IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39859
First Lieutenant (O-2), LIAM C. LATTIN, USAF, *Appellant.*	)	USCA Dkt. No. 22-0211/AF

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

ISSUES PRESENTED

I.

WHETHER THE LOWER COURT ERRED WHEN IT DID NOT APPLY THE EXCLUSIONARY RULE?

II.

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

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ.[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

A general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual assault of 1st Lt KA in violation of Article 120, UCMJ, Manual for Courts-Martial, United States (2016 ed.) (2016 MCM), and one specification each of sexual assault and abusive sexual contact of 2d Lt AW in violation of Article 120, UCMJ. (JA at 062-63.) Appellant was sentenced to a dismissal, 10 years confinement, and forfeiture of all pay and allowances. (JA at 063.) The convening authority took no action on the findings or sentence. (Id.)

Appellant raised eight assignments of error at AFCCA. (JA at 002.) On 20 April 2022, a majority of the lower court found no error materially prejudiced Appellant's substantial rights and affirmed the findings and sentence. (JA at 049.) One judge filed a separate opinion, dissenting in part and in the result. (JA at 049-55.) This Court granted review on 26 August 2022.

[1] Unless indicated otherwise, all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2019 ed.) (MCM).

STATEMENT OF FACTS

7-9 September 2018: 1st Lt KA and the River Float

1st Lt KA met Appellant in late 2016 during Undergraduate Pilot Training. (JA at 369.) The two stayed in touch after graduation and became romantically interested in each other. (JA at 369-70, 74.) In early September 2018, Appellant invited 1st Lt KA to visit him in Phoenix, AZ. (JA at 101.) 1st Lt KA accepted the invitation. (JA at 376.)

On Friday, 7 September 2018, Appellant picked up 1st Lt KA from the airport. (JA at 377.) Once at Appellant's apartment, the two drank and hung out with Appellant's friends. (JA at 378.) When Appellant's friends left, Appellant and 1st Lt KA began making out on the couch. (Id.) Appellant then tried to unbutton 1st Lt KA's pants. (Id.) 1st Lt KA said she did not want Appellant to do this. (JA at 378.) Appellant then went upstairs to his bedroom to sleep, and 1st Lt KA slept downstairs. (JA at 378-79.)

The next morning, 1st Lt KA noticed Appellant's demeanor towards her had changed. (JA at 379.) Appellant was being short with her and more physically distant than before. (Id.) But they proceeded with the plan for the day: a river float with Appellant's friends. (JA at 377.)

The river float lasted several hours. (JA at 383.) 1st Lt KA drank numerous alcoholic drinks during the river float and became intoxicated. (JA at 383-85.) She began having gaps in her memory and could not remember how the river float

ended. (JA at 390.) In 1st Lt KA's first memory after the river float, she was sitting in the back seat of Appellant's truck next to Capt KS, another pilot in Appellant's squadron. (Id.) The last thing 1st Lt KA remembered from the drive back from the river was giving her phone number to Capt KS. (JA at 391.)

1st Lt KA next remembered finding herself alone with Appellant at his apartment. (Id.) She remembered having blurry vision, being leaned over an ottoman, and feeling something penetrating her vagina from behind. (Id.) She could not remember how long the penetration lasted, but at some point, she remembered Appellant saying, "put your clothes on, [Capt KS is] coming over." (Id.) After this, 1st Lt KA remembered laying on the living room couch. (JA at 392.) She remembered looking into the kitchen and seeing Appellant and Capt KS talking in the kitchen. (Id.) At this point she remembered feeling "very dazed, almost in a dreamlike state. Just very heavy, exhausted, tired." (Id.) 1st Lt KA fell asleep. (Id.) When she woke up on the couch, 1st Lt KA realized Capt KS was digitally penetrating her vagina underneath a blanket. (JA at 393.) While this was occurring, 1st Lt KA saw Appellant sitting in a chair next to the couch. (Id.) Sitting across from the couch was somebody else who 1st Lt KA did not know.[2] (Id.) 1st Lt KA remembered thinking, "this has to be a dream, this can't be real life." (JA at 394.)

[2] Investigation later revealed this person was Maj DS. (Supp. JA at 530-31.)

1st Lt KA next remembered being in the shower. (Id.) She remembered getting out of the shower to retrieve items from her suitcase, which she had left outside the bathroom. (Id.) When she opened the bathroom door, her suitcase was missing (Id.) 1st Lt KA went downstairs and saw Capt KS. (Id.) She asked Capt KS if he knew where her suitcase was. (Id.) Capt KS said, "[Appellant] told me to put it in my car." (Id.) 1st Lt KA thought this was odd because she had not asked anyone to move her suitcase. (Id.) Capt KS retrieved 1st Lt KA's suitcase. (Id.) 1st Lt KA took some items from her suitcase and went upstairs to the bathroom to get dressed. (Id.) Capt KS came into the bathroom and asked 1st Lt KA whether she was ready. (JA at 395.) 1st Lt KA did not know what Capt KS was talking about and was "really confused as to what's going on." (Id.) So 1st Lt KA began texting Appellant:

1st Lt KA: ???

Appellant: Huh?

1st Lt KA: Kicking me out?!

Appellant: I never kicked you out
You left on your own accord
Enjoy ;)

1st Lt KA: You did (sad emoji)

Appellant: No I did not
I didn't even see you when you left
It's all good
You want to chill with [Capt KS]. Doesn't hurt my feelings ;)

1st Lt KA: Jeeeez [Appellant]

Appellant: Lol enjoy

1st Lt KA: So confused

Appellant: Enjoy your night girl
You left ;)

1st Lt KA: I'm super drunk

Appellant: Lol you left

1st Lt KA: You left!

Appellant: Yeah my own place Ok
Enjoy [Capt KS] ;)

(JA at 106-07.)

Upon seeing Appellant's text messages, 1st Lt KA felt "abandoned" and "really confused." (JA at 395.) Eventually, 1st Lt KA left Appellant's apartment and spent the night at Capt KS's apartment. (Id.) The next morning, Capt KS drove 1st Lt KA to the airport, and 1st Lt KA returned home. (JA at 396.)

After arriving home, 1st Lt KA texted Appellant to let him know she arrived safely, thanked him for letting her stay with him, but said she could not remember much because she had blacked out. (JA at 107.) 1st Lt KA told Appellant she was still confused about how she ended up at Capt KS's apartment and asked Appellant

if he was "playing matchmaker." (JA at 108.) Appellant replied that he saw 1st Lt KA and Capt KS making out on the river and "doing something under the blanket" at Appellant's apartment, after which Capt KS took 1st Lt KA home. (Id.) 1st Lt KA said she was embarrassed she blacked out and "hooked up" with one of Appellant's friends. (JA at 109.)

Throughout the following week, 1st Lt KA began piecing together the events of the prior weekend. (JA at 396.) 1st Lt KA became angry with Appellant for not taking care of her after she blacked out and for "pass[ing] me off to [Appellant's] friend who I didn't know." (JA at 397.) A few days after returning from Phoenix, 1st Lt KA filed a restricted report of sexual assault regarding Appellant's and Capt KS's sexual acts with her.[3] (JA at 403.) 1st Lt KA chose to file a restricted report because she did not want her chain of command to know. (Id.) On 15 September 2018, 1st Lt KA told Appellant in a text message that she was "extremely upset over what happened" during the weekend. (JA at 110.) She told Appellant she was "extremely drunk," "blacked out," and that Appellant should not have sent her off with Appellant's friend in that state. (Id.) Moreover, she said she was "pretty sure you and I did something back at your place after the river." (Id.)

Appellant denied doing anything with 1st Lt KA. (JA at 111.) Appellant also said he was "sorry" 1st Lt KA felt that way, he did not know 1st Lt KA was

[3] The record indicates that 1st Lt KA did not specifically name Appellant and Capt KS in her restricted report. (*See* JA at 113.)

blacked out, that 1st Lt KA's choices were her own, that Appellant did not know he "had to play parent," and that he had no bad intent. (Id.) 1st Lt KA responded:

> I'm not gonna screw your careers…but I wanted to let you know what happened on my end.
> . . .
> Blackout aka [sic] not consent, I accept your apology. Going forward in the future I hope you don't let this happen to anyone else. Because there's always the potential to unrestrict my report[].

(JA at 112.) Appellant said he was sorry 1st Lt KA felt she was taken advantage of. (Id.) Appellant again denied doing anything with 1st Lt KA, then asked, "[d]id you really put my name in a report?" (Id.) 1st Lt KA replied, "[y]our name is not in the report." (JA at 113.)

Appellant engaged in text message conversations with numerous individuals in the hours and days immediately after the river float. First, he texted his friend Capt NL, who participated in the river float earlier that day. (Supp. JA at 540.) Appellant said, "[d]ude you should see [Capt KS] and [1st Lt KA] haha. They're jacking each other off under my blanket lmao." (JA at 130.) Three days later, Appellant and Capt NL had the following exchange:

> Appellant: Dude did i tell you about the story with [Capt KS]? Lmao
>
> Capt NL: Like what happened with [1st Lt KA] or what?
>
> Appellant: Yeah lol
>
> Capt NL: No haha what happened?

Appellant: Hahah it's better in person but i was getting him roasted today lmao

Capt NL: What did he do?
. . .
Did [Capt KS] not close after all that?

Appellant: He did
Cuz she was blacked out and i pawned her off on him
So happy i didn't have to drive her ass to the airport lmao
. . .
Dude it was hilarious
[Maj DS] was here to witness

(JA at 130.)

Indeed, Maj DS was there to witness—he was the individual 1st Lt KA did not recognize when she was being digitally penetrated by Capt KS at Appellant's apartment. (Supp. JA at 533.) On 8 September 2018, Maj DS lived in the same apartment complex as Appellant. (Supp. JA at 530.) That day, after the river float, Appellant told Maj DS that Capt KS was at Appellant's apartment and that Appellant was trying to hook up Capt KS with 1st Lt KA. (Supp. JA at 547.) Appellant asked Maj DS to come over to his apartment to "[w]atch Capt KS hit on [1st Lt KA]." (Supp. JA at 548.) Appellant then said:

And funny thing
I was inside her earlier [three crying emojis, one winky emoji, one "ok" emoji]
. . .
So [Capt KS] and i might be Eskimo bros in he [sic] future.
Without him knowing [unknown emoji]

(Id.) Maj DS explained he understood "Eskimo bros" to mean Appellant and Capt KS had intercourse with the same woman. (Supp. JA at 533.) Appellant continued texting Maj DS after Maj DS arrived at Appellant's apartment. (Supp. JA at 549-50.) Appellant begged Maj DS not to leave him alone with Capt KS and 1st Lt KA, saying he needed "help getting [1st Lt KA] out of here and off to [Capt KS's apartment] so i can enjoy Sunday funday with the bros and football." (Supp. JA at 550.)

Meanwhile, Appellant was also texting Capt KS. (JA at 124.) Appellant told Capt KS to "[g]et her to go to your place. I already know ur working it." (Id.) Approximately 30 minutes later, Appellant told Capt KS to "hurry the fuck up" and "[g]et her the fuck out of my place please." (Id.)

The following morning, Appellant had the following exchange with his father:

Appellant:	Lol i got [Capt KS] laid
Father:	The same day that you did her? Did you ask [Capt KS] how you taste
Appellant:	Hahah no cuz he wouldn't handle that well

(JA at 119.)

Later that day, Appellant had the following exchange with Maj AS: [4]

Appellant: Got [Capt KS] laid

. . .

Maj AS: Ha, [Capt KS] found a lucky lady??

Appellant: No he found me who led him down the beaten path

25-26 January 2019: 2d Lt AW and the ROTC Trip

In January 2019, 2d Lt AW was an Air Force Reserve Officer Training Corps (ROTC) cadet. (JA at 004.) On 23 January 2019, 2d Lt AW and her ROTC detachment went to Luke AFB, AZ to explore different career paths. (Id.)

On 25 January 2019, while touring a fighter squadron building, 2d Lt AW saw Appellant. (JA at 320.) Later that day, 2d Lt AW went to the squadron bar for a "meet and greet." (JA at 005.) Pilots from the squadron offered alcohol to 2d Lt AW and other cadets, which the cadets accepted—despite the ROTC commander's previous order not to consume any alcohol on the trip. (Id.) While at the bar, 2d Lt AW introduced herself to Appellant. (Id.) Appellant said he remembered 2d Lt AW's boyfriend, TD, from their time together in ROTC. (Id.) Capt KS—the same Capt KS from earlier—also interacted with the cadets that day. (JA at 265.)

[4] JA 127 reflects texts messages between Appellant and "Gambit." Gambit was Maj AS's call sign. (Supp. JA at 556.)

That evening, Appellant asked 2d Lt AW if she wanted to hang out. (JA at 005.) 2d Lt AW agreed. (Id.) Appellant picked up 2d Lt AW from her hotel and drove to his apartment. (Id.) They then walked to and spent time at several bars. (Id.) While at the first bar, Appellant used 2d Lt AW's phone to contact another ROTC cadet. (Supp. JA at 558.) Later, at the second bar, Appellant tried to kiss 2d Lt AW. (JA at 005.) 2d Lt AW refused and told Appellant she did not want to cheat on her boyfriend. (Id.)

Appellant and 2d Lt AW spent time at a third bar and left shortly after midnight on Saturday. (JA at 334.) Appellant told 2d Lt AW he would drive her back to her hotel. (Id.) Appellant's car was at his apartment so he and 2d Lt AW walked back to Appellant's apartment. (Id.) Rather than immediately drive 2d Lt AW to her hotel as promised, Appellant went inside his apartment, poured himself a drink, then told 2d Lt AW he was unable to drive. (Id.) Appellant then turned on a movie and said he would take 2d Lt AW home in "a couple hours." (Id.) 2d Lt AW was annoyed because she was tired and wanted to get back to her hotel. (Id.)

At some point during the movie, Appellant tickled 2d Lt AW to get her to lie down with him and began "forcefully kissing" her. (JA at 339-40.) 2d Lt AW resisted but Appellant continued trying to kiss her. (JA at 341.) Eventually, Appellant slid 2d Lt AW's sweatshirt and bra aside and bit her nipple. (Id.) When 2d Lt AW told Appellant it hurt, Appellant pulled down her pants and digitally penetrated her vagina. (Id.) 2d Lt AW again told Appellant it hurt and that she did

not want to do this. (JA at 342.) Appellant stopped, then resumed hugging 2d Lt AW and trying to kiss her. (JA at 343.)

2d Lt AW was scared and wanted to leave, but she could not because Appellant had his arms so tightly around her that she could not get up or reach her phone. (Id.) 2d Lt AW continued to lay on the couch hoping everything was over and Appellant would fall asleep. (Id.) Appellant did not fall asleep. (Id.) Instead, Appellant began petting 2d Lt AW's hair, continued trying to kiss 2d Lt AW, said something about getting 2d Lt AW pregnant, and said "be my dependent." (JA at 347.) Appellant also said, "kiss me back, kiss me like you mean it." (Id.) 2d Lt AW kissed Appellant back to get him to stop. (Id.)

Eventually, 2d Lt AW went to Appellant's bedroom, alone. (JA at 347-48.) Once in the bedroom, 2d Lt AW began texting TD. (Id.) It was now 1:47 a.m. (JA at 067.) 2d Lt AW's first message to TD was, "[b]aby I need help." (Id.) She then said, "I'm scared," but told TD not to text back. (Id.) TD asked 2d Lt AW what happened, but 2d Lt AW did not tell him. (Id.) While waiting for 2d Lt AW to respond, TD and Appellant engaged in the following text message conversation:

TD:	Yo bro what happened tonight [2d Lt AW]'s texting me all freaked out
Appellant:	Nothing man She passed out and i put her to sleep in my bed and I'm sleeping on the couch downstairs
TD:	Aight. I trust you brother. Appreciate ya taking care of her

Appellant: Yeah of course
I ain't trying to do anything shady. I set my alarm so i can drop her off back at the hotel before u guys leave

(JA at 183.)

Later that night, while still at Appellant's apartment, 2d Lt AW told TD via text message what Appellant had done to her. (JA at 068-69.) But she insisted TD not tell anyone because she did not want her commander to find out she had been drinking. (JA at 069.) 2d Lt AW fell asleep while texting TD. (JA at 357.) 2d Lt AW woke up when she heard police officers at the door of Appellant's apartment. (Id.) TD had reported 2d Lt AW's situation to law enforcement. (JA at 073.) 2d Lt AW spoke to the officers and denied anything was wrong to get the officers to leave. (JA at 007.) After the officers left, Appellant drove 2d Lt AW to her hotel. (Id.) She and the other ROTC cadets departed for Los Angeles, CA hours later. (Id.)

After arriving in Los Angeles, 2d Lt AW went to a rape treatment center and reported what happened. (Id.) There, 2d Lt AW underwent a sexual assault forensic examination. (Id.) Medical personnel collected evidence from 2d Lt AW's clothing and body. (Id.) Forensic analysis later revealed the presence of Appellant's DNA on 2d Lt AW's left nipple, inside her bra, and on the inside front panel of her pants. (Id.) 2d Lt AW also filed a report with local law enforcement. (Id.)

The Investigation

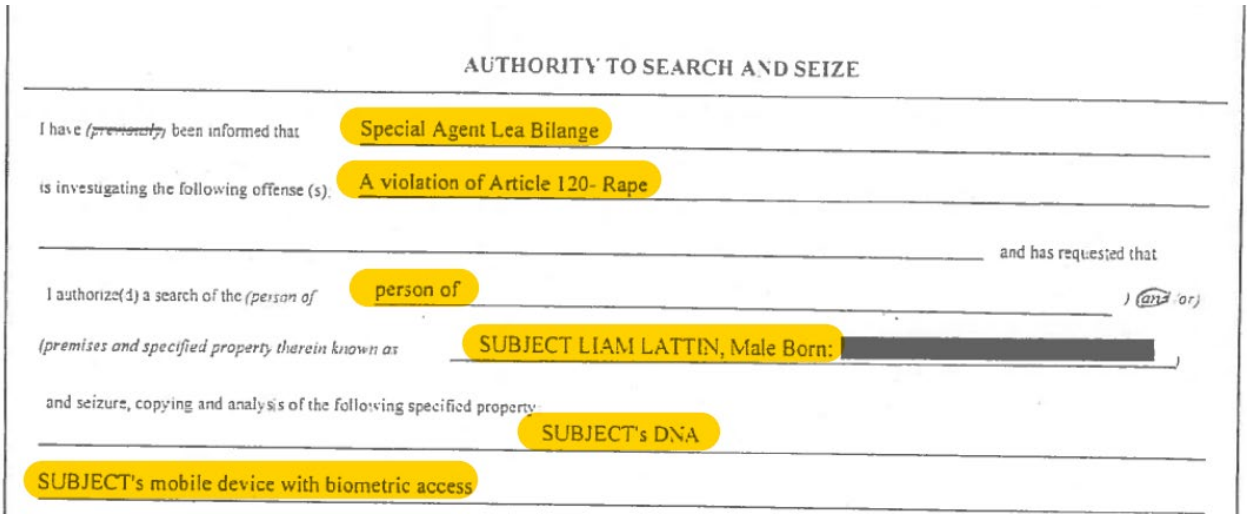
The Air Force Office of Special Investigations (AFOSI) was notified shortly after 2d Lt AW reported the sexual assault at the rape treatment center. (JA at 261.) AFOSI agents in Los Angeles interviewed 2d Lt AW. (JA at 262.) 2d Lt AW told them there were text messages between her, Appellant, and TD. (Id.) 2d Lt AW also said Appellant had been in contact with another ROTC cadet. (Supp. JA at 558.) The agents also interviewed TD, other ROTC cadets who went on the trip, and Capt KS—who agents identified as one of the pilots who interacted with the cadets during the trip. (JA at 262-63, 265.) Both 2d Lt AW and TD provided agents with the text messages they had exchanged with each other and with Appellant. (JA at 287.)

Special Agent (SA) LB was an AFOSI agent assigned to Luke AFB. (JA at 260.) She was certified as an agent in early 2017. (JA at 294.) Initially, SA LB was not involved in the investigation of 2d Lt AW's allegations. (JA at 261.) At some point in February 2019, SA LB took over as the lead case agent. (JA at 286.) To orient herself to the case, SA LB reviewed, among other things, the recording of 2d Lt AW's original interview and the write-up of TD's interview. (JA at 287.)

Based on her review of the case, SA LB sought a search authorization of Appellant's phone and DNA. (JA at 265, 269.) The affidavit stated SA LB was "conducting an investigation involving Rape, a Violation of Article 120, UCMJ." (JA at 165.) It specified Appellant as the subject of the investigation and 2d Lt

AW as the victim. (Id.) In relevant part, the affidavit sought authority to search and seize Appellant's "mobile device, to include biometric access, to be examined and have data extracted for evidence." (Id.) The affidavit referenced the text messages between Appellant, TD, and 2d Lt AW. (JA at 167.) SA LB then sent the draft affidavit to the Luke AFB legal office for review. (JA at 266.)

In addition to the affidavit, SA LB also prepared an Air Force Form 1176 (AF 1176), *Authority to Search and Seize*. (JA at 164.) The portions of the AF 1176 filled in by SA LB are highlighted below:



AUTHORITY TO SEARCH AND SEIZE

I have ~~(previously)~~ been informed that Special Agent Lea Bilange

is investigating the following offense (s) A violation of Article 120- Rape

and has requested that

I authorize(d) a search of the *(person of* person of) (and/or)

(premises and specified property therein known as SUBJECT LIAM LATTIN, Male Born: [redacted])

and seizure, copying and analysis of the following specified property:

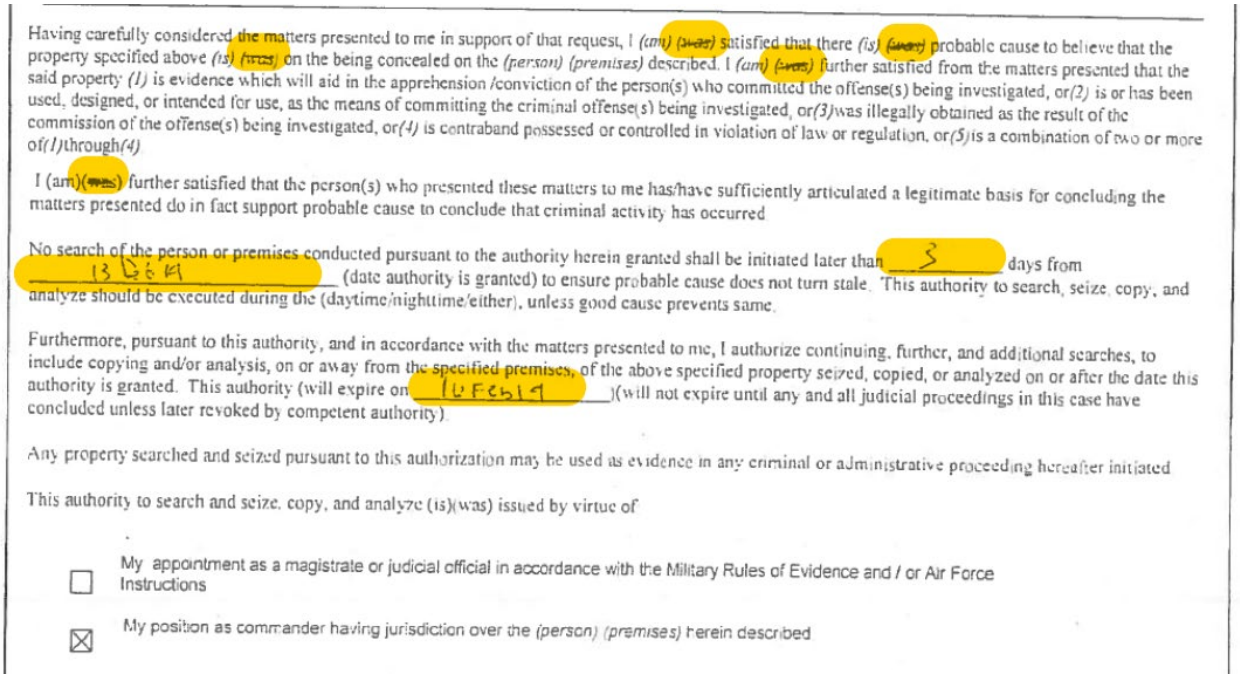
SUBJECT's DNA

SUBJECT's mobile device with biometric access

(*See* JA at 164, 289.)

On 13 February 2019, SA LB met with the search authority, Col MR, to obtain his signature on the AF 1176. (JA at 303.) Also present at the meeting was Capt WT, an attorney serving as the legal advisor. (Id.) First, Capt WT advised Col MR on Col MR's role and duties as the search authority and then provided a

training on probable cause determinations.[5] (JA at 304.) Capt WT then swore in SA LB. (JA at 305.) Next, SA LB presented the affidavit to Col MR. (JA at 267.) Col MR read the affidavit, asked questions regarding the facts of the case, and signed the affidavit. (JA at 267-68.) Col MR then completed relevant portions of the AF 1176 by hand. (JA at 290.) The portions of the AF 1176 completed by Col MR are highlighted below:



Having carefully considered the matters presented to me in support of that request, I *(am)* ~~*(was)*~~ satisfied that there *(is)* ~~*(was)*~~ probable cause to believe that the property specified above *(is)* ~~*(was)*~~ on the being concealed on the *(person) (premises)* described. I *(am)* ~~*(was)*~~ further satisfied from the matters presented that the said property *(1)* is evidence which will aid in the apprehension /conviction of the person(s) who committed the offense(s) being investigated, or*(2)* is or has been used, designed, or intended for use, as the means of committing the criminal offense(s) being investigated, or*(3)* was illegally obtained as the result of the commission of the offense(s) being investigated, or*(4)* is contraband possessed or controlled in violation of law or regulation, or*(5)* is a combination of two or more of*(1)* through*(4)*.

I (am)(~~was~~) further satisfied that the person(s) who presented these matters to me has/have sufficiently articulated a legitimate basis for concluding the matters presented do in fact support probable cause to conclude that criminal activity has occurred.

No search of the person or premises conducted pursuant to the authority herein granted shall be initiated later than 5 days from 13 Feb 19 (date authority is granted) to ensure probable cause does not turn stale. This authority to search, seize, copy, and analyze should be executed during the (daytime/nighttime/either), unless good cause prevents same.

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 18 Feb 19)(will not expire until any and all judicial proceedings in this case have concluded unless later revoked by competent authority).

Any property searched and seized pursuant to this authorization may be used as evidence in any criminal or administrative proceeding hereafter initiated.

This authority to search and seize, copy, and analyze (is)(was) issued by virtue of:

☐ My appointment as a magistrate or judicial official in accordance with the Military Rules of Evidence and / or Air Force Instructions

☒ My position as commander having jurisdiction over the *(person) (premises)* herein described.

(JA at 164.) Finally, Col MR signed and dated the AF 1176. (JA at 268.)

[5] Capt WT testified during the hearing on the Defense motion to suppress and stated the wrong standard for probable cause. (JA at 307.) In his ruling on the Defense motion to suppress, the military judge expressed disappointment in Capt WT's inaccurate description of the probable cause standard. (JA at 193.) Nonetheless, the military judge noted the standard articulated by Capt WT was "a higher standard than probable cause requires," which worked to Appellant's favor. (Id.)

SA LB executed the search authorization the following day. (JA at 269.) When Appellant came into the AFOSI office, SA LB read Appellant his Article 31, UCMJ, rights. (Id.) Appellant invoked his right to counsel. (Id.) SA LB then requested consent to search and seize Appellant's phone. (Id.) Appellant refused. (Id.) SA LB showed Appellant the AF 1176 and explained she had authorization to search and seize his phone. (JA at 187-88, 269.) Appellant asked questions about how the search authorization worked and asked if he could speak to his lawyer. (JA at 270.) SA LB attempted to contact Appellant's lawyer but was unable to reach her. (Id.) SA LB again told Appellant the search authorization gave her authority to search and seize his phone. (Id.) SA LB clarified she did not want Appellant to tell her his password but did need Appellant to unlock his phone. (Id.) Appellant unlocked his phone by putting the phone up to his face. (JA at 272.) Next, SA LB put the phone in airplane mode to prevent "additional data being put on the phone that wasn't there at the time of seizure." (JA at 271.) SA LB also disabled the automatic lock feature on the phone. (Id.) While surrendering his phone to AFOSI, Appellant said, "I'm not trying to get away with anything, all the text messages you guys are looking for are still on there." (JA at 188.)

The same day, SA LB manually searched Appellant's phone. (JA at 272.) First, she opened Appellant's messaging application. (JA at 273.) The application displayed the most recent text messages. (Id.) SA LB did a "precursory search"

through the recent messages. (JA at 272.) While doing this, SA LB recognized the name of one contact as a defense counsel. (Id.) SA LB "took special care not to open those messages at all." (JA at 273.) Upon concluding the other text message conversations were not privileged, SA LB "took a good look through the messages for other witnesses in the case, and for . . . messages with [2d Lt AW], and messages with [TD] specifically." (Id.)

SA LB located messages Appellant had exchanged with Capt KS, Appellant's father, and other people with whom Appellant was discussing the investigation. (Id.) SA LB did a keyword search for "OSI" and read the messages to see if there was evidence of what occurred with 2d Lt AW. (JA at 274.)

SA LB eventually found Appellant's text messages with 2d Lt AW and TD. (Id.) But she noticed Appellant had not saved 2d Lt AW's or TD's phone numbers as contacts. (Id.) Therefore, when SA LB found a text message conversation where the phone number was not saved as a contact, she read the messages to see if they were relevant to her investigation. (JA at 274.)

In doing so, SA LB found a conversation between Appellant and an unsaved contact whom Appellant referred to as "K[]." (JA at 275.) SA LB did not know who "K[]" was. (Id.) When SA LB read the messages, she noticed that "K[]" made references to filing a restricted report of sexual assault against "K[S]", who SA LB inferred was Capt KS based on her knowledge that Appellant and Capt KS were friends. (Id.) In fact, SA LB was familiar with Capt KS because he had

already been interviewed as a witness in 2d Lt AW's case based on his interaction with cadets during their trip. (JA at 265.)

After reading K[]'s messages, SA LB believed Appellant was a potential witness to a sexual assault involving Capt KS and K[]. (JA at 275.) SA LB did not believe Appellant was a *subject* in the sexual assault involving K[]. (Id.) Based on K[]'s messages, AFOSI opened a separate investigation into Capt KS. (JA at 276.) On 24 February 2019, SA LB called K[]. (Supp. JA at 560.) K[] said she did not wish to participate in the investigation. (Supp. JA at 561.) SA LB eventually discovered K[] was 1st Lt KA. (JA at 276.)

On 6 March 2019, SA LB interviewed Appellant as a witness in the case involving 1st Lt KA and Capt KS. (Supp. JA at 561.) During the interview, Appellant described what he witnessed on 8 September 2018 between 1st Lt KA and Capt KS. (Id.) Appellant did not mention his own sexual acts with 1st Lt KA, nor did SA LB question him about this topic. (Id.) Appellant also told SA LB that Maj DS was a witness. (Id.) Finally, Appellant told SA LB he had text messages on his phone regarding the weekend 1st Lt KA was in Phoenix and said, "[y]ou guys still have my phone, like you can . . . see all these messages that you're asking about." (JA at 277.)

Following SA LB's interview of Appellant, agents at Hill AFB, UT, interviewed Maj DS. (Supp. JA at 563.) Maj DS told agents he had exchanged text messages with Appellant on 8 September 2018 regarding 1st Lt KA and Capt

KS. (Id.) Maj DS provided agents consent to search his phone for these text messages. (Supp. JA at 564.) The agents found and photographed the messages. (Id.; Supp. JA at 547-52.) The agents then sent Maj DS's messages to SA LB. (Supp. JA at 564.)

SA LB reviewed Maj DS's messages and compared them to the messages on Appellant's phone. (Id.) SA LB noticed the message in which Appellant said he had been "inside [1st Lt KA] earlier" was missing from Appellant's phone. (Id.) Nonetheless, SA LB did not begin investigating Appellant for sexually assaulting 1st Lt KA because SA LB had no reason to believe the acts between Appellant and 1st Lt KA were not consensual. (JA at 279.)

In approximately mid-March 2019, SA LB noticed Appellant's phone had locked itself. (Supp. JA at 565.) On 2 April 2019, SA LB sent Appellant's phone to the Defense Computer Forensics Laboratory (DCFL) to examine and analyze text messages pertaining to two different cases: the case involving Appellant and 2d Lt AW, and the case involving Capt KS and 1st Lt KA. (JA at 114.)

At some point after SA LB's initial phone call with 1st Lt KA, 1st Lt KA decided to participate in the investigation. (JA at 282.) On 19 April 2019, SA LB interviewed 1st Lt KA. (Supp. JA at 566.) 1st Lt KA allowed SA LB to take photographs of her text message conversations with Appellant. (Supp. JA at 570.) It was only after SA LB interviewed 1st Lt KA that AFOSI added Appellant as a subject in 1st Lt KA's case. (JA at 283.) (*See also* Supp. JA at 571.)

During the hearing on the Defense motion to suppress, SA LB explained that she sought authority to search Appellant's phone because "[w]e had knowledge of . . . communications between [Appellant] and [2d Lt AW] and between [Appellant] and [TD]. So we wanted to . . . ensure that they were actually from his phone." (JA at 265.) On cross examination, SA LB said that at the time she sought the search authorization, she "guess[ed]" there was "nothing else to lead me to believe there would be anything on [Appellant's] phone other than those [text messages]." (JA at 290.) SA LB also explained that the AF 1176 gave her authority to search Appellant's entire phone, because "[t]hat's what's written on the authority that was granted." (JA at 292.) As to her rationale for looking through Appellant's messages with Capt KS, SA LB explained that she did so because Capt KS was a witness to the circumstances surrounding 2d Lt AW's allegation, and therefore these messages could be evidence of the sexual assault of 2d Lt AW. (JA at 293.)

Trial defense counsel questioned SA LB on the meaning of the line in the AF 1176 that reads, "This authority will expire on 16 February 2019," and asked her why she continued to search Appellant's phone after that date. (JA at 290-91.) SA LB explained that the search authorization required her to seize the phone within three days. (JA at 292.) According to SA LB, so long as she seized the phone within three days, the three-day deadline did not limit her ability to search the phone, which "contain[s a] massive amount of data" and "take[s] a while to peruse." (Id.) SA LB added, "[a]ll of our authorities are three days." (JA at 295.)

On redirect examination, SA LB explained why she did not seek a subsequent search authorization with an expanded scope to encompass the sexual assault involving 1st Lt KA:

> Because the original authority gave us authority to search the entirety of the phone that includes his contents at the time of seizure. So anything that's in the phone belongs to the government from the time of seizure. So anything regarding any allegation, or any other evidence of crimes is - if we have – we were taught, you know, in FLETC[], the right – I have a right to be in the phone, and I see something that leads me to believe there's evidence of a crime, just like we did with finding the other allegation of a sexual assault, that's in play. So there was no need to get an expanded scope.

(JA at 301.)

The Military Judge's Ruling

The Defense filed a motion to suppress the evidence found during the search of Appellant's phone, as well as any evidence derived from the search. (JA at 136.) The military judge denied the motion. (JA at 202.) First, the military judge found the search authorization was not overbroad.

Second, the military judge determined SA LB's manual search of Appellant's phone was within the scope of the search authorization and SA LB's actions were reasonable under the circumstances. (JA at 197.) The military judge recognized that phones contain large amounts of data and criminals often manipulate files to conceal criminal activity, and therefore SA [LB] "was allowed to use all reasonable inferences about where evidence is likely to be kept." (JA at

195.) The military judge found SA LB made such a "reasonable inference" when, knowing that Appellant had not saved 2d Lt AW's number as a contact, SA LB searched other text message strings with unsaved numbers to determine if those messages involved 2d Lt AW. (Id.) The military judge concluded this was reasonable given that "there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at documents contained within those folders" when searching files on a phone. (Id.) The military judge also commended SA LB's efforts to avoid reading communications between Appellant and his attorney. (Id.)

Third, the military judge determined the plain view doctrine applied to the messages found on Appellant's phone. (JA at 196.)

Fourth, the military judge addressed the Defense's argument that because the AF 1176 stated that it expired on 16 February 2019, any subsequent search of Appellant's phone was warrantless and thus illegally obtained. (JA at 197.) The military judge rejected this argument by citing United States v. Linton, ACM 39229, 2018 CCA LEXIS 492 (A.F. Ct. Crim. App. 12 October 2018) (unpub. op.) and United States v. Kicker, ACM 39080, 2017 CCA LEXIS 756 (A.F. Ct. Crim. App. 14 December 2017) (unpub. op.), two AFCCA cases holding that the three-day deadline in the AF 1176 "equated to a 'start no later than date,' meaning that so long as agents started—i.e. initiated—the search or seizure before the deadline

date," subsequent searches were done legally pursuant to the authority granted by the AF 1176. (JA at 197.)

Fifth, the military judge found that even if SA LB exceeded the scope of the search authorization, the inevitable discovery and good faith exceptions to the exclusionary rule applied. (JA at 198-99.)

Finally, the military judge concluded that even if SA LB's searches were unlawful and no exceptions to the exclusionary rule applied, application of the exclusionary rule was inappropriate because the Government had demonstrated, by a preponderance of the evidence, "that the deterrence of future unlawful searches or seizures is not appreciable, or such deterrence does not out-weigh the costs to the justice system of excluding the evidence." (JA at 199.) The military judge found SA LB's conduct was neither deliberate enough to yield meaningful deterrence, nor culpable enough to be worth the price paid by the justice system. (JA at 200.) Even if SA LB violated Appellant's Fourth Amendment rights, she "did not do so deliberately, recklessly, or with gross negligence." (Id.) Rather, the military judge found SA LB acted reasonably, "especially considering the nature of digital evidence and the realities faced when attempting to search and analyze the same without knowing potentially involved parties' phone numbers." (Id.) To the extent Appellant's rights were violated, it was "by accident, not design," as evidenced by how SA LB "scrupulously honored [Appellant's] communications with his attorney." (JA at 201.) Finally, the military judge found the cost to the

justice system of excluding the evidence found on Appellant's phone to be high. (Id.) Excluding such evidence would "perpetually preclude [1st Lt KA] from testifying about her relationship with [Appellant]," resulting in a "serious obstruction to the ascertainment of the truth." (JA at 202.) Therefore, the military judge concluded that any deterrence achieved by exclusion of the evidence would not outweigh the costs to the judicial system. (Id.)

1st Lt KA testified at trial. (JA at 365-444.) The following text messages were admitted into evidence:

- Messages between TD and 2d Lt AW—provided to AFOSI by 2d Lt AW (JA at 067-73.)
- Messages between TD and Appellant—provided to AFOSI by TD (JA at 183.)
- Messages between 1st Lt KA and Appellant—provided to AFOSI by 1st Lt KA (JA at 074-113.)
- Messages between Maj DS and Appellant—provided to AFOSI by Maj DS (Supp. JA at 547-52.)
- Messages between Appellant and 2d Lt AW, Appellant's father, Maj AS, Capt NL, and Capt KS—found on Appellant's phone by DCFL (JA at 114-35.)

The AFCCA Decision

AFCCA reviewed the military judge's ruling on appeal. (JA at 014-030.) First, AFCCA addressed Appellant's argument that the search authorization expired three days after it was issued. (JA at 018.) AFCCA found the military judge "did not err in his findings of fact and conclusions of law" regarding this

claim, noting that the terms of the AF 1176 required SA LB to initiate the search within three days, which SA LB in fact did. (JA at 018-019.)

AFCCA then reviewed the search authorization and found it was "overbroad in scope." (JA at 020.) Next, AFCCA considered whether any exceptions to the exclusionary rule applied. (Id.) AFCCA disagreed with the military judge and found the good faith, inevitable discovery, and plain view exceptions did not apply. (JA at 020-024.) Nonetheless, AFCCA concluded the military judge did not abuse his discretion in ruling the evidence obtained from the search of Appellant's phone was admissible. (JA at 030.) AFCCA noted that the military judge considered deterrence and cost to the justice system "at length," and agreed with the military judge's conclusion that SA LB's conduct did not warrant exclusion of evidence because the benefit of deterrence "does not outweigh the costs to the justice system." (JA at 027.)

SUMMARY OF ARGUMENT

Appellant was convicted of sexually assaulting two fellow Air Force officers: 2d Lt AW and 1st Lt KA. Appellant's convictions must stand for two reasons. First, application of the exclusionary rule—a remedy of "last resort" used only when the need to deter "intentional" and "patently unconstitutional" conduct outweighs the "substantial social costs" exacted by the rule—is not warranted in this case. Herring v. United States, 555 U.S. 135, 140-41, 143 (2009). Second, Appellant's hyper-technical reading of the "expiration date" ignores the

commonsense interpretation of the full text of the search authorization and must be rejected.

Because the exclusionary rule exacts "substantial social costs" on society, namely "letting guilty and possibly dangerous defendants go free," courts must apply the exclusionary rule only when police conduct is sufficiently culpable such that deterrence of that conduct outweighs the costs. Id. at 141. As the lower court recognized, the military judge properly conducted this balancing test and concluded that the lead agent was not sufficiently culpable and that any benefits of deterring police misconduct were outweighed by the cost of permanently preventing 1st Lt KA from testifying about Appellant's crimes.

The military judge's conclusions are amply supported when considering the evidence in the light most favorable to the Government. United States v. Richards, 76 M.J. 365, 369 (C.A.A.F. 2017). The evidence demonstrates SA LB was not acting deliberately, recklessly, or with gross negligence to violate Appellant's rights. In many ways, SA LB was acting reasonably and trying *not* to violate Appellant's rights: she obtained a search authorization before beginning her search; she initially confined her search to finding evidence of Appellant's sexual assault of 2d Lt AW; and she was careful not to read messages between Appellant and his attorney. Furthermore, the evidence demonstrates that SA LB was not engaged in a "fishing expedition" to find evidence of any and all criminal wrongdoing by Appellant when she stumbled upon the text messages with 1st Lt

KA. Once SA LB suspected Appellant of sexually assaulting 1st Lt KA, she should have obtained an additional search authorization before continuing to search his phone. In failing to do so, she violated Appellant's rights. But this was due to simple negligence, which is not enough to trigger the exclusionary rule. Herring, 555 U.S. at 144 n.4.

On the other side of the scale, the evidence demonstrates that exclusion would result in substantial costs. Exclusion would permanently preclude 1st Lt KA from testifying against Appellant, which the Supreme Court has noted is a "serious obstruction[] to the ascertainment of truth." United States v. Ceccolini, 435 U.S. 268, 278 (1978). It would also force this Court to ignore "reliable, trustworthy evidence," Davis v. United States, 564 U.S. 229, 237 (2011), bearing on Appellant's guilt—namely, Appellant's text messages wherein he bragged to his father and friends about having sex with 1st Lt KA despite knowing she was "blacked out." (JA at 130.) Even if this Court finds SA LB's conduct amounted to more than simple negligence and should be deterred, the benefits of doing so do not outweigh the tremendous costs. This Court should decline to swallow the "bitter pill" of exclusion, id., and conclude application of the exclusionary rule is not appropriate in this case.

Finally, this Court should reject Appellant's constrained and hyper-technical reading of the search authorization, which is exactly what this Court cautioned against in United States v. Eppes, 77 M.J. 339, 345 (C.A.A.F. 2018). Unsatisfied

with the military judge's and AFCCA's failure to adopt his hyper-technical reading of the search authorization, Appellant now accuses both the military judge and AFCCA of ignoring his earlier arguments. But neither the military judge nor AFCCA ignored his earlier arguments; rather, they squarely addressed, and rejected, his unreasonable reading of the search authorization. This Court should do the same.

The lower court did not err in upholding the military judge's ruling in Appellant's case. Therefore, the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the lower court's decision.

ARGUMENT

I.

THE LOWER COURT PROPERLY CONCLUDED APPLICATION OF THE EXCLUSIONARY RULE WAS INAPPROPRIATE.

Standard of Review

This Court "review[s] a military judge's denial of a motion to suppress for an abuse of discretion." United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010). An abuse of discretion occurs when the military judge's findings of fact are "clearly erroneous or . . . he misapprehended the law." Richards, 76 M.J. at 369. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000). "The challenged action must be arbitrary, fanciful, clearly unreasonable, or

clearly erroneous." Id. (internal quotations and citations omitted). When reviewing a military judge's ruling on a motion to suppress, this Court considers the evidence in the light most favorable to the prevailing party. Richards, 76 M.J. at 369.

Law and Analysis

A. The exclusionary rule is applied only as a "last resort," and only when the heavy costs to the justice system are outweighed by appreciable deterrence of flagrant police misconduct.

The exclusionary rule is not expressly contained in the Fourth Amendment. Arizona v. Evans, 514 U.S. 1, 10 (1995). Rather, it is a judicially created rule that forbids the use of evidence obtained in violation of the Fourth Amendment at trial. Herring, 555 U.S. at 139. But "[t]he fact that a Fourth Amendment violation occurred—*i.e.*, that a search . . . was unreasonable—does not necessarily mean that the exclusionary rule applies." Id. at 140. In Herring, the Supreme Court recognized two important principles that constrain application of the exclusionary rule: sufficiently deliberate police conduct and substantial social costs. Id. In recognition of these principles, application of the exclusionary "has always been our *last resort*, not our first impulse." Id. (emphasis added).

The first principle provides that the exclusionary rule applies only when "police conduct [is] sufficiently deliberate that exclusion can meaningfully deter it." Id. at 144. To provide clarity on "sufficiently deliberate" conduct, the Herring court reviewed the nature of the police conduct that gave rise to the exclusionary

rule. Id. at 143-44. The Herring court noted that in Weeks v. United States, 232 U.S. 383 (1914), the police broke into the defendant's home without a warrant, confiscated incriminating evidence, and returned to confiscate more. Id. at 143. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), federal officials "without a shadow of authority" went to the defendants' office and searched every paper they could find. Id. at 144. And in Mapp v. Ohio, 367 U.S. 643 (1961), officers forced their way into a woman's home, prevented her lawyer from entering, brandished a false warrant, forced the woman into handcuffs, then searched the home. Id.

The Herring court determined each of these cases "featured intentional conduct that was patently unconstitutional." Id. at 143. The Herring court then noted that, since the Supreme Court's 1984 decision in United States v. Leon, 468 U.S. 897 (1984), "we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was *no more intentional or culpable than this*." Herring, 555 U.S. at 143 (emphasis added). As a result, the Herring court concluded "nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the [exclusionary] rule in the first place," and held there must be "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" to trigger the exclusionary rule. Id.

The second principle provides that even if application of the exclusionary rule results in deterrence, the benefits of such deterrence must outweigh the "substantial social costs" resulting from application of the rule. Id. at 141. "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" Id. (citing Leon, 468 U.S. at 908.) Therefore, the exclusionary rule's "costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." Id. (citing Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364-65 (1998)).

Two years after Herring, the Supreme Court revisited the exclusionary rule in its Davis opinion. The Davis court noted that prior opinions of the Supreme Court suggested the exclusionary rule automatically applied whenever there was a Fourth Amendment violation. Davis, 564 U.S. at 237. "In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a judicially created remedy." Id. at 238. Therefore, the exclusionary rule requires "a more rigorous weighing of its costs and deterrence benefits." Id. at 238.

The Davis court clarified that the "more rigorous" balancing test requires more than simply showing a Fourth Amendment violation occurred, or that police will be deterred, because "[r]eal deterrent value is a necessary condition for exclusion, but it is not a sufficient one." Davis, 564 U.S. at 237 (internal quotation marks and citation omitted). "For exclusion to be appropriate, the deterrence

benefits of suppression must outweigh its heavy costs." Id. The costs are heavy, the Court reasoned, because "[i]t almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence . . . suppress[es] the truth and set[s] the criminal loose in the community without punishment." Id. Given the heavy costs, "society must swallow this bitter pill when necessary but only as a *last resort*." Id. (emphasis added).

The Davis court reiterated the deterrent value outweighs the heavy costs only when police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights. Id. at 238. But when the police conduct "involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way." Id. (citing Herring, 555 U.S. at 137, and Leon, 468 U.S. at 919, 908 n.6) (internal quotation marks omitted).

The Supreme Court's constrained application of the exclusionary rule has been fully adopted in military justice practice, both in the military rules of evidence and in appellate jurisprudence. Mil. R. Evid. 311(a)(3) incorporates the Herring balancing test. 2016 MCM, A22-20. According to this rule, evidence obtained as a result of an unlawful search or seizure is inadmissible if "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)(3) (emphasis added). The burden is on the prosecution to prove by a preponderance of the evidence that "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). And consistent with Herring and Davis, this Court recognized the exclusionary rule's "[a]dmittedly drastic" costs, Eppes, 77 M.J. at 349, and has been careful to apply the rule only as a "last resort, not our first impulse." United States v. Hernandez, 81 M.J. 432, 442 (C.A.A.F. 2021) (citing Herring, 555 U.S. at 140).

B. SA LB's conduct was not sufficiently culpable to trigger the exclusionary rule.

To trigger the exclusionary rule, SA LB's conduct must be "deliberate, reckless, grossly negligent," or constitute "recurring or systemic negligence." Herring, 555 U.S. at 143.

1. SA LB did not deliberately, recklessly, or with gross negligence violate Appellant's rights.

The military judge did not abuse his discretion in finding that SA LB did not act "deliberately, recklessly, or with gross negligence" in searching Appellant's phone. (JA at 200.) The record demonstrates that from the beginning of her investigation, SA LB attempted to follow what she believed were proper investigative procedures. When SA LB recognized Appellant had exchanged text messages with the only known victim and her boyfriend, SA LB did not attempt to search and seize Appellant's phone "without a shadow of authority." Silverthorne Lumber Co., 251 U.S. at 390. Instead, she sought a search authorization. (JA at

265.) She first drafted her affidavit in support of the search authorization. (JA at 265.) She specified the exact crime she was investigating—Appellant's rape of 2d Lt AW. (JA at 165.) And she described the probable cause she had to search Appellant's phone—the existence of text messages between Appellant, 2d Lt AW, and TD.[6] (JA at 167.) She then ensured her affidavit was reviewed by an attorney. (JA at 266.)

Next, SA LB met with Col MR to obtain his signature on the AF 1176. (JA at 303.) An attorney was present during the entire meeting. (Id.) This attorney provided a training[7] to Col MR and was available to "make sure that everything went down legally and perhaps smoothly." (Id.) Col MR then signed the search authorization, which authorized SA LB to search Appellant's phone for the purpose of investigating the offense of "violation of Article 120-Rape." (JA at 164.)

Whether SA LB was deliberate, reckless, or grossly negligent must be viewed through her reliance on the search authorization, even in light of the lower court's finding that it was overly broad. Analyzing SA LB's actions through this

[6] In her probable cause affidavit, SA LB also could have—but ultimately did not—cited to information that Appellant had exchanged messages with another ROTC cadet hours before he sexually assaulted 2d Lt AW. (*See* Supp. JA at 558.)

[7] Though Capt WT explained the incorrect standard for probable cause to Col MR during this training (JA at 193), the exclusionary rule seeks to deter police, not lawyer, conduct; therefore, Capt WT's erroneous training should play no role in this Court's analysis.

lens is particularly appropriate when considering the scope of the violation. Based on this Court's decision in Richards, this search authorization would not have been overly broad if the wording had been slightly altered to specifically give AFOSI authority to search for and seize "evidence of a violation of Article 120-Rape."[8] In other words, the lower court's finding that the search authorization was overly broad is a close call.

In Richards, this Court noted the issues presented by searches of electronic devices. 76 M.J. at 370. This Court balanced the need for warrants for electronic devices to "affirmatively limit the search to evidence of specific federal crimes or specific types of material," with "the dangers of too narrowly limiting where investigators can go." Id. This Court reasoned that "the dangers" of limiting investigators are particularly pronounced when it comes to searches of electronic devices because "computer files may be manipulated to hide their true contents." Id. Therefore, this Court held search authorizations of electronic devices will be upheld so long as they are "sufficiently particularized to prevent a general search." Id. This Court's holding aligns with federal case law on searches of electronic devices. *See* United States v. Palms, 21 F.4th 689, 698-99 (10th Cir. 2021)

[8] While the scope of the search authorization is not a granted issue in this case, the lawfulness of the search authorization—and SA LB's reliance on that search authorization—is an important factor in this Court's analysis of the culpability of SA LB's conduct. A common sense reading of the document indicates AFOSI was authorized to search the phone for evidence of the crime of rape.

(finding a warrant authorizing the search of "all digital evidence stored on [electronic devices, including a cell phone] was sufficiently particular because it contained a "limiting principle," to wit: authorizing officers to search and seize only evidence of a specific crime).

The search authorization at issue in Richards authorized AFOSI agents to seize "[a]ll electronic media and power cords for devices capable of transmitting or storing online communications" and search these devices for the appellant's violation of a specific crime. Id. at 367. This Court found the search authorization was "sufficiently particularized" and not overbroad because "the authorization and accompanying affidavit did not give authorities carte blanche to search in areas clearly outside the scope of the crime being investigated." Id. at 370. Therefore, AFOSI agents "were entitled to search [the appellant's] electronic media for any communication that related to his possible violation of the [crime described on the search authorization]." Id.

Here, just as in Richards, the search authorization would be constitutionally permissible if read to authorize SA LB to search Appellant's phone for evidence of Appellant's sexual assault of 2d Lt AW. Even if the search authorization was poorly worded, SA LB did, in fact, confine her search to looking for evidence of the sexual assault of 2d Lt AW when she searched Appellant's text messages for evidence that Appellant talked to others about what occurred with 2d Lt AW.

Therefore, this Court cannot conclude SA LB was deliberate, reckless, or grossly negligent for relying on the search authorization. Though SA LB erroneously believed the search authorization gave her authority to search all of Appellant's text messages for evidence of Appellant's sexual assault of 2d Lt AW, SA LB received affirmation from an attorney that her actions were legal at every step of the process in obtaining the search authorization. *See* United States v. Perkins, 78 M.J. 381, 388 (C.A.A.F. 2019) (finding agents' reliance on lawyers' advice was the most significant factor in determining whether agents had an objectively reasonable belief for probable cause under the good faith exception).

SA LB's lack of culpability and attempted adherence to proper investigative procedures continued after she obtained the search authorization. When executing the search authorization, SA LB ensured she read Appellant his rights. (JA at 269.) After seizing Appellant's phone, SA LB put the phone in airplane mode to ensure the phone did not receive any further data—recognizing she had no authority to search information put on the phone post-seizure. (JA at 292.) And while conducting the manual search of Appellant's text messages, SA LB "scrupulously honored [Appellant's] communications with his attorney—which the military judge found "commendable." (JA at 195, 201.)

These facts demonstrate that SA LB was not *trying* to violate Appellant's rights. If she was in fact a rogue agent who was trying to violate Appellant's rights, the record would not be replete with instances in which SA LB took steps

not to violate his rights. To the extent SA LB violated Appellant's rights, she did so based on her belief that the search authorization was legal. But her reliance on a search authorization she believed was legal falls far below the "intentional" and "patently unconstitutional" police conduct that the exclusionary rule was created to deter. Herring, 555 U.S. at 143.

2. SA LB was not acting deliberately to violate Appellant's rights when she discovered 1st Lt KA's messages.

In attempting to demonstrate the flagrancy of SA LB's search of his phone, Appellant characterizes the search as a "fishing expedition for other 'potential victims.'" (JA at 30.) Appellant argues that but for this so-called fishing expedition, "the Government would not have discovered any crime relating to [1st Lt KA]."[9] (App. Br. at 31.) Appellant relies on SA LB's use of the words "potential victims" during her testimony to suggest SA LB admitted to specifically looking for other "potential victims." But Appellant takes SA LB's testimony out of context. This is what SA LB actually said:

> As I was paging through the phone one of the things that we always do, as an OSI policy is *if we come across*

[9] The United States disagrees. 1st Lt KA filed a restricted report of sexual assault against Appellant four months *before* SA LB searched Appellant's phone. (JA at 403.) Shortly after filing the restricted report, she warned Appellant, "[g]oing forward in the future, I hope you don't let this happen to anyone else. Because there's always the potential to unrestrict any report[]." (JA at 112.) It is possible, if not likely, that even if SA LB never discovered 1st Lt KA's text messages on Appellant's phone, 1st Lt KA would have decided to unrestrict her report upon hearing that Appellant was being court-martialed for crimes nearly identical to the ones she warned Appellant not to let "happen to anyone else." (JA at 112.)

> *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?'"

(JA at 274.) (emphasis added). SA LB was not saying she was looking for other potential victims. Rather, she was explaining what would happen *if*, during her search, she found evidence of potential victims.

Furthermore, a close examination of the way in which SA LB discovered 1st Lt KA's messages reveals not only that there was no "fishing expedition," but also that SA LB was not acting deliberately to violate Appellant's rights. When SA LB began searching Appellant's text messages, she knew of only one victim: 2d Lt AW. (JA at 165.) She began her search by looking for text messages Appellant had exchanged with the sole victim and the victim's boyfriend. (JA at 272.) She found the messages but noticed Appellant had not saved their numbers as contacts. (Id.) As a result, SA LB looked through other text message conversations with unsaved contacts to see if they were relevant to her investigation. (JA at 274.) In doing so, SA LB found messages from an unsaved contact who was talking about a different sexual assault—who investigation later revealed was 1st Lt KA. (JA at 274, 279.)

These facts demonstrate SA LB found 1st Lt KA's text messages "by accident, not design." (JA at 201.) She had no reason to believe there were other victims, nor was she engaged in a fishing expedition for other victims. She simply

stumbled upon 1st Lt KA's messages while searching through text messages involving unsaved contacts. And she only searched through text messages involving unsaved contacts while lawfully searching for Appellant's messages with 2d Lt AW and TD—whose numbers Appellant also had not saved.

Notably, the military judge did not find SA LB was engaged in a "fishing expedition" when she discovered 1st Lt KA's messages. Instead, the military judge found SA LB's actions in this regard were reasonable, "especially considering the nature of digital evidence and the realities faced when attempting to search and analyze the same without knowing potentially involved parties' phone numbers." (JA at 200.) This conclusion was not an abuse of discretion. It was supported by the record and aligns with this Court's decision in Richards, in which this Court recognized that when it comes to searches of electronic devices, "there may be no practical substitute for looking in many (perhaps all) folders and sometimes at the documents contained within those folders." Richards, 76 M.J. at 370.

3. SA LB's actions after she discovered 1st Lt KA's messages further demonstrate SA LB was not acting deliberately to violate Appellant's rights.

Examination of SA LB's actions post-discovery of 1st Lt KA's messages demonstrates that her conduct was due to simple negligence rather than a deliberate violation of Appellant's rights. Moreover, her actions further contradict any suggestion that SA LB was on a "fishing expedition."

After finding 1st Lt KA's messages, SA LB did not immediately jump to the conclusion that Appellant had also sexually assaulted 1st Lt KA. Rather, based on the text messages, SA LB concluded a *separate crime* occurred—that Capt KS sexually assaulted 1st Lt KA. (JA at 276.) As a result, she began a separate investigation into Capt KS. (Id.) But Appellant found himself in the middle of two investigations—his own and Capt KS's—because SA LB found evidence of Capt KS's sexual assault of 1st Lt KA on Appellant's phone while searching for evidence of Appellant's sexual assault of 2d Lt AW.

Notwithstanding the fact that SA LB found evidence of Capt KS's sexual assault on Appellant's phone, SA LB did not conclude Appellant was anything more than a witness in Capt KS's case. (Id.) In fact, SA LB—knowing that Appellant was represented by an attorney in his own case—interviewed Appellant as a witness in Capt KS's case. (JA at 277.) Even after seeing the text messages independently provided by Maj DS in which Appellant admitted to being "inside [1st Lt KA] earlier," SA LB gave Appellant the benefit of the doubt and concluded Appellant's sexual acts with 1st Lt KA were consensual. (JA at 279.)

Still having no reason to believe Appellant had sexually assaulted 1st Lt KA, SA LB then sent Appellant's phone to DCFL for analysis on 2 April 2019. (JA at 115; 281.) SA LB wanted DCFL to search Appellant's phone for evidence of two different crimes: (1) Capt KS's sexual assault of 1st Lt KA, and (2) Appellant's sexual assault of 2d Lt AW. (JA at 281.) In evaluating the scope of SA LB's

conduct, it is important to note that AFOSI was in lawful possession of Appellant's phone pursuant to the AF 1176. Moreover, Appellant arguably gave SA LB consent to search his phone for these messages when he said, "[y]ou guys still have my phone, like you can . . . see all these messages that you're asking about." (JA at 277.)

As to whether it was appropriate for SA LB to send Appellant's phone to DCFL to find evidence of Appellant's sexual assault of 2d Lt AW, this would have been permissible if, as discussed above, the wording of the search authorization had been slightly altered to give AFOSI authority to search for "evidence of a violation of Article 120-Rape." But SA LB's act of sending Appellant's phone to DCFL to find evidence of Appellant's sexual assault of 2d Lt AW, based on SA LB's arguably mistaken belief that the search authorization was legal, does not come close to the "deliberate, reckless, or grossly negligent conduct" warranting application of the exclusionary rule.

The more problematic conduct occurred after the events of 19 April 2019. On that date, SA LB interviewed 1st Lt KA. (Supp. JA at 566.) AFOSI added Appellant as a subject in 1st Lt KA's case based on this interview. (JA at 283.) At this point, Appellant's phone was already at DCFL. (*See* JA at 115.) Upon opening a new investigation into Appellant—and assuming this Court does not find that Appellant consented to DCFL's analysis of his phone when he said, "[y]ou guys still have my phone, like you can . . . see all these messages that you're

asking about" (JA at 277)—SA LB should have sought an additional authorization to search Appellant's phone for evidence of Appellant's sexual assault of 1st Lt KA. Instead, SA LB did not seek additional search authorization based on her memory of what she learned at FLETC—specifically, that if she already had a right to be in the phone, then saw evidence of a different crime, she did not have to seek an additional search authorization. (JA at 301.) DCFL subsequently analyzed Appellant's phone and found incriminating text messages relevant to Appellant's sexual assault of 1st Lt KA.[10] (JA at 114-135.)

While SA LB's failure to obtain an additional search authorization was erroneous, she did not fail to do so deliberately, recklessly, or with gross negligence. Rather, her failure to obtain an additional search authorization was due to her reliance on what she believed she learned at FLETC—which, based on a review of her testimony, could be interpreted as a misunderstanding of what she learned about the plain view doctrine. (*See* JA at 301.) Moreover, based on the numerous instances in which SA LB followed the law, it is likely she would have sought an additional search authorization if she knew she needed one. And there is

[10] To be clear, the only "new" evidence DCFL found during its analysis were messages between Appellant and his father (JA at 119), Capt KS (JA at 124-25), Maj AS (JA at 127), and Capt NL (JA at 130). While DCFL found messages between Appellant and 2d Lt AW (JA at 117), TD (Id.), 1st Lt KA (JA at 121), and Maj DS (JA at 129), AFOSI was already in possession of these messages *before* completion of the DCFL report because the witnesses had provided them to AFOSI directly. (*See* JA at 287, Supp. JA at 564, 570.)

no doubt an additional search authorization would have been granted based on AFOSI's interview of 1st Lt KA and the existence of text messages between her and Appellant. Under these circumstances, and "consider[ing] the evidence in the light most favorable to the [United States]," Richards, 76 M.J. at 369, SA LB's failure to obtain an additional search authorization was due to simple negligence. But simple negligence does not rise to the level of sufficiently deliberate conduct that warrants application of the exclusionary rule. Herring, 555 U.S. at 147 ("[W]e conclude that when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way.") (internal quotation marks and citation omitted).

4. AFCCA appropriately concluded there was no evidence of recurring or systemic negligence.

Appellant argues the military judge erred when he found that SA LB acted reasonably and, to the extent SA LB violated Appellant's rights, she did not do so deliberately, recklessly, or with gross negligence. (App. Br. at 23.) Appellant also contends the military judge erred in his conclusion that application of the exclusionary rule would not deter future actions by military law enforcement personnel. (Id.) These conclusions were error, Appellant argues, because the military judge ignored SA LB's role in creating the search authorization and failed to consider her testimony "that she had spent the last two years operating in this manner" and "was apparently taught to do so by FLETC." (Id.)

The military judge did not ignore SA LB's role in creating the search authorization. Contrary to Appellant's argument, the military judge made a specific finding of fact that "[SA LB] drafted the authority to search and seize." (JA at 190-91.) This finding demonstrates the military judge concluded SA LB acted reasonably and did not violate Appellant's rights deliberately, recklessly, or with gross negligence *despite* her role in creating the search authorization.

As to SA LB's testimony, the United States acknowledges the military judge did not explicitly address the portions of SA LB's testimony cited by Appellant. Nonetheless, AFCCA did address this testimony, which Appellant quotes in full in his brief. (App. Br. at 26). Appellant contends AFCCA's analysis of SA LB's testimony shifted the burden to him to demonstrate deterrence. (Id.) But AFCCA did not shift the burden. The lower court merely commented on the record before it and accurately concluded there was nothing in the record to conclude SA LB's actions were "recurrent or representative of law-enforcement practices" rather than simply her own practice. (JA at 028.) It was not burden shifting, and certainly not error, for AFCCA to comment on the record in this way, given that the Supreme Court did the same in Herring. 555 U.S. at 147 ("But there is no evidence that errors in Dale County's system are routine or widespread.").

AFCCA considered SA LB's testimony in the light most favorable to the Government and found no evidence of recurring or systemic negligence. (JA at 028.) As a result, AFCCA concluded that "[e]xclusion of the evidence seized

because of [SA LB's] unlawful search is far too drastic a response" to ensure her conduct is not repeated. (Id.) This Court should conclude the same.

In sum, SA LB's conduct fell well below the intentional and patently unconstitutional conduct that the exclusionary rule was created to deter. To the extent SA LB violated Appellant's rights, it was due to simple negligence. But her conduct was not *grossly* negligent, nor was it deliberate or reckless. And there is no evidence before this Court that SA LB's conduct was recurrent or representative of law enforcement practices writ large. This Court may have a difference of opinion with the military judge's conclusion that SA LB's conduct did not warrant exclusion, but the abuse of discretion standard calls for more. McElhaney, 54 M.J. at 130. Because the military judge's conclusion and findings of fact were not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous," id., this Court should find SA LB's conduct was not sufficiently culpable to trigger the exclusionary rule.

C. Any benefits of deterrence are outweighed by the heavy costs of exclusion.

Even if this Court disagrees and finds SA LB's conduct was sufficiently deliberate to trigger the exclusionary rule and application of the rule would result in appreciable deterrence of future unlawful searches, exclusion is not automatic. Indeed, "[r]eal deterrent value is a necessary condition for exclusion, but it is not a sufficient one." Davis, 564 U.S. at 237. Before applying the exclusionary rule in

this case, this Court must first apply the balancing test set out in Herring and Mil. R. Evid. 311(1)(3) and weigh the benefits of deterrence against the costs to the justice system. Only if this Court finds the benefits of deterrence outweigh the costs to the justice system—a "high obstacle for those urging [its] application"—can this Court apply the exclusionary rule, and only as a "last resort." Herring, 555 U.S. at 141.

Only one individual in this case will be deterred by exclusion: SA LB. Appellant argues the effect of exclusion will be broad, and "will resonate within the military law enforcement community . . . ensure proper instruction at FLETC . . . [and] ensure the proper practice by special agents." (App. Br. at 27.) But there is no evidence before this Court that anyone, let alone SA LB, committed conduct "sufficiently deliberate that exclusion can meaningfully deter it." Herring, 555 U.S. at 144.

While SA LB testified that what she recalled learning at FLETC that caused her to conduct the search of Appellant's phone in the manner she did, there is no evidence before this Court this is *actually* what FLETC taught SA LB and other AFOSI agents. In fact, one would assume that if SA LB's memory was correct, Appellant's case would be one of many inundating this Court's docket involving military law enforcement agents testifying that they learned the same lesson during their time at FLETC and conducted their searches accordingly. It is not. Appellant's case is unique because SA LB testified to a troubling

misunderstanding of search authority, but ultimately not an accurate reflection of what is taught in training. Even Appellant seems skeptical of the accuracy of SA LB's memory. (*See* App. Br. at 22 ("[SA LB] *claimed* she learned [at FLETC] she could pursue anything she found on the cell phone once she seized it, without further authorization."); App. Br. at 23 ("[SA LB] *was apparently* taught to do so at FLETC.").) This Court cannot find that an entire organization, much less the entire "military law enforcement community," (App. Br. at 27) must be deterred simply because of one agent's likely inaccurate testimony.

SA LB's incorrect memory led to her failure to seek an additional search authorization after discovering an additional victim. This, the United States acknowledges, was error. But this Court must consider this error in the context of all the reasonable and lawful actions she took during the investigation. SA LB initially limited her search for evidence related to the sexual assault of 2d Lt AW. SA LB was careful not to read privileged messages. She found 1st Lt KA's messages not because she was "fishing" for other crimes Appellant committed, or for even for other victims, but rather by accident while looking through text messages with unsaved numbers.

The United States does not suggest that SA LB's misunderstanding of the law and failure to obtain a subsequent search authorization should not be corrected. But the exclusionary rule, a remedy of "last resort," Herring, 555 U.S. at 140, is not the appropriate tool to correct the behavior of an agent who tried to follow the

law but, due to her misunderstanding of what she learned in training, violated it. This is because the culpability of SA LB's conduct is outweighed by the "substantial social costs exacted by the exclusionary rule." Id. at 144 n.4.

Indeed, the costs of exclusion in this case are particularly high because, as the military judge accurately noted, it would "perpetually disable [1st Lt KA] from testifying about relevant and material facts about [A]ppellant." (JA at 201.) "Rules which disqualify knowledgeable witnesses from testifying at trial are . . . serious obstructions to the ascertainment of truth." Ceccolini, 435 U.S. at 278 (internal citations omitted). But exclusion would not just permanently bar 1st Lt KA's testimony. It would also require this Court to ignore "reliable, trustworthy evidence bearing on guilt," Davis, 564 U.S. at 237, in the form of Appellant's incriminating text messages to Capt NL (JA at 130 "([S]he was blacked out and i pawned her off on him")); Maj DS (Supp. JA at 548 ("And funny thing . . . I was inside her earlier")); Maj AS (JA at 127 ("[H]e found me who led him down the beaten path")); and Appellant's father (JA at 119.). Moreover, as AFCCA noted, the costs go beyond the exclusion of evidence. Given these were not "victimless crimes" and "Appellant was a repeat offender from whom society needed protection," the costs also include the reality that "exclusion would not just impact society in general, but particular members of society, and potential future victims." (JA at 029.)

Appellant's brief offers little discussion of the costs of exclusion. (*See* App. Br. at 27.) In failing to discuss the costs, Appellant would have this Court return to the days when the exclusionary rule automatically applied upon a showing of a Fourth Amendment violation or a demonstration that police conduct should be deterred. But those days are long gone. Today, courts must conduct "a more rigorous weighing" of the costs and benefits before applying the exclusionary rule. Davis, 564 U.S. at 238.

In this case, the military judge weighed the costs and benefits and concluded that application of the exclusionary rule was not appropriate. (JA at 201-02.) This conclusion was amply supported by the record and was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." McElhaney, 54 M.J. at 130. Therefore, this Court should conclude the military judge did not abuse his discretion in declining to apply the exclusionary rule.

II.

THE LOWER COURT CONSIDERED, AND PROPERLY REJECTED, APPELLANT'S HYPER-TECHNICAL READING OF THE SEARCH AUTHORIZATION.

Standard of Review

This issue also concerns the military judge's denial of a motion to suppress. This Court reviews such denials for an abuse of discretion. Clayton, 68 M.J. at 423.

Law and Analysis

At trial, Appellant argued that because paragraph four of the AF 1176 stated it expired on 16 February 2019, any evidence found during a search of Appellant's phone after that date was illegally obtained. (JA at 197.) The military judge explicitly rejected this argument, finding the AF 1176's expiration date equated to a "start no later than date" rather than a date after which subsequent searches were not authorized. (Id.) The military judge relied on the holdings of Kicker and Linton, two AFCCA cases attached to the Joint Appendix. (Id.; JA at 497, 508.) The military judge found that because the search authorization was signed on 13 February 2019, and SA LB initiated the search and seizure prior to 16 February 2019, it was proper for SA LB to conduct subsequent searches of Appellant's phone after 16 February 2019. (JA at 197-98.) On appeal, AFCCA again considered Appellant's argument and rejected it, finding no error in the military judge's findings of fact and conclusions of law. (JA at 019.)

In Kicker, the magistrate signed an AF IMT 1176 granting authorization to search and seize the appellant's cell phone. (JA at 504-05.) The magistrate provided a three-day period to initiate the search. (JA at 505.) Agents conducted an initial search within the three-day period, and a subsequent search 12 days later. (Id.) AFCCA found the search conducted outside the three-day period was proper because agents had *initiated* the search within the three-day period, as required by the AF IMT 1176. (Id.)

The AF IMT 1176 in Linton read, "No search conducted pursuant to the authority herein granted shall be *initiated* later than three days from 04 November 2015." (JA at 517 (emphasis in original).) The search authorization language in Linton was substantially the same as the language of the AF 1176 in this case. (*Compare* JA at 517, *with* JA at 164.) The appellant in Linton raised an argument identical to the one Appellant raises here—that searches conducted after expiration of the three days listed on the authorization are illegal. (JA at 517.) AFCCA rejected the argument, reasoning that "[a]ppellant would have us strictly apply the language of the AF IMT 1176, but ignore its specific words." (Id.)

Appellant does not address these cases despite the fact that they were central to the military judge's ruling. Instead, Appellant asks this Court to interpret paragraph four of the AF 1176 in a vacuum, independent of the language found elsewhere on the form, and find both the military judge and AFCCA erred in not adopting his reading of the AF 1176. In so doing, Appellant asks this Court to conclude that Col MR intended that all "continuing, further, and additional searches" of Appellant's cell phone must have occurred in—at most—three days. This hyper-technical reading of a search authorization is exactly what this Court has cautioned against. *See* Eppes, 77 M.J. at 345 ("Courts should not invalidate warrants by interpreting affidavits in a hyper technical, rather than commonsense manner.").

Contrary to Appellant's claim, both the military judge and AFCCA fully considered, but rejected, the hyper-technical reading advocated by Appellant. Such a conclusion was not surprising given the military judge's reliance on Kicker and Linton, which adopt a commonsense, rather than hyper-technical, reading of the AF 1176.

The fact that the "16 February 2019" expiration date contained in paragraph four mirrors the three-day timeframe for initiating the search in paragraph three shows that "16 February 2019" is indeed a "start no later than date," rather than a "stop all searches date." This commonsense reading is reinforced by the fact that Col MR authorized a search of Appellant's entire phone as well as "continuing, further, and additional searches, to include copying and/or analysis, on or away from the specified premises," which was unlikely to be accomplished in only three days. (JA at 164.) In contrast, Appellant's reading of the search authorization would mean that Col MR wanted SA LB to complete her search of Appellant's phone within three days of his signing the AF 1176. AFCCA correctly concluded the military judge did not abuse his discretion in rejecting this hyper-technical and constrained reading of the AF 1176.

Even if this Court disagrees, technical or de minimis violations of a warrant's terms do not warrant suppression. United States v. Cote, 72 M.J. 41, 45 (C.A.A.F. 2013.) Appellant does not dispute the search was initiated within the timeframe set by Col MR, but argues, without citation to authority, that "the

approximately six-week gap between the expiration of the search authorization and the request for analysis to DCFL . . . cannot be considered *de minimis*." (App. Br. at 29.) To be sure, this Court has concluded that failing to initiate a search of an electronic device within 90 days, and failing to request forensic analysis from DCFL until well over one year had elapsed, was unreasonable. Cote, 72 M.J. at 45. But in so holding, this Court noted that "the Fourth Amendment harm being protected against by the ninety-day provision in this case is from a seizure of unreasonable duration and the resulting interference with [appellant's] possessory interest in noncriminal materials." Id. (internal citation omitted).

Here, there is no such concern. SA LB's initial search was timely and revealed text messages relevant to the investigation. The moment SA LB found text messages relevant to the sexual assault of 2d Lt AW, the Fourth Amendment harm of "interference with [appellant's] possessory interest in noncriminal materials" was vitiated because Appellant's phone was now evidence of a crime against 2d Lt AW.

Both the military judge and AFCCA considered the expiration date in paragraph four of the AF 1176. Both concluded that the expiration was a "start no later than" date, rather than a "stop all searches" date. Their conclusions were supported by the record and based on a commonsense, not hyper-technical, reading of the entirety of the AF 1176. Therefore, no remedy is warranted.

CONCLUSION

The military judge did not abuse his discretion in concluding the exclusionary rule was not appropriate in Appellant's case, nor did he abuse his discretion in rejecting Appellant's hyper-technical reading of the search authorization. Therefore, the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court of Criminal Appeals.

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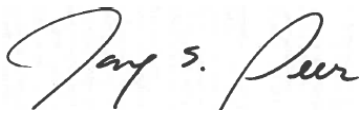
I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 26 October 2022.



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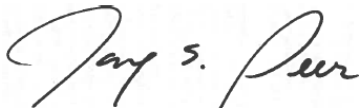

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Date: 26 October 2022