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

REPLY ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, First Lieutenant (1st Lt) Liam C. Lattin, the Appellant, hereby replies to the Government's Answer (Govt. Ans.) concerning the granted issues, filed on October 26, 2022.

Argument

I.

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

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

The Supreme Court has recognized that suppression of evidence obtained in violation of the Fourth Amendment is not an automatic consequence. *Herring v. United States*, 555 U.S. 135, 137 (2009). "Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id*. The exclusionary rule was judicially created to "safeguard Fourth Amendment rights generally through its deterrent effect." *Id*. at 139-40 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

In *Herring*, law enforcement arrested Herring based upon an active arrest warrant that appeared in a neighboring county's computer database. *Id*. at 137. The arresting county immediately requested a copy of the warrant as confirmation. *Id*. It was at this point that the neighboring county clerk realized that the warrant had been

recalled but had not been removed from the database. *Id*. The arresting county was quickly alerted to the error, but by that time, Herring had already been arrested and found with guns and drugs. *Id*. The Eleventh Circuit concluded that the failure to remove the warrant from the database was negligent, but not reckless or deliberate. *Id*. at 140. This fact was crucial in the Supreme Court's determination that the error was not enough to require exclusion. *Id*.

The Court emphasized that exclusion was not a necessary consequence of a Fourth Amendment violation and instead focused on the efficacy of the rule in deterring future Fourth Amendment violations. *Id*. at 141. 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." *Id*. at 144. The Court concluded that when police mistakes are made as the result of negligence, such as in Herring's case, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not outweigh the societal cost of exclusion of evidence. *Id*. at 147.

Two years after deciding *Herring*, the Supreme Court looked again at the issue of exclusion in light of a Fourth Amendment violation. *Davis v. United States*, 564 U.S. 229 (2011). In that case, Davis was a passenger in a car that was pulled over in a routine traffic stop. *Id*. at 235. He was arrested for giving the officers a false name while the driver was arrested for driving while intoxicated. *Id*. Both occupants were

removed from the car, handcuffed, and placed in the back of patrol cars. *Id*. The officers then searched the car, finding a revolver inside Davis' jacket pocket. *Id*. Although the search was allowed under settled law at the time of arrest, the law changed while the case was on appeal. *Id*. at 235-36. The Supreme Court reiterated its holding in *Herring*, that for "exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id*. at 237. The Court held that the conduct of the officers in performing a search that was lawful at the time was neither deliberate enough to yield meaningful deterrence nor culpable enough to be worth the price paid by the justice system. *Id*. at 240. The Court concluded that the "harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Id*. at 241 (quoting *United States v. Leon*, 468 U.S. 897, 919 (1984)).

B. SA L.B.'s Conduct was Deliberate, Reckless, and Grossly Negligent and Reflected Recurring and Systemic Negligence.

When compared to the police conduct that did not require exclusion in *Herring* and *Davis*, it is clear that SA L.B.'s conduct was not "objectively reasonable" nor a negligent records error. Her conduct was deliberate, reckless, and grossly negligent. It also reflected recurring and systemic negligence.

2d Lt A.W. met 1st Lt Lattin for the first time on January 25, 2019. JA at 321. The meeting was unplanned. *Id*. The first text communication between them was when 2d Lt A.W. messaged 1st Lt Lattin, saying "Hey it's [A.]" JA at 117. By

January 26, 2019, 2d Lt A.W. had alleged sexual assault and an Air Force Office of Special Investigations (AFOSI) investigation was opened. JA at 261.

SA L.B. met with Col M.R., the search authority, on February 13, 2019 in order to obtain a search authorization for 1st Lt Lattin's DNA and cell phone. JA at 265. She presented him with an affidavit that laid out the facts of 2d Lt A.W.'s allegations, including the date of the alleged assault and the text message communications between 2d Lt A.W. and her boyfriend, T.D., and between T.D. and 1st Lt Lattin on January 26, 2019. JA at 165-67.

SA L.B. sought the search authorization for the phone because AFOSI had knowledge of communications between 1st Lt Lattin and 2d Lt A.W. and between 1st Lt Lattin and T.D.; she wanted to ensure that the texts attributed to him were actually from 1st Lt Lattin's phone. JA at 266. SA L.B. briefed Col M.R. that she intended to corroborate the existence of text messages between 1st Lt Lattin and 2d Lt A.W. and between 1st Lt Lattin and T.D.. JA at 286-87. SA L.B seized 1st Lt Lattin's phone on February 14, 2019. JA at 271.

Almost immediately, SA L.B. was able to locate the messages between 1st Lt Lattin and 2d Lt A.W. and between 1st Lt Lattin and T.D.. JA at 273. She was also able to see messages sent and received during the nineteen days that had elapsed since the allegations were made where 1st Lt Lattin discussed the investigation. *Id*.

SA L.B. accomplished her stated goal in corroborating the text messages she

had been given by 2d Lt A.W. and T.D. and even went further in finding messages relevant to the investigation sent and received between January 25, 2019 and February 14, 2019. *Id*. Yet, she did not stop there. Instead, she began to "page through the phone" searching for evidence of other offenses. Eventually, she landed upon messages from 1st Lt K.A. and began to pursue a new investigation. JA at 274.

Despite the restriction of the exclusionary rule brought about by the Supreme Court's language in *Herring* and *Davis*, federal courts have applied the rule to suppress evidence in cases where the warrant's facial invalidity or the illegality of the search was obvious. *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 475 (S.D.N.Y. 2013) (excluding illegally obtained evidence where the officers did not act in an objectively reasonable manner, where the warrant lacked particularity, and the officers were presumed to be familiar with the governing law and acting on the basis of extensive training and experience); *United States v. Vasquez-Algarin*, 821 F.3d 467 (3d Cir. 2016) (excluding evidence found after the forced entry of a home based on vague and uncorroborated information that the subject of an arrest warrant lived there); *United States v. Cook*, 106 F. Supp. 3d 573 (E.D. Pa 2015) (rejecting the Government's plain view argument and finding that the police conduct was sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system); and *United States v. Lazar*, 604 F.3d 230 (6th Cir. 2010) (holding that *Herring* does not

purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient).

The federal courts who have considered *Herring* have not applied it to instances of police conduct where the warrants were facially invalid or the police conduct was obviously illegal. They have confined the application of *Herring* to instances where the negligence is isolated and is attenuated from the officer performing the search and where the officers' conduct is objectively reasonable. *Zemlyansky*, 945 F. Supp. 3d at 471.

SA L.B. created the overbroad search authorization and briefed Col M.R. about what she was searching for. JA at 165-67. She found the messages she was looking for, but continued her search through the phone unabated and illegally. She did so because she had been trained that once she seized a cell phone, she had free reign to search it. JA at 21-22. This conduct was not the result of an administrative error. It was not an isolated nor attenuated mistake. Her conduct was not objectively reasonable. It was also not only illegal due to a change in law subsequent to the search.

SA L.B.'s conduct was deliberate, reckless, and grossly negligent. SA L.B.'s references to what she was taught at the Federal Law Enforcement Training Center (FLETC) and the length of time during which she had been operating in this manner also raises the issue of recurring and systemic negligence.

C. The Government's Arguments Run Counter to the Lower Court's Determination and the Record.

The Government argues that SA L.B.'s conduct was not deliberate, reckless, or grossly negligent. (Govt. Ans. at 35). The basis for this argument is contrary to the facts in the record, the holding of the lower court, and the law.

First, the Government argues that SA L.B.'s conduct should be viewed through her reliance on the search authorization, even though the lower court found it to be overly broad. (Govt. Ans. at 36). Despite failing to cross-petition this Court over the Air Force Court of Criminal Appeals' (AFCCA's) findings related to the legality of the search authorization, the Government now claims that "the lawfulness of the search authorization—and SA L.B.'s reliance on that search authorization—is an important factor in this Court's analysis of the culpability of SA L.B.'s conduct. (Govt. Ans. at 37, n.8).

AFCCA did not just find the scope of the authorization to be overly broad, but also that the authorization was so facially deficient that SA L.B. could not have reasonably presumed it to be valid. Joint Appendix (JA) at 21. This finding was based upon the general nature of the scope listed in the authorization as well as SA L.B.'s testimony that when there is "probable cause for anything on the phone, [she] can search everything on the phone" because "[i]f the warrant allows for the entire phone to be seized, then all the data on the phone becomes property of the [G]overnment and can be searched at any time." JA at 21-22.

As the Supreme Court noted in *Herring*, "evidence 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.'" *Herring*, 555 U.S. at 143 (quoting *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987)). The lower court determined that SA L.B. could not in good faith rely upon the search authorization because of its deficiency on its face. A law enforcement officer may properly be charged with knowledge that a facially deficient search authorization is unconstitutional under the Fourth Amendment. SA L.B. had been a Special Agent with AFOSI since March 2017 and had been trained at the United States Air Force Special Investigations Academy as well as the Federal Law Enforcement Training Centers Criminal Investigator Training Program. JA at 165. She had a bachelor's degree in Criminal Justice. *Id*. In light of her training and experience, her reliance on such an obviously overbroad authorization was deliberate, reckless, and grossly negligent.

The Government next argues that "the lower court's finding that the search authorization was overly broad is a close call." (Govt. Ans. at 37). The Government further asserts that all that was necessary to bring the authorization into compliance was the specification that the search was for evidence of a violation of Article 120-Rape and then the search that SA L.B. conducted would have been lawful. (Govt. Ans. at 38). Nothing in AFCCA's opinion indicates that the court found the

overbreadth of the search authorization to be "a close call." Instead, the court found the authorization so broadly written that SA L.B. could not rely on it in good faith. The addition of the article alleged to have been violated would not have cured the issue or allowed the unlimited search SA L.B. conducted.

A properly written search authorization would have specified that SA L.B. had probable cause to seize text messages related to 2d Lt A.W.'s allegation of sexual assault. JA at 20. This narrow focus would have aligned with what SA L.B. told Col M.R. she was looking for, and would have prevented the fishing expedition which she subsequently undertook.

The Government further argues that SA L.B. did not act deliberately to violate 1st Lt Lattin's rights when she discovered 1st Lt K.A.'s messages because she found them "accidentally" while looking for evidence related to 2d Lt A.W.'s allegations. (Govt. Ans. at 40-41.) This argument completely misrepresents SA L.B.'s testimony throughout the Article 39(a) session. SA L.B. made it clear that she had been trained that if she was authorized to search and seize a phone that its entire contents were available to be searched. JA at 271, 292, 294, 301. There is no straight-faced argument that the Government can make that SA L.B. thought that messages from September 2018 were related to allegations made by 2d Lt A.W., whom 1st Lt Lattin first met on January 25, 2019.

SA L.B. did not even make that claim. She stated that after she confirmed the

messages with 2d Lt A.W. and T.D. that she kept looking. JA at 274. The Government's reading of her testimony concerning looking through other messages with phone numbers not saved as contacts is erroneous. She quite clearly stated that after she looked at messages sent and received since January 25, 2019, she began a more general search through the text messages. JA at 273-74. This is in line with her training that she was entitled to see everything and look for evidence of any crime. Her testimony on her intent behind her continued search was clear:

> As I was paging through the phone one of the things that we always do, as an OSI policy is if we come across something that identifies any past potential victims, we consider that – that's also a question we ask of witnesses, "Hey, do you know of any, you know, past sexual partners?" Because they will identify any other victims that could be out there. So, I looked through his phone. I – as I'm looking through it, [INAUDIBLE] – I notice [INAUDIBLE] doesn't have any contacts – like her contact wasn't saved, so any number where the contact wasn't saved I looked through too, just to see who it was or what they were talking about. And I ended up finding text messages between him and [1st Lt K.A.] about – that led me to believe that there was a different sexual assault allegation going on.

JA at 274.

She stated that OSI has a policy of asking witnesses about past sexual partners in order to determine whether any "past potential victims" exist. JA at 274. Here, SA L.B. had the best witness: 1st Lt Lattin's entire cell phone. In order to determine whether any past partners or victims existed, SA L.B. noted that 1st Lt Lattin had not saved 2d Lt A.W.'s phone number as a contact. JA at 274. Using that as a means of identifying others with whom 1st Lt Lattin might have had sexual encounters, SA

L.B. began to search. JA at 274. She would have no reason to link 2d Lt A.W.'s lack of a saved contact to witnesses to her allegations, especially not if the messages predated his first encounter with 2d Lt A.W. The only reason SA L.B. was searching messages sent and received pre-January 25, 2019 was to look for "past potential victims." JA at 274. To suggest otherwise is a distortion of her testimony.

The Government claims SA L.B.'s only misstep was in failing to get a new search authorization once she had interviewed 1st Lt K.A. and became aware of the second allegation. (Govt. Ans. at 44). AFCCA addressed this argument in its opinion and found otherwise: "Any evidence SA LB found as a result of her unlawful search of Appellant's phone was tainted and could not form the basis of a new search authorization or any other method leading to their discovery." JA at 23. It held that the incriminating text messages with and about 1st Lt K.A. were unlawfully discovered long before 1st Lt K.A. came forward. JA at 23. The unlawful search is what led SA L.B. to identify 1st Lt K.A. in the first place, as AFCCA recognized because it saw "little evidence that SA LB or other AFOSI agents were working on other leads regarding who Appellant might have messaged about his sexual encounters, his encounters with AW specifically, or his encounters with KA." JA at 23. The Government has not appealed the lower court's decision, yet continues to contradict it in argument.

SA L.B. acted in accordance with what she was trained at FLETC. JA at 301.

She had an authorization to search the phone, and search it she did. Her actions in searching messages that never could have been relevant to allegations made in January 2019 were deliberate, reckless, and grossly negligent. These actions also raise the specter of recurrent and systemic negligence, as SA L.B. stated that she had been conducting searches in this manner for the two years she had been a Special Agent. JA at 294. She testified she learned this approach at FLETC. JA at 301.

To argue the absence of recurring or systemic negligence, the Government's answer implies that SA L.B. must have gotten the training wrong or was not remembering it correctly. (Govt. Ans. at 45, 49-51). Yet, this is not the state of the record. The Government at trial was aware of the requirements laid out in Mil. R. Evid. 311. It was responsible for proving by a preponderance of the evidence that the evidence at issue 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). The Government called no other witnesses from FLETC or AFOSI to contradict SA L.B.'s testimony. It tried to desperately minimize SA L.B.'s testimony as "her memory" of what she learned at FLETC or "what she believed she learned at FLETC." (Govt. Ans. at 45). The Government asks this Court to assume that SA L.B. must have gotten it wrong and then find, based upon that assumption, that there was no recurrent or systemic

negligence to deter.

Further, this argument runs counter to the Government's argument that SA L.B. did not act deliberately, recklessly, or grossly negligently. If she had the law and her training so wrong as to not accurately reflect what she had been taught, then her unlawful search of 1st Lt Lattin's phone must be grossly negligent. SA L.B. had been operating for two years under such a misapprehension of fundamental Fourth Amendment law that she was unable to compile a lawful search authorization or conduct a lawful search. She was either taught her conduct was appropriate, or she deliberately, recklessly, or grossly negligently disregarded or misapplied it. Regardless of which theory is true, the Government's assertion that "Only one individual in this case will be deterred by exclusion: SA LB" is false. If SA L.B.'s law enforcement training was incorrect, this case will cause it to be corrected for *all future* agents. If SA L.B.'s conduct was reckless or grossly negligent, excluding the evidence she garnered will send a warning shot to *all current* agents that "mistaken ideas," "facially deficient" warrants, and searches "writ large" are not condoned. JA at 20, 22, 28.

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

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*.

AFCCA determined SA L.B.'s reliance on the search authorization was not reasonable. JA at 21-22. The lower court found the authorization was overbroad, her search into text messages unrelated to 2d Lt A.W.'s allegations were unlawful, and both were based on her belief that her search of the cell phone was not constrained in any way. JA at 19-22. AFCCA further disagreed with the Military Judge's conclusions in terms of inevitable discovery. JA at 23. Despite finding the Military Judge's conclusions in all other aspects of his ruling to be an abuse of discretion, the lower court 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 determination by AFCCA was in error. The Military Judge abused his discretion in finding SA L.B.'s conduct was not deliberate, reckless, or grossly negligent and that there was no evidence of recurring or systemic negligence. SA L.B.'s conduct in this case was not reasonable. She was either taught unlawful practices, or developed her own and continued them for two years. In comparing her conduct to those of the officers in *Herring* and *Davis*, SA L.B.'s conduct was not objectively reasonable nor merely a negligent administrative error. This was a misapplication of established Fourth Amendment law. Her conduct was both deliberate enough to yield meaningful deterrence and culpable enough to be worth the price paid by the justice system. *Davis*, 564 U.S. at 240. Exclusion of the evidence unlawfully obtained in this case is important in order to deter SA L.B., her fellow law enforcement agents, and those conducting training at FLETC from continuing this unlawful violation of Fourth Amendment rights. This deterrence merits the "harsh sanction" of exclusion. *Id*. at 241.

II.

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

The Government argues that both the Military Judge and AFCCA considered 1st Lt Lattin's claim that the fourth paragraph of the search authorization created an expiration date for any subsequent searches. (Govt. Ans. at 53-55). This argument is

contrary to the language used by the Military Judge and the lower court on the issue. The Military Judge's cursory discussion of 1st Lt Lattin's argument dealt only with the language of the third paragraph. He wrote:

> The Defense argues that because the AF IMT 1176 stated that it expired on 16 Feb 19, any subsequent search of the Accused's cell phone data was warrantless and thus illegally obtained. However, the search authorization states "[n]o search of the person or premises conducted pursuant to the authority herein granted shall be initiated later than 3 days from 13 Feb 19 to ensure probable cause does not turn stale."

JA at 197 (emphasis in original). The Military Judge used the unpublished cases of *United States v. Linton*, 2018 CCA LEXIS (A.F. Ct. Crim. App. Oct. 12, 2018) and *United States v. Kicker*, 2017 CCA LEXIS (A.F. Ct. Crim. App. Dec. 14, 2017) to establish that authorizations that require initiation of searches within three days still allow for continued search after that point, so long as the search was begun before the three-day window expired. JA at 197.

This analysis ignores the difference between the language present in the search authorization here and the authorizations at issue in *Kicker* and *Linton*. In those cases, the appellants claimed that language requiring the initiation of a search within three days of the authorization prohibited any *further* search beyond the three-day initiation window. *Kicker*, 2017 CCA LEXIS at *9; *Linton*, 2018 CCA LEXIS at *10; *see also* JA at 503, 517.

Paragraph 3 of the search authorization in this case addresses its own three-day initiation window. "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." JA at 164.

Unlike the *Kicker* and *Linton* appellants, 1st Lt Lattin does not argue that the language in this paragraph of the search authorization prohibits further searches of the seized items so long as the search is initiated within the three days proscribed. Instead, 1st Lt Lattin relies on the language in the next paragraph—one not mentioned in the Military Judge's ruling. Paragraph 4 states:

> 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. This language was not present in the authorizations litigated in *Kicker* or *Linton* and those cases are, therefore, inapposite.

The lower court's analysis of the Military Judge's ruling is even briefer than the Military Judge's. The court stated only that the Military Judge had found that the search authorization required initiation within three days and that this conclusion was not error. The lower court did not address the failure of the Military Judge to even reference the fourth paragraph and the stated expiration of the search authority.

Neither the Military Judge nor AFCCA mentioned the language of the fourth paragraph, the differences between this language and the language relied upon in *Kicker* or *Linton*, or how it informed their conclusions. With such clear omissions in

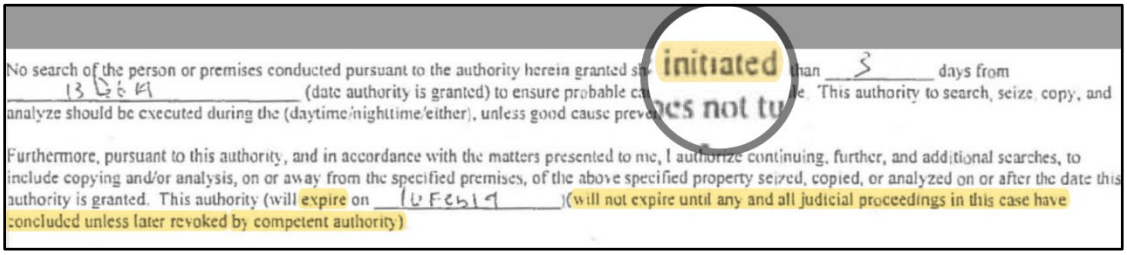
their analysis, 1st Lt Lattin does not share the Government's confidence that "[b]oth the military judge and AFCCA considered the expiration date in paragraph four of the AF 1176." (Govt. Ans. at 56).

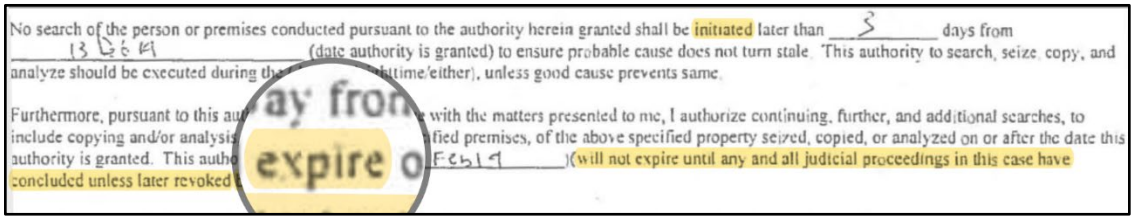
The Government argues that the language of paragraph four cannot be read to limit the Government's search authority beyond February 16, 2019. (Govt. Ans. at 55). In this argument, the Government speculates that Col M.R. could not have intended to limit AFOSI's search to only three days and argues that this is the only common sense reading of the language. (Govt. Ans. at 55). However, since the Government did not call Col M.R. to testify on this motion, it has no idea what his intentions were. Perhaps he felt three days was plenty of time for SA L.B. to check 1st Lt Lattin's text messages to 2d Lt A.W. and T.D. against what they had provided to AFOSI. This was, after all, why she told him she needed to search the phone. As this Court noted in *United States v. Cote*, 72 MJ. 41, 45 (C.A.A.F. 2013), Col M.R.'s handwritten term of three days to conduct any further searches indicated that "the duration of the limitation was tailored to the facts of this case, rather than being boilerplate language of the warrant." *Id*.

The Government claims 1st Lt Lattin's reading of the warrant is "hyper-technical." (Govt. Ans. at 54). It also alleges that 1st Lt Lattin is interpreting paragraph four of the warrant "in a vacuum, independent of the language found elsewhere on the form." (*Id*.) This argument is false and ignores the plain text of the

warrant, the placement of the paragraphs in relation to each other, and the context contained within the paragraphs themselves.

First, as highlighted below, the plain text of the warrant and the placement of the paragraphs in relationship to each other shows that paragraph three is an "initiation" paragraph and paragraph four is an "expiration" paragraph:





JA at 164 (highlights, magnification added).

If the fourth paragraph was, as the Government claims, simply a "mirror" of paragraph three, then it would render paragraph four as mere surplusage in violation of textual interpretation. (Govt. Ans. at 55). Rather, the plain language supports the argument that the two paragraphs are not copies of one another: The words "initiated" and "expire" delineate the plain meaning of each paragraph. One paragraph authorizes a valid start date while the other establishes an expiration date of "additional searches, to include copying and/or analysis." *Id.*

Furthermore, the Government ignores the stock language available in

paragraph four which gives the search authority the option to not have the warrant expire "until any and all judicial proceedings in this case have concluded unless later revoked by competent authority." JA at 164. If paragraph four was merely reiterating the initiation date, this stock language would not make sense. When the "16 Feb 19" date is read together with the stock language in the form that the search authority could have used, "the meaning—or ambiguity—of certain words or phrases…become[s] evident when placed in context." *United States v. McPherson*, 73 M.J. 393, 399 (C.A.A.F. 2014) (quoting *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citations omitted)).

Additionally, the fact that the search authority hand wrote a date as opposed to using the stock language is a doctrinal example of *expressio unius est exclusio alterius.* Meaning, the search authority's written insertion of "16 Feb 19" indicates a deliberate choice to exclude any other form of statement, *i.e.*, the stock language that the warrant would expire after judicial proceedings. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (reiterating that while this canon does not apply to every statutory listing or grouping, it has force when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded deliberately, not inadvertently). When the two paragraphs and the words within each paragraph are read in context, it becomes evident that the Government is the party engaging in "hyper-technical" reading so it can attempt to

salvage evidence that it readily concedes was obtained in violation of 1st Lt Lattin's rights. (Govt. Ans. at 25, 29, 40, 48, 51).

The Government's argument that 1st Lt Lattin has no Fourth Amendment claim over a search of his property beyond the expiration of the search authorization because evidence of an alleged offense was found once it was searched is contrary to Fourth Amendment jurisprudence. (Govt. Ans. at 56). Certainly, case law in this area has not developed from cases where the complained of searches and seizures resulted in the absence of inculpatory evidence. In *Cote*, the case cited by the Government to support this argument, the Government found evidence of child pornography on an item searched well after the search authorization expired. 72 M.J. at 43. This Court still held that the Government's search beyond the expiration of the authorization was unreasonable and not *de minimis*. *Id*. at 45-46.

The searches of 1st Lt Lattin's cell phone conducted by SA L.B. in the days following February 16, 2019 and by the Defense Computer Forensic Laboratory (DCFL) months after the authorization for such searches expired were not only well beyond the proper scope of a search authorization, but were also conducted outside of any reasonable time frame and were not *de minimis* violations of his 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 November 7, 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 WITH RULES

This supplement complies with the type-volume limitation of Rule 24(c)(2) because it contains 5,421 words.

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