IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

LIAM C. LATTIN,
First Lieutenant (O-2), United States Air Force,
Appellant.

USCA Dkt. No. 22-0211/AF
Crim. App. Dkt. No. ACM 39859

BRIEF ON BEHALF OF APPELLANT

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WHETHER THE LOWER COURT ERRED WHEN IT FAILED TO ADDRESS A SEARCH AUTHORIZATION'S STATED EXPIRATION DATE?

Statement of Statutory Jurisdiction

First Lieutenant (1st Lt) Lattin's approved sentence included a dismissal. Accordingly, the Air Force Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2019). This Honorable Court has jurisdiction to review the record under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

Statement of the Case

A panel of officer members sitting as a general court-martial tried 1st Lt Lattin on December 3-12, 2019. Contrary to his pleas, he was found guilty of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2016) and one specification of sexual assault and one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2019). Joint Appendix (JA) at 002. 1st Lt Lattin was sentenced to confinement for 10 years, total forfeitures, and a dismissal from the United States Air Force. *Id*. The

Convening Authority took no action on the findings or sentence. *Id*.

1st Lt Lattin appealed his conviction to the Air Force Court of Criminal Appeals (AFCCA) under Article 66, UCMJ, 10 U.S.C. § 866 (2019). On April 20, 2022, AFCCA affirmed the findings and sentence. JA at 049. This Court granted review on August 26, 2022.

Statement of Facts

1. 2d Lt A.W. trip from USC

In January 2019, a group of ROTC cadets from University of Southern California (USC) travelled to Phoenix, Arizona to visit Luke Air Force Base. JA at 319. While there, the group toured the squadron to which 1st Lt Lattin belonged. JA at 320. One of the cadets, 2d Lt A.W.[1], recognized 1st Lt Lattin's photo hanging in the squadron spaces. *Id*.

She knew 1st Lt Lattin was a USC graduate who had been a part of the ROTC detachment and knew her boyfriend, Officer T.D. *Id*. Later, 2d Lt A.W. saw 1st Lt Lattin and introduced herself to him. JA at 321. The two made plans to go out that evening after the ROTC group's dinner. JA at 324. Although another cadet was originally invited to join them, only 2d Lt A.W. went out with 1st Lt Lattin. JA at 325-26.

[1] Although a cadet at the time of the alleged offenses, 2d Lt A.W. was commissioned at the time of trial. She will be referred to herein by her rank at trial.

After stopping at three bars, 1st Lt Lattin and 2d Lt A.W. went back to his apartment. JA at 327- 29, 334. 1st Lt Lattin told 2d Lt A.W. he would take her back to her hotel before the bus left the following morning. JA at 334. At 0147 local time, 2d Lt A.W. texted Officer T.D., her boyfriend, that she needed help. JA at 067, 332. Over the course of several hours, she texted him that 1st Lt Lattin had assaulted her and would not let her leave his apartment. JA at 067. 2d Lt A.W. did not want Officer T.D., a police officer on duty with the Los Angeles Police Department (LAPD), to contact 1st Lt Lattin or anyone else. JA at 069-73. Eventually, Officer T.D. informed his watch commander that 2d Lt A.W. was being held against her will, and the Glendale Police Department was dispatched to 1st Lt Lattin's apartment. JA at 066. When the police arrived, 2d Lt A.W. opened the door for the officers. *Id*. She told them she was not being held against her will and denied she had been harmed in any way. *Id*. When the officers left, 1st Lt Lattin drove 2d Lt A.W. back to her hotel. JA at 360. When she arrived, she learned the Air Force Office of Special Investigations (AFOSI) had also been involved in searching for her and had been at the hotel. *Id*. When she returned to Los Angeles, 2d Lt A.W., accompanied by Officer T.D., went to have a SANE exam completed and she made an unrestricted report of sexual assault. JA at 364.

On January 26, 2019, AFOSI opened an investigation into an allegation of

sexual assault. JA at 261. 2d Lt A.W. alleged that on the evening of January 25, 2019, she had met 1st Lt Lattin for the first time. JA at 321. 2d Lt A.W. said that she and 1st Lt Lattin had gone out together on the night of the 25th and had ended up in his apartment where she alleged he had assaulted her. JA at 343-47. Directly after the alleged assault, 2d Lt A.W. had texted with Officer T.D. JA at 348.

2. Search authorization

On February 13, 2019, SA L.B., the lead AFOSI investigator, sought a search authorization for 1st Lt Lattin's DNA and mobile device. JA at 265. She completed an affidavit that other agents had drafted and met with Col M.R., the Group Commander and search authority. JA at 265-66. The affidavit recounted the allegations made by 2d Lt A.W. JA 165-66. The affidavit referenced text messages between 2d Lt A.W. and Officer T.D. that evening. JA at 167. It further referenced text messages between Officer T.D. and 1st Lt Lattin, providing the content of those messages. *Id*. The affidavit made no mention of text messages or other electronic communication between 2d Lt A.W. and 1st Lt Lattin. The affidavit made clear the alleged offense occurred on January 26, 2019. JA at 165. The affidavit stated SA L.B. had spoken with the Chief of Military Justice who had advised her to seek a search authorization for the seizure of 1st Lt Lattin's DNA and his mobile device "for evidence." JA at 167. SA L.B. testified that the purpose of asking for the search authorization was to confirm the texts she had seen from

2d Lt A.W. and Officer T.D. were actually from 1st Lt Lattin's phone. JA at 265.

Col M.R. signed the authorization, allowing for the seizure and analysis of "SUBJECTs DNA" and "SUBJECTs mobile device with biometric access." JA at 164. The authorization went on to direct:

> No search of the person or premises conducted pursuant to the authority herein granted shall be initiated later than 3 days from 13 Feb 19 (date authority is granted) to ensure probable cause does not turn stale.
>
> Furthermore, pursuant to this authority, and in accordance with the matters presented to me, I authorize continuing, further, and additional searches, to include copying and/or analysis, on or away from the specified premises, of the above specified property seized, copied, or analyzed on or after the date this authority is granted. This authority will expire on 16 Feb 19.

Id.

3. Seizure and search of mobile phone

On the basis of this authorization, SA L.B. seized 1st Lt Lattin's mobile phone and a sample of his DNA on February 14, 2019. JA at 269. SA L.B. manually searched the text messages on the mobile phone on February 14, 2019. JA at 272. She located messages between 1st Lt Lattin and 2d Lt A.W. and between 1st Lt Lattin and Officer T.D. JA at 273. In the three-day period before the authorization expired on February 16, 2019, she looked through the text messages and corroborated the messages between 1st Lt Lattin and 2d Lt A.W. and between 1st Lt Lattin and T.D. JA at 291.

Despite having achieved her stated goal of confirming the texts with 2d Lt A.W. and Officer T.D., SA L.B. did not end her inquiry there. JA at 272. Instead, she then looked through the messages to check which other contacts 1st Lt Lattin had recently been in contact with. *Id*. SA L.B. began to run key word searches using terms like "OSI" to find evidence regarding the incident with 2d Lt A.W. JA at 273. During this manual search, SA L.B. saw messages between 1st Lt Lattin and 2d Lt A.W., Officer T.D., Capt K.S., and 1st Lt Lattin's father during the timeframe following the alleged assault of 2d Lt A.W. *Id*. SA L.B. then began to search the phone for evidence of other potential victims. JA at 274. SA L.B. noticed 2d Lt A.W.'s phone number was not saved as a contact with her name. JA at 273. The messages between her and 1st Lt Lattin showed only her phone number. JA at 274. SA L.B. decided to look at other text conversations with other phone numbers that were not saved as contacts to look for other potential victims. *Id*.

One such text conversation had ended in September 2018, four months before the incident SA L.B. was investigating. JA at 113. Despite the fact that this conversation predated any events with 2d Lt A.W., SA L.B. opened the text conversation and reviewed the contents. JA at 274. The messages were between 1st Lt K.A. and 1st Lt Lattin; some of the messages referenced a restricted sexual assault report 1st Lt K.A. had filed following an incident in September 2018. JA at

275.

4. 1st Lt K.A. visit

In August 2018, 1st Lt Lattin visited Albuquerque for a friend's birthday party. JA at 371. While in Albuquerque, 1st Lt Lattin reconnected with 1st Lt K.A., a friend from pilot training. *Id*. She attended the party with him where the two kissed and engaged in some sexual activity. JA at 372. Following the party, the pair continued to stay in touch. JA at 373. Eventually, 1st Lt Lattin invited 1st Lt K.A. to travel to Phoenix to visit him, and on September 7, 2018, 1st Lt K.A did. JA at 376. That evening, after spending time with some friends, 1st Lt Lattin and 1st Lt K.A. kissed. JA at 378. When 1st Lt K.A. indicated that she did not want to take it further at that time, 1st Lt Lattin stopped and went to bed while 1st Lt K.A. slept on the couch. *Id*.

The next morning, the pair joined a group for a river float. JA at 380. The river float took approximately five hours to complete. JA at 448. Although 1st Lt K.A. brought three ciders with her to drink on the float, she testified that she also drank hard alcohol and Strawberritas provided by others in the group. JA at 384-85.

During the river float, 1st Lt K.A. spent much of her time with Capt K.S., a classmate of 1st Lt Lattin's. JA at 449. By the end of the float, the two had kissed while on the river and continued to kiss on the bus back to the parking lot. JA at

450-51. After 1st Lt Lattin and 1st Lt K.A. returned to his apartment, Capt K.S. and Major D.S. joined them to watch a sporting event on TV. JA at 453. Capt K.S. and 1st Lt K.A. were sitting together on a couch and were engaging in kissing and other sexual activity under a blanket. *Id*. Capt K.S. asked 1st Lt K.A. out to dinner but she was unsure whether she should leave 1st Lt Lattin because she was his guest. JA at 455. Eventually 1st Lt K.A. showered, got ready, and went out to dinner with Capt K.S. JA at 456. He asked if she wanted to stay at his apartment and she agreed. JA at 457. The two engaged in intercourse that evening and again the next morning. JA at 457-58.

Capt K.S. took 1st Lt K.A. to the airport and she returned to Albuquerque. JA at 396. Upon her return, 1st Lt K.A. texted 1st Lt Lattin and thanked him for the visit. JA at 107. She told him that she was having trouble remembering what had occurred on September 8, but that she thought "something" had happened between her and 1st Lt Lattin after the river float. JA 108-111. About a week later, after hearing rumors concerning her conduct on the river float, 1st Lt K.A. made a restricted report of sexual assault against Capt K.S. and 1st Lt Lattin. JA at 403, 442.

5. SA L.B.'s continued search of 1st Lt Lattin's mobile phone

Initially, based upon the text messages from September 2018 between 1st Lt K.A. and 1st Lt Lattin, SA L.B. believed 1st Lt Lattin was a witness to a possible

sexual assault of 1st Lt K.A. by Capt K.S. JA at 275. SA L.B. contacted 1st Lt K.A., who was shocked to hear that AFOSI was aware of her restricted report and who did not want to participate in any investigation. JA at 282.

SA L.B. then interviewed 1st Lt Lattin about his knowledge of an incident involving 1st Lt K.A. and Capt K.S. JA at 276. During this interview 1st Lt Lattin mentioned he had texted with Capt K.S. about 1st Lt K.A. during her visit. JA at 277. He also told SA L.B. about Maj D.S.'s involvement in the weekend. JA at 278.

After 30 days, the mobile phone locked itself and SA L.B. was unable to access the contents. JA at 280. In order to further examine the contents of the mobile phone, sometime in April 2019, SA L.B. sent the phone to the Defense Cyber Forensics Laboratory (DCFL) for analysis. JA at 137, 280, and 295. The examiner was able to provide several text conversations relevant to 1st Lt K.A. and her visit. JA at 114. Eventually, 1st Lt K.A. decided to participate in the investigation and court-martial. JA at 282. When interviewed, and when called at trial, 1st Lt K.A. stated that 1st Lt Lattin had sexually assaulted her after their return from the river float; before 1st Lt K.S. and Maj D.S. had come to the apartment. JA at 391. Her testimony was incomplete as she did not have memory of much of that time period. *Id*. She stated that she remembered "pressure from behind" on her vagina but did not testify to penetration. *Id*. Text messages from 1st

Lt Lattin's phone to Maj D.S. indicating that he had been "inside" 1st Lt K.A. were introduced at trial and used as evidence of penetration. JA at 010, 476.

6. Motion to suppress

At trial, the defense moved to suppress the results of the search and all derivative evidence. JA at 136. Aside from the discussion of the scope of the search authorization, the defense's motion pointed both to the requirement to initiate searches within three days of the February 13, 2019 signing of the authorization as well as the expiration of the authority to conduct follow on searches, copying, or analysis on February 16, 2019. JA at 148.

The Government called SA L.B. to testify to the seizure and search of 1st Lt Lattin's mobile phone. JA at 260. SA L.B. testified that she had been a certified special agent for two years. JA at 294. In order to be certified as a special agent, SA L.B. had attended FLETC, the Federal Law Enforcement Training Center. JA at 301.

SA L.B. testified that, based upon the authorization that had been granted, she believed once the phone was seized, all data on it became the property of the government and she was free to search all aspects of the phone. JA at 292. She testified this belief came as a result of the training she received at FLETC. JA at 301. She further testified that once the phone was seized, regardless of the expiration of the search authorization, she believed all data on the phone "becomes

property of the government." JA at 292. She further testified she did not need to get an authorization with an expanded scope in order to search beyond the timeframe associated with the allegations made by 2d Lt A.W. because the original authority gave her authority to search the entirety of the phone for any evidence of any crimes. JA at 301. SA L.B. testified she had conducted searches of cell phones in this same manner for the two years she had served as a special agent with AFOSI. JA at 294.

7. Military judge's ruling

The Military Judge provided a written ruling on the defense motion to suppress. JA at 189. In his ruling, the Military Judge only addressed the initiation date set out in the third paragraph of the authorization and ignored the expiration date listed in the fourth paragraph. JA at 197. Having determined the search was initiated within the date established in the third paragraph, the Military Judge did not address this aspect of the motion further. *Id*.

When discussing the scope of the search, the Military Judge concluded that SA L.B.'s searches of 1st Lt Lattin's phone resulting in the discovery of text messages with 1st Lt K.A. were within the scope of the search authorization. JA at 195. He based this conclusion on a determination that SA L.B. was "allowed to use all reasonable inferences about where evidence is likely to be kept." *Id.* His conclusion relied upon this Court's statement in *United States v. Richards*, 76 M.J.

365, 370 (C.A.A.F. 2017) that "there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders." *Id.* Having concluded that SA L.B. was entitled to search "perhaps all" areas of 1st Lt Lattin's mobile phone, the Military Judge found the text messages leading SA L.B. to discover 1st Lt K.A.'s messages were within her plain view. *Id.*

The Military Judge then determined that even if the scope of the search authorization had been exceeded by SA L.B.'s exploration of the text messages on 1st Lt Lattin's phone, 1st Lt K.A.'s text messages would have inevitably been discovered. JA at 198. He based this conclusion on the fact that when SA L.B. asked for DCFL assistance in searching the phone, she had already found the messages from Maj D.S. and 1st Lt K.A. *Id*. Further, he relied upon 1st Lt Lattin's "habit of discussing sexual encounters via text message" to conclude that SA L.B. could have "very easily" applied for an additional authorization to look further into the mobile phone. *Id*.

The Military Judge also concluded the good faith exception to the warrant requirement applied in this case. JA at 199. He found SA L.B. "objectively and reasonably relied" on the search authority's probable cause determination and the sufficiency of his search authorization. *Id*.

Finally, the Military Judge concluded that, even if SA L.B.'s searches of 1st

Lt Lattin's phone were unlawful and no exceptions applied, the Government could still meet their burden of proving by a preponderance of the evidence that deterrence of future unlawful searches or seizures is not appreciable, or that such deterrence does not outweigh the costs to the justice system of excluding the evidence. JA at 199. He came to this conclusion by placing any blame for an overly broad search authorization at the feet of the issuing official and not SA L.B. JA at 200. He further determined that SA L.B. did not act deliberately, recklessly, or with gross negligence and that the case did not involve any recurring or systemic negligence on the part of law enforcement. *Id*.

8. The Air Force Court of Criminal Appeals decision

AFCCA reviewed the Military Judge's ruling on appeal. JA at 014. Turning first to the issue of the expiration of the search authorization, AFCCA noted the Military Judge's conclusion that the authorization required the initiation of a search within three days. JA at 018. As the court agreed the search was initiated within three days, the court found the "military judge did not err in his findings of fact and conclusions of law regarding Appellant's claim that the authorization to search had expired." JA at 019.

AFCCA then reviewed the scope of the search authorization. JA at 019. The court observed that the Military Judge made no findings of fact as to the scope of the search authorization but merely concluded that the search authorization was not

overbroad and that SA L.B.'s searches were within the scope of the authorization. *Id*. AFCCA disagreed with the Military Judge and found the search authorization to be overbroad in scope because it failed to identify the data for which the Government had probable cause to seize. JA at 020. Therefore, the searches based upon the search authorization were unlawful under the Fourth Amendment. *Id*. Because SA L.B. was not "in the course of otherwise lawful activity" while reading the text messages on 1st Lt Lattin's phone, the plain view doctrine also did not apply. JA at 024.

AFCCA then looked to see if any of the exceptions to the Fourth Amendment warrant requirement applied. JA at 020. First, it determined the good faith exception was not applicable because it found the search authorization to be facially deficient "such that investigators cannot reasonably have presumed it to be valid." JA at 021. The court noted SA L.B.'s belief that once a phone is seized, law enforcement can search all areas of the phone: "SA L.B. was wrong in her belief that the law allows such a broad search." JA at 022.

Similarly, AFCCA did not find that the inevitable discovery exception applied to this search. JA at 023. Noting the Military Judge's analysis on this point, AFCCA pointed out that his reasoning overlooked the fact that the "incriminating" text messages with 1st Lt K.A. and Maj D.S. and 1st Lt Lattin's "habit" of discussing sexual encounters were only discovered through SA L.B.'s initial

unlawful search of the mobile phone. *Id*. Although finding that 1st Lt Lattin's messages with 2d Lt A.W. and Officer T.D. would have been inevitably discovered, the court determined the messages leading to the discovery of 1st Lt K.A.'s allegations would not have been. *Id*.

Finally, AFCCA looked to whether the exclusionary rule would be appropriate in this case. JA at 024. The court did not find the search authority or SA L.B.'s actions to be "deliberate, reckless, or grossly negligent" or part of "recurring or systemic negligence." *Id*. The court considered the Military Judge's finding that exclusion of this evidence under these facts would not deter future actions by military law enforcement personnel. JA at 027. AFCCA agreed with the Military Judge that SA L.B.'s conduct did not warrant exclusion of evidence to deter future unlawful searches. *Id*. AFCCA relied upon three findings by the Military Judge. *Id*. First, that SA L.B. acted reasonably. Second, that she did not violate 1st Lt Lattin's rights "deliberately, recklessly, or with gross negligence." Third, that any wrong done to the accused's rights was by accident and not by design, and that it had not been shown that this case "involve[d] any recurring or systemic negligence on the part of law enforcement." *Id*. AFCCA agreed with the Military Judge that SA L.B.'s conduct was not deliberate, reckless, or grossly negligent, "or even indifferent or wanton." *Id*. AFCCA pointed to the lack of evidence from AFOSI or FLETC regarding training or standard practices in

obtaining search authorizations or conducting searches. JA at 028. Therefore, the court could not conclude that exclusion would address "recurring or systemic negligence." *Id*.

AFCCA also found that exclusion of evidence derived from the illegal search would result in substantial social costs. JA at 028-29. It based this conclusion on the fact that 1st Lt Lattin was charged with the sexual assault and abusive sexual contact of two victims. JA at 029. Exclusion of the evidence derived from the illegal search would have precluded 1st Lt K.A.'s testimony. AFCCA found that Capt K.S. and Maj D.S. were aware of 1st Lt K.A.'s allegations, that 1st Lt K.A. had filed a restricted report against 1st Lt Lattin four months before she was contacted by AFOSI, and that 1st Lt K.A. might have heard about 2d Lt A.W.'s allegations through her fellow officers and come forward. JA at 030. AFCCA agreed with the Military Judge that the deterrence resulting from exclusion of the illegally obtained evidence would not outweigh the costs to the judicial system of excluding 1st Lt K.A.'s live testimony.

One judge dissented from AFCCA's decision. The dissent stated that the exclusionary rule was appropriate, and that the deterrence would outweigh the costs to the justice system. JA at 050. The dissent further argued that SA L.B.'s failure to recognize the facial deficiency of the search authorization shows she was not acting as a reasonable law enforcement officer should. JA at 052. Further, the

dissent emphasized this was not an isolated incident, as SA L.B. had been operating in this manner for two years. JA at 053-54. The dissenting judge noted he would exclude the text messages and derivative evidence, but not preclude 1st Lt K.A. from testifying. JA at 055.

Summary of the Argument

The lower court found the scope of the search authorization was overbroad. It also determined the law enforcement officer conducting the search did not do so in good faith, because the search authorization was facially deficient. Further, the lower court found that evidence relating to the allegations pertaining to 1st Lt K.A. was only found by those illegal searches and would not have been inevitably discovered. However, after making these findings, AFCCA adopted the Military Judge's reasoning in finding that the special agent had acted reasonably and that exclusion of the illegally obtained evidence would not deter future law enforcement conduct. This conclusion is contradictory and contrary to the law established in *United States v. Leon*, 468 U.S. 897, 909 (1984).

Additionally, both the Military Judge and the lower court failed to address the established expiration date for the authorized searches and any follow-on searches. Both the Military Judge and the lower court only examined the established initiation date, ignoring the date on which searches were ordered to cease.

Argument

I.

THE LOWER COURT ERRED WHEN IT DID NOT APPLY THE EXCLUSIONARY RULE.

Standard of Review

Courts review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). Courts review the military judge's findings of fact for clear error and conclusions of law *de novo*. *Id*. Appellate courts review *de novo* a claim that a search authorization was overly broad such that it resulted in a general search prohibited by the Fourth Amendment. *United States v. Maxwell*, 45 M.J. 406, 420 (C.A.A.F. 1996).

Law and Analysis

A. The Purpose of the Exclusionary Rule is Deterrence of Law Enforcement Misconduct.

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. The United States Supreme Court has established a rule precluding the use of evidence obtained in violation of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914). This rule is "designed to safeguard Fourth Amendment rights generally through its

deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

However, the fact that a Fourth Amendment violation occurred does not necessarily mean the exclusionary rule applies. *Herring v. United States*, 555 U.S. 135 (2009). The rule applies only where it results in appreciable deterrence. *Leon*, 468 U.S. at 909. Additionally, the benefits of deterrence must outweigh the social costs. *Id*. at 910. The cost of excluding evidence obtained in violation of the Fourth Amendment is letting guilty defendants go free. *Id*. at 908.

In *Leon*, the Supreme Court created an exception to the exclusionary rule for situations where the police act in "objectively reasonable reliance" on a search warrant that is later invalidated for lacking probable cause. *Id*. at 922. The Court then extended this "good faith" exception to instances where a warrant was invalid due to a clerical error, where a search was performed in good faith reliance on a statute later declared unconstitutional, and where police reasonably relied on mistaken information entered by court employees into a database. *Herring*, 555 U.S. at 142 (citing *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984); *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987); and *Arizona v. Evans*, 514 U.S. 1, 15 (1995). Ultimately, the Court held that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144.

The Supreme Court has further discussed the type of police misconduct that

should lead to the exclusion of evidence. "[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. *Leon*, 468 U.S. at 911. "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Krull*, 480 U.S. at 348-49 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)). The Supreme Court identified four situations that would indicate the presence of bad faith and call for the application of the exclusionary rule despite a warrant having been issued. *United States v. Ganzer*, 922 F.3d 579, 588 (5th Cir. 2019). One of those is where the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id*. (citing *Leon*, 468 U.S. at 923).

The Supreme Court's jurisprudence regarding the exclusionary rule has been incorporated into Mil. R. Evid. 311. This rule makes evidence obtained as a result of an unlawful search or seizure by a person acting in a governmental capacity inadmissible in court if the accused makes a timely motion to suppress, the accused had a reasonable expectation of privacy in the item searched and has standing to object, and "exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such

deterrence outweigh the costs to the justice system." Mil. R. Evid. 311(a). When the defense makes a motion to suppress, the prosecution bears the burden of proving by a preponderance of the evidence the evidence was not obtained as a result of an unlawful search or seizure, an exception exists, or "the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence." Mil. R. Evid. 311(d)(5)(A).

B. The Military Judge's Determination that the Exclusionary Rule Would Not Deter Future Behavior was an Abuse of Discretion.

For decades, the Fourth Amendment's application to digital evidence has been the subject of numerous cases within the military justice system and the federal courts. In terms of the scope of a search, modern computer technologies, such as cell phones and laptops, present challenges well beyond computer disks, storage lockers, and boxes. *United States v. Wicks*, 73 M.J. 93, 102 (C.A.A.F. 2014). The vast amount of data that can be stored and accessed, as well as the myriad ways it can be sorted, filed, and protected makes a container analogy problematic when discussing one of these modern devices. *Id*. "The potential invasion of privacy in a search of a cell phone is greater than in a search of a 'container' in a conventional sense" because a cell phone can provide access to a "vast body of personal data." *Id*. (quoting *United States v. Flores-Lopez*, 670 F.3d

803, 805 (7th Cir. 2012)). "One of the most notable distinguishing features of modern cell phones is their immense storage capacity." *Riley v. California*, 573 U.S. 373, 393 (2014).

Certainly, by the time the investigation into 1st Lt Lattin began in January 2019, a special agent within AFOSI would have been trained on the requirement to provide particularity in a warrant authorizing a search of a cell phone or other digital device. SA L.B. had been a certified special agent for two years by that time. JA at 294. She had attended FLETC, the Federal Law Enforcement Training Center, and claimed she learned there she could pursue anything she found on the cell phone once she seized it, without further authorization. JA at 301. SA L.B. testified she had conducted searches of cell phones in this same manner for the two years she had served as a special agent with AFOSI. JA at 294.

Despite the established need for particularity in the search of digital devices and SA L.B.'s testimony she had conducted expansive general searches of cell phones for two years before the illegal search of 1st Lt Lattin's cell phone, the Military Judge found the Government had still met its burden to prove by a preponderance of the evidence that the deterrence of future unlawful searches or seizures was not appreciable or that such deterrence did not outweigh the costs to the justice system of excluding the evidence. JA at 202. The Military Judge ruled exclusion of the illegally discovered evidence and its derivative evidence would

not "deter future actions by military law enforcement personnel." JA at 200. The Military Judge came to this conclusion because he found any error in the issuance of the search authorization rested with the search authority for not indicating a narrower scope and not with law enforcement. *Id*. Even if SA L.B. was found to have violated 1st Lt Lattin's rights, a conclusion he did not reach, the Military Judge found she did not do so deliberately, recklessly, or with gross negligence. *Id.* The Military Judge further found no recurring or systemic negligence on the part of law enforcement. *Id.* He found SA L.B. acted reasonably. *Id*.

This conclusion by the Military Judge disregarded SA L.B.'s role in creating the search authorization and securing the search authority's signature. She wrote the affidavit and created the authorization. JA at 265. She filled in the item to be seized and searched and gave herself the ability to search the entirety of the cell phone. JA at 266. The search authority might have narrowed the scope, but as the law enforcement agent presenting a completed authorization to the search authority, SA L.B.'s conduct in crafting the overbroad authority cannot be overlooked. *Id*.

Additionally, the Military Judge's determination that exclusion would not deter future misconduct and that SA L.B. acted reasonably ignored her testimony that she had spent the last two years operating in this manner, and was apparently taught to do so by FLETC. If an agency charged with training federal law

enforcement officers is not appropriately educating government agents on the nuances of search warrants for digital devices and the applicable law, only the exclusion of evidence in a case such as this can make sure that they do. If SA L.B. has spent two years running roughshod through digital devices with no limiting factors without consequence, only application of the exclusionary rule prevents her, and others, from doing the same. The Military Judge's finding that SA L.B. acted reasonably, and exclusion of evidence would not deter law enforcement behavior, was an abuse of his discretion.

C. AFCCA's Failure to Apply the Exclusionary Rule in this Case was Error.

The lower court's opinion appears to have taken contradictory views of SA L.B.'s conduct and good faith. AFCCA first found that SA L.B.'s searches of 1st Lt Lattin's mobile phone were not in good faith because the search authorization was facially deficient. In coming to this conclusion, AFCCA used the test from *Leon* the Supreme Court developed to determine whether the exclusionary rule was appropriate in order to deter law enforcement behavior. JA at 021. In fact, the lower court stated, "We…find the fourth *Leon* exception clearly applies in this case—that the search authorization was facially deficient in not limiting the scope of the search such that investigators cannot reasonably have presumed it to be valid." The court also stated SA L.B. could not "reasonably have presumed" the

authorization to be valid. *Id*.

Yet, when the court turned to the question of the exclusionary rule, it found the Military Judge's conclusion that SA L.B. acted reasonably and did not violate 1st Lt Lattin's rights deliberately, recklessly, or with gross negligence to be accurate. These conclusions by the Military Judge were based upon the same conclusion regarding the good faith exception that AFCCA found to be clearly erroneous. AFCCA had already found SA L.B.'s reliance on the authorization to not be reasonable as the authorization was facially deficient.

This was the authorization she created and briefed the search authority on. If it was not reasonable for her to presume it to be valid, then her actions in creating the invalid authorization and conducting the illegal search were clearly unreasonable as well. Her testimony that she believed once a search authorization for a cell phone was granted she was entitled to search the entirety of the phone for any possible crime showed her actions in creating this broad authority to be deliberate, reckless, or at the very least grossly negligent.

AFCCA noted that the Military Judge did not find exclusion of the evidence would deter future actions by military law enforcement, but did not point out that the Military Judge made this finding because he did not find the search authorization overbroad and, even if overbroad, blamed the search authority for that deficiency and not SA L.B. JA at 200. The Military Judge's

determination that exclusion would not deter law enforcement was based upon his finding that law enforcement was not responsible for the unlawful search.

Further, AFCCA appeared to shift the burden of proof on deterrence to 1st Lt Lattin. The court stated:

> [W]hile SA L.B. testified about *her* "standard practice" for searching phones, she did not quantify those searches, indicate how many involved such sweeping authorizations, or suggest that her practice was also AFOSI's. No one else from AFOSI, and no one from FLETC, testified about training or standard practices in obtaining an authorization to search a phone, and how to conduct the search. The record provides inadequate support to conclude that SA L.B.'s actions in searching Appellant's phone were either recurrent or representative of law-enforcement practices, and therefore we cannot conclude that exclusion of the evidence would address "recurring or systemic negligence." *Herring*, 555 U.S. at 144.

JA at 028 (emphasis in original). This analysis suggests 1st Lt Lattin was responsible for providing evidence of gross negligence or recurring or systemic negligence. However, Mil. R. Evid. 311(d)(5)(A) lays this burden at the *Government's* feet. The Government bears the sole responsibility to establish by a preponderance of the evidence that exclusion of the evidence would not deter future police misconduct. The only evidence at trial, however, was that SA L.B. had a standard practice, based on her training at FLETC, to conduct general searches of cell phones without any restrictions based upon the facts of the investigation. The preponderance of the evidence, indeed the only evidence, established reckless and recurrent misconduct on the part of an AFOSI special

agent.

The lower court's opinion also holds that any deterrent effect would not outweigh the costs to the justice system of excluding this evidence. It is true that 1st Lt Lattin's conviction of the offense against 1st Lt K.A. rests entirely upon evidence derived from this illegal search and exclusion of such evidence would likely result in this guilty finding being set aside. However, this cost does not outweigh the deterrent effect that exclusion of such evidence will provide. Only the loss of a conviction such as this will resonate within the military law enforcement community. It will ensure the proper instruction at FLETC. It will ensure the proper practice by special agents. It will ensure the proper practice by SA L.B., who currently has no reason not to continue to violate the Fourth Amendment rights of servicemembers through her "standard practice" to search the entire cell phone without restraint. The cost to the justice system may be high, but the deterrent effect would be greater.

II.

THE LOWER COURT ERRED WHEN IT FAILED TO ADDRESS THE SEARCH AUTHORIZATION'S CLEARLY STATED EXPIRATION DATE.

Standard of Review

Courts review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *Hoffman*, 75 M.J. at 124.

Law and Analysis

While the Fourth Amendment does not specify that search warrants must contain expiration dates or requirements about when the search or seizure is to occur or the duration, it is a different case when the individual authorizing the search establishes just such a requirement. *United States v. Cote*, 72 M.J. 41, 44 (C.A.A.F. 2013). The search and seizure conducted under a warrant must conform to the warrant, or some well-recognized exception. *Id*. at 45 (internal citations omitted).

The Military Judge concluded that the authorization only gave a date by which the search must be initiated. JA at 197. In making this conclusion, the Military Judge quoted only the third paragraph of the authorization. The relevant language, overlooked in the Military Judge's ruling, is found in the fourth paragraph. JA at 164. This paragraph, set apart from the contents of the third paragraph with the word "furthermore," establishes the Government's authority to continue to search, copy, and analyze the seized items either on or off the premises after the date the search authority is granted. *Id*. This paragraph states that this authority to conduct additional searches expires on February 16, 2019. *Id*.

The lower court's adoption of the Military Judge's conclusion also adopts his exclusion of any analysis of the language in the fourth paragraph. This

paragraph authorizes continuing searches, copying, and analysis of the seized property. *Id*. However, the last sentence states that "[t]his authority will expire on 16 Feb 19." *Id*. This was not a standard provision, but one written into the document. *Id*. The Government did not call the authorizing official to testify at the hearing on the motion, so this Court is left with the plain language of the document. This language states that any authority to conduct continuing searches expired on February 16, 2019.

Pursuant to this Court's opinion in *Cote*, a search and seizure conducted under a warrant must conform to the warrant, or some well-recognized exception. *Cote*. 72 M.J. at 45 (internal citations omitted). The additional searches conducted by SA L.B. and then by the analysts at DCFL beyond February 16, 2019, were well past the expiration of the search authorization and therefore a violation of its plainly written terms. The Government must establish a violation of the terms of the warrant were *de minimis* or otherwise reasonable under the circumstances. *Id*.

Given the approximately six-week gap between the expiration of the search authorization and the request for analysis to DCFL, the violation cannot be considered *de minimis*. The delay cannot be considered reasonable under the circumstances either. SA L.B. sought the seizure of the phone to confirm that the messages from 2d Lt A.W. and Officer T.D. originated from 1st Lt Lattin's phone. JA at 289. She was able to confirm this fact almost immediately upon seizing the

phone. JA at 273. It was only her expansion of the search beyond this scope that extended her review beyond the authorized window. This fishing expedition for other "potential victims" beyond the timeframe established in the authorization was unreasonable. JA at 274.

The lower court's adoption of the Military Judge's conclusion and failure to address this expiration date in the search authorization was error. Had the lower court fully reviewed the authorization as a whole, it would have had to find the authorization for continuing searches had expired well before SA L.B.'s continuing searches and the DCFL full analysis were conducted.

Prejudice

I.

The Government's Impermissible Search of 1st Lt Lattin's Phone Materially Prejudiced His Substantial Right to be Free from Unreasonable Searches and Seizures under the Fourth Amendment

This Court should grant 1st Lattin relief because the Government's impermissible search amounts to an error that materially prejudiced his substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859. Not only was there error, but the error was of a constitutional dimension which triggers the "harmless beyond a reasonable doubt" standard. *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019). As the "beneficiary of the error," the Government must prove, and this Court must be convinced, beyond a reasonable doubt, that the error "did

not taint the proceedings or otherwise contribute to defendant's conviction or sentence." *Id*. at n. 6, 469. The Government cannot meet its burden that it would have discovered the additional victim but for the impermissible search nor can it prove that without its use of the impermissibly seized evidence, it would have been able to convict 1st Lt Lattin of the relevant charges.

A. But for the Impermissible search, the Government Would not Have Established an Additional Victim Which was Unknown to it Prior to the Search

If SA L.B. had not impermissibly searched 1st Lt Lattin's phone, the Government would not have discovered any crime relating to K.A. During its analysis of the "inevitable discovery doctrine," the Air Force Court noted it saw "little evidence that SA L.B. or other AFOSI agents were working on other leads regarding who Appellant might have messaged about his sexual encounters, his encounters with A.W. specifically, or his encounters with K.A." JA at 023. The Air Force Court concluded, "Thus, it is not inevitable that evidence of Appellant's sexual assault of K.A. would have been discovered" *Id*.

K.A. herself made it clear she would not have known about nor participated in the investigation against 1st Lt Lattin, but for S.A. L.B. contacting her. She stated she had not contacted AFOSI or requested AFOSI reach out to her. JA at 404. When S.A. L.B. contacted K.A. she initially thought it was regarding a security clearance; when S.A. L.B. mentioned 1st Lt Lattin, K.A. "started getting

very upset and started to cry." *Id*. She specifically stated she decided to participate in the case based on the information that S.A. L.B. provided to her in that initial phone call:

> A: Knowing that there was another victim and that he – after I confronted him apparently he didn't learn from the mistake with me, and that he went and did something to somebody else possibly worse. *So that motivated me to come forward* and help out with the case with my story.
>
> Q: Let me ask you this. Do you know [A.W.]?
>
> A: No.

JA at 406 (emphasis added).

The Government came to this conclusion as well and highlighted it to the members in its closing argument various times. The Government first said that "[K.A.] decides she's going to make a restricted report and does that days later, *until, until* [S.A. L.B.], throughout her investigation finds her and makes that call." JA. at 475 (emphasis added). The Government further emphasized this point:

> [K.A.] doesn't have any motive to lie because the very first thing she does is make a restricted report. Nobody knows about it. *OSI doesn't know about it until they find those text messages*. She makes a restricted report. If she were out to save her reputation, if she were out to stop rumors, she would have done something public. *She would have made an unrestricted report, but she doesn't*.

JA at 489 (emphasis added). The Government then argued to the members—to bolster K.A.'s credibility—that AFOSI was the one to bring her allegation forward, not K.A.:

> *[K.A.] doesn't bring this forward ever. OSI does.* OSI finds her and [S.A. L.B.] told you, "I called [K.A.] and her initial response was "I don't want to participate, I don't want any part of this."… And she told you ultimately why she did it, because ultimately what she learned and what she had figured out is that this involves somebody else, that despite her warnings to him, "do better in the future, I'm not going to ruin your career, but you need to not repeat this again" he had. *And that's what drives her to come forward. Knowing that she had been sexually assaulted and that he had done that to somebody else*.
>
> JA at 490 (emphasis added).

Neither K.A. herself, Trial Counsel, nor the Air Force Court elided the fact that but for S.A. L.B.'s impermissible search of 1st Lt Lattin's phone, K.A. would *not* have participated in the investigation and prosecution against him. As such, this Court should reach the same conclusion and find 1st Lt Lattin was materially prejudiced by the Government's error to impermissibly search his phone.

B. The Government Leveraged the Impermissibly Seized Evidence Throughout the Trial to Unlawfully Convict 1st Lt Lattin

The Government not only admitted the impermissibly seized text messages (Prosecution Exhibit 13; JA at 074), but it turned itself into a *raconteur* in closing argument to use the text messages as its *pièce de résistance* to convict 1st Lt Lattin of sexually assaulting two women. The Government's story was simple, yet effective: Painting the two victims as lacking motive to fabricate and showing that their accounts corroborate each other's all while sketching 1st Lt Lattin as having shown consciousness of guilt in the text messages. *See* JA at 219. Of the 18

PowerPoint slides with content related to the charges for K.A., 15 of the slides addressed the impermissibly seized text messages or used the theme of lack of motive, corroboration, and consciousness of guilt to set the stage for the text messages. JA at 219; 240-42; 242-58. The Government bedaubed its PowerPoint visual aid with 17 screenshots or direct quotes of the text messages. *Id*. Thus, nearly the entirety of the Government's argument for K.A. relied on the impermissibly seized text messages.

To start its closing argument for K.A., the Government skillfully weaved "those same three things" together—motive, corroboration, and consciousness of guilt. JA at 489. The Government claimed that since AFOSI approached K.A.—not vice versa—K.A. lacked a motive to fabricate. *Id*. The Government explained that AFOSI "call[ed] in February of 2019. That's almost six months after when it happened in September on the river. Surely any rumors, any reputation issues amongst a bunch [*sic*] fighter pilots at Luke was water under the bridge six months later." JA at 490.

The Government then stated the text messages that AFOSI found corroborated K.A.'s testimony. The Government argued the "idea of that prior consistent statement" and what K.A. told "the accused *via text message*, and it's consistent with what she told you on the stand. 'I'm pretty sure something happened between us when we got back, but I can only recount short clips of it.'"

JA at 491 (emphasis added). The Government went on to further bolster K.A.'s prior consistent statement by arguing it aligned perfectly with the testimony of the Government's expert on memory. *Id*. Thus, the fact that K.A. did not remember everything was fine, if not expected, because "that's what she has always described." *Id*.

The Government stated the "last piece" with K.A. was that the members could see 1st Lt Lattin's consciousness of guilt through the impermissible text messages. JA at 493. The Government argued that in the text messages 1st Lt Lattin "never [told] her 'Whoa, whoa, what are you talking about, you consented to this, this was total consensual sex you were into it you came on to me what are you talking about?' He never tells her that. Not once." JA at 493. The Government accentuated its argument by claiming that there are "multiple false exculpatory statements that [1st Lt Lattin] makes." JA. at 495. The Government then highlighted what it believed to be 1st Lt Lattin's false statements to K.A. via text message.

Finally, and most damning, the Government culminated its argument by mooring the impermissibly seized evidence and testimony to the other named victim in the case, thus creating a propensity argument:

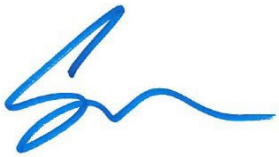
> The last piece I want to talk to you about briefly members is that you look at this and in order for this you have two women, two women who have never met, two women who didn't know each other, who have no connection to each other, who never even talked to each

> other. Four months apart saying they were sexually assaulted by the accused. *And you see commonalities there*. The trips to Hill, [“]come visit me at Hill,[”] the petting of the hair, you see that. You see the lies that he tells. You see the manipulation, you see that. *He’s either the unluckiest person in the world, or you have two women who are telling the truth*.
>
> And so when you look at all the evidence, when you look at these women, you know what you have in this case of two credible victims *with evidence to back them up* and an accused who has lied about this to multiple people because of his guilt.

JA at 496 (emphasis added). The Government argued that the two victims corroborated each other’s story with “evidence to back them up…” *Id*. However, to get to this argument, and ultimately a conviction, the Government used evidence that was impermissibly seized in violation of 1st Lt Lattin’s Fourth Amendment rights.

Conclusion

WHEREFORE, 1st Lt Lattin respectfully requests this Honorable Court find that the lower court erred in failing to exclude the evidence illegally obtained and all evidence derived therefrom; set aside the findings of guilty with regard to Specification 1 of the Charge with prejudice; and send the matter back to AFCCA to conduct a new factual and legal sufficiency review for the convictions relating to A.W. without use of the illegally obtained evidence and the Government's propensity arguments.



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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on September 26, 2022 pursuant to this Court's order dated August 26, 2022, and that a copy was also electronically served on the Air Force Government Trial and Appellate Division on the same date.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(c) which sets a limit of 14,000 words because it contains 8,917 words.

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