. Br. at 42), Investigator A.M. prepared his affidavit and sought search authorization within a day of conducting the sweep. JA at 49. He failed to make any effort to verify material facts with SSgt P.O prior to claiming Jager alerted to Appellee's door. JA at 123. AFCCA found that Investigator A.M.'s "failure to confirm this information with SSgt PO—Jager's

handler—prior to executing his affidavit to be a reckless disregard for the truth of the matter." JA at 21.

It was also not error for AFCCA to consider a material omission in the affidavit when determining whether Colonel P.N. had a substantial basis for his finding that the affidavit was supported by probable cause. Defense Counsel focused at length on this omission of the March 2, 2018 date in her argument at trial. She emphasized that this date was "absent from the affidavit," and argued that not providing this date allowed an inference that marijuana was only smelled in the dorms *after* Appellee moved in, which was "just not true," and which was "extremely misleading." JA at 187–188. In discussing the omission of this date, AFCCA determined that Investigator A.M.'s "[w]ithholding [of] such plainly relevant information in this case amounts to reckless disregard for the truth, which was that the odors preceded [Appellee's] arrival." JA at 19. AFCCA found that Investigator A.M.'s failure to include the March 2, 2018 date caused Colonel P.N. to be misled, such that Colonel P.N. "incorrectly believed the odors were only noticed 'the day after [Appellee] moved back into the dorms.'" *Id.*

The Government asserts that Investigator A.M. was not asked why he failed to include the March 2, 2018 date in the affidavit. Gov. Br. at 45. The Government then explores various possible reasons why Investigator A.M. did not include this date when writing the affidavit. *Id.* None of these reasons are persuasive given

that Investigator A.M. failed to include this date in his affidavit when the request for search authorization came within a day of the sweep (JA at 49), the notes regarding the dates taken by SrA A.C. were a part of Investigator A.M.'s investigative file, and SrA A.C. testified he provided both dates to Investigator A.M. JA at 168.

Further supporting Investigator A.M.'s reckless disregard for the truth is the fact that the affidavit states that this resident "*first* smelled marijuana in the hallways on March 10, 2018," (JA at 47), which is inaccurate. The Government notes that the Military Judge "never made a finding of fact that this dorm resident smelled marijuana on March 2, 2018, or that SrA AC communicated this information[4] to Investigator AM. . ." Gov. Br. at 45 n.13. This failure on the Military Judge's part to make findings of fact concerning testimony on the material omissions raised by Appellee at trial was clearly erroneous. *See* Issue I, at 29–32, *supra*. As AFCCA explained, "we need not hypothesize as to whether the magistrate considered these matters—Col PN testified he did, saying he based his authorization on "[t]he fact the dog sat on [Appellee's] floor, and sat when he came out, and sat each time it passed his room, and then . . . someone . . . said that the smell of marijuana started the day after he moved back into the dorms." JA at

[4] It bears mentioning that the Military Judge found SrA AC credible. JA at 200.

20 –21. As noted by AFCCA, Colonel P.N.'s search authorization was based upon two facts which were shown to be false.

3. Probable cause was lacking even with all the information included

In determining that probable cause existed, the military magistrate testified that he was aware of the following facts: (1) the odor of marijuana had been present in the Titan dormitory; (2) a sweep was conducted of the dorm using Jager, a MWD, and he alerted to the second floor hallway; (3) Jager alerted twice to Appellee; (4) Appellee's person was consensually searched and nothing was found; (5) Appellee's room was consensually searched and Jager did not alert to anything in the room; (6) Jager alerted twice by sitting in front of his door; (7) no evidence was presented that Appellee was exhibiting any signs of intoxication; (8) no evidence was presented that Appellee was being cagey or evasive (9) Jager alerted to the third floor hallway; (10) a resident indicated that the smell of marijuana started after Appellee moved back into the dorms; and (11) Colonel P.N. believed that Appellee had been convicted for using cocaine and marijuana. JA at 147, 149–150, 157. Colonel P.N. explained that he believed Jager was alerting to "the scent of some kind of controlled substance . . . in [Appellee's] clothes, his hair or his skin. JA at 157.

In looking at the totality of the circumstances, the military magistrate did not have a substantial basis for finding probable cause as there was not "a

sufficient nexus between the alleged crime and the specific item to be seized." *Nieto*, 76 M.J. at 106. The military magistrate based his probable cause determination on the "fair probability" that marijuana would be found in Appellee's urine. However, this "fair probability" did not exist. The fact that residents had smelled marijuana in the dorms prior to the sweep is not particularized to Appellee, nor is Jager's alert to the second floor or third floor hallways, as both hallways housed a whole floors' worth of dormitory rooms.

Jager's alerts to Appellee suggest that Jager was alerting to something. Colonel P.N. indicated that he believed Jager was alerting to "some kind of scent" on Appellee's "clothes, hair, or skin." JA at 157. However, after Jager's alert, Appellee's person was searched and nothing was found on him, nor did Jager alert to *anything* in Appellee's dorm room.

The Government claims that "Appellee's room and person were searched with negative results, allowing an inference that no drugs were found because they had already been consumed, thus producing the smell in the dorms and the detectable residue on Appellee's person." Gov. Br. at 39. If the smell of marijuana in the second dorm floor was strong enough to cause Jager to alert to the second floor hallway, then it belies common sense that Jager did not alert to *anything* in Appellee's room, especially considering the whole premise for the search authorization was that Appellee had been smoking marijuana—and thus, ingested

it—*inside* the dormitory. If probable cause was based on the fair probability that Appellee used marijuana *somewhere other than inside the dormitory*, then none of the facts relating to the smell of marijuana in the dormitory would be relevant to Colonel P.N.'s probable cause determination. Appellee also showed no signs of intoxication and he was not acting cagey or evasive when questioned by investigators. If Appellee had just smoked marijuana, such that the air was saturated with the smell of marijuana, it seems highly unlikely that Appellee would show no obvious signs of being under the influence of marijuana. While the affidavit stated that Jager alerted to Appellee's *door* three times, if Appellee had residual odor on his clothing, hair, or skin from smoking marijuana shortly before the sweep, it would seem much more plausible that marijuana residue would be found *in* his room, rather than outside his room.

While a resident stated she smelled marijuana on March 10, 2018—almost a full month prior to the dorm sweep—and SrA A.C. smelled marijuana on March 31, 2018, the fact that the dormitory smelled like marijuana previously does not create a sufficient nexus to connect Appellee to the smell of marijuana on April 3, 2018. This is especially true given that Appellee's person, backpack, and room were searched and nothing was found, though the dorm was saturated with the smell of marijuana such that Jager alerted to both the second and third floor hallways.

As noted above, *see* Issue II, at 43–44, *supra*, Appellee's drug conviction provided negligible support for a finding of probable cause that Appellee's urine would contain evidenced of drug use a year later. JA at 15. Even considering the totality of the circumstances and all the information presented to the magistrate, probable cause was lacking.

4. The Military Judge abused his discretion in finding the good faith exception applied

The Government asserts that "the military judge did not abuse his discretion in finding the good faith exception applied." Gov. Br. at 50. The good faith exception applies when three conditions are met: (1) the authorization was issued by "an individual competent to issue the authorization; (2) the search authority had "a substantial basis for determining the existence of probable cause;" and, (3) the individuals executing the authorization "with good faith relied on the authorization . . ." Mil. R. Evid. 311(c)(3).

In *United States v. Carter*, 54 M.J. 414, 422 (C.A.A.F. 2001), this Court explained that the second prong of Mil. R. Evid 311(c)(3) "is satisfied if the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause." In *Leon*, the Supreme Court held that the good faith exception does not apply where the magistrate was "misled by information in an affidavit that the affiant knew was

false or would have known was false except for his reckless disregard for the truth." 468 U.S. at 923 (citing *Franks*, 438 U.S. 154).

In support of their claim that good faith applied, the Government contends that the Military Judge's finding that there was "no evidence presented of reckless conduct was not clearly erroneous . . . " Gov. Br. at 51. The Military Judge failed to make any findings of fact from the testimony during the motions hearing—beyond those facts in the written filings—including any factual findings relating to the omissions specifically highlighted by Defense Counsel. As noted in Issue 1, at 29–32, *supra*, this was clearly erroneous. As such, the Military Judge's findings of fact relating to the good faith exception should be given little deference.

In determining the good faith exception did not apply, AFCCA focused on the inaccurate information in the affidavit regarding Jager's alert to Appellee's room, the omitted information regarding the date (*see* Issue II, at 45–48, *supra*), that Investigator A.M. omitted the fact that Jager's alert was "out of the ordinary and 'not usual,'" and that Investigator A.M. failed to discuss that not only do MWDs "have no demonstrated capabilities with respect to searching and detecting controlled substances on people, Air Force regulations entirely prohibit using military working dogs to search people." JA at 18.

The Government asserts that "[a] reasonably well-trained officer in this case would not have known the search authorization was unsupported by probable cause." Gov. Br. at 50. In support of this claim, the Government states that there was no reason to believe that Jager's alert "should be considered less reliable." *Id.* However, Investigator A.M. had every reason to believe that Jager's alert was "less reliable," given that SSgt P.O. told him the alert was "not normal" the first time, and SSgt P.O. stated, "it's not usual," after the second alert. JA at 106, 136. SSgt P.O. testified "I've never seen [Jager] responding on an individual, nor have I seen it in my past career with other dogs. This is my third drug dog." JA at 106.

That Jager's alerts to Appellee were unusual—and that drug dogs are not trained to search people, and are specifically *prohibited* from searching people — was highly relevant and a fact that the military magistrate would wish to know, especially given SSgt P.O.'s experience with MWDs and the fact that SSgt P.O. had never seen Jager or *any* other drug dog alert *on* a person. As AFCCA emphasized, "[d]espite being aware of this anomaly, [Investigator] AM left the information out of his affidavit." JA at 20. The Government claims that "there is no evidence Investigator A.M. subjectively believed this omitted evidence would negate probable cause," and suggests that "despite the unusual alert on Appellee's person, SSgt PO was very confident that Jager was making a positive alert." Gov. Br. at 53. During his testimony, SSgt P.O. stated, "I'm *pretty sur*e that's telling

me he's responding on him, and this is -- so we don't train dogs to search people . . ." JA at 106 (emphasis added). SSgt P.O. was less confident than the Government asserts and he immediately qualified this statement by discussing the fact that they do not train dogs to search people. AFCCA found that the inclusion of information about the unusualness of Jager's alert would have put the magistrate "on notice to inquire further about the meaning—or lack thereof—of Jager sitting in front of [Appellee], and what that said about the likelihood of finding evidence of drugs in [Appellee's] urine." JA at 20.

The Government argues that even if Investigator A.M. included this information, it is unlikely that Colonel P.N. would have additional questions as he had knowledge of the MWD program. Gov. Br. at 54. Colonel P.N. testified that dogs "are trained to detect the scent, so I'm not sure if that's accurate to say they weren't trained to detect *on* a person." JA at 156 (emphasis added). His testimony suggests that he may not have been aware of the extent to which drug dogs are trained (or *not* trained in this case) to alert on a person and that they are *not* used to search people. Moreover, Colonel P.N. may have been concerned about Jager's reliability if alerted to the sheer unusualness of Jager's alert, given that SSgt P.O. had never seen Jager, or *any* other dog, alert to a person.

AFCCA correctly concluded that the good faith exception did not apply as "[Investigator] AM drafted his affidavit with a reckless disregard for the truth," and it was clear error for the military judge to conclude otherwise." JA at 21.

5. Exclusion of the evidence is warranted

The Government asserts that suppression is not warranted under Mil. R. Evid. 311, and suppression is not justified when considering the purpose served by the exclusionary rule. Gov. Br. at 55. In determining suppression was appropriate, AFCCA properly balanced "the appreciable deterrence of future unlawful searches or seizures" and whether "the benefits of such deterrence outweigh the costs to the justice system." Mil. R. Evid. 311(a)(3). Here, the Fourth Amendment violation was significant: Appellee's bodily integrity was breached when he was forced to provide "evidence which was contained in the sanctity of his body." JA at 21. This breach resulted when Investigator A.M. drafted his affidavit with reckless disregard for the truth.

Specifically, AFCCA found suppressing the evidence would have a significant deterrent effect and it would "reinforce the seriousness of seeking search authorizations which grant permission to overbear servicemembers' constitutional protections without misleading the magistrates charged with upholding those protections." JA at 22. Regarding the costs to the Government, AFCCA emphasized that Appellee was charged with a single use of cocaine

"with no apparent impact on his unit or the military mission." *Id*. Moreover, Appellee had drug-related convictions for which a punitive discharge was adjudged and his conviction and his sentence were affirmed. *Id.* As AFCCA concluded, "the paramount importance of safeguarding servicemembers' constitutional rights" outweighs the minimal cost to the Government of excluding the evidence in Appellant's case. *Id*

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm AFCCA's ruling. Appellee did not waive his challenge to the sufficiency of the affidavit or to the good faith exception based upon material misstatements and omissions made with reckless disregard for the truth. These misstatements and omissions rendered the affidavit insufficient and rendered the good faith exception inapplicable.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because: this Brief contains 13,222 words and 1,140 lines of text.

This Brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on March 31, 2021.

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