IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 20220225
First Lieutenant (O-2) **ADALBERTO BRINKMAN-CORONEL**, United States Army, Appellant	USCA Dkt. No. 24-0159/AR

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INDEX

TABLE OF AUTHORITIES

United States Constitution

Statutory Provisions

Supreme Court of the United States

Federal Circuit Courts

Court of Appeals for the Armed Forces

Court of Military Appeals

Service Courts of Criminal Appeals/Courts of Military Review

Manual for Courts-Martial, United States (2019 ed.)

Military Rules of Evidence

Rules for Courts-Martial

Miscellaneous

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

GRANTED ISSUES

I.

WHETHER THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE FAILED TO RECUSE HIMSELF FROM APPELLANT'S COURT-MARTIAL FOR THE APPEARANCE OF BIAS.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS EVIDENCE DISCOVERED FROM APPELLANT'S "VACUUM PHONE."

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

A military judge sitting as a general court-martial convicted appellant, contrary to his plea, of attempted sexual assault of a child who has attained the age of twelve years, attempted sexual abuse of a child, absence from place of duty, communicating indecent language, wrongfully possessing child pornography,[2] and wrongfully distributing child pornography (three specifications), in violation of Articles 80, 86, and 134, UCMJ, 10 U.S.C. §§ 880, 886, and 934 (2019). The military judge sentenced appellant to dismissal and confinement for nine years and ten days.

On March 22, 2024, the CCA affirmed the findings and sentence in a divided opinion. *United States v. Brinkman-Coronel*, ARMY 20220225, 2024

[1] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence [Mil. R. Evid.], and the Rules for Courts-Martial [R.C.M.] are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] After the announcement of findings, the military judge merged the convictions for wrongful possession of child pornography in Specifications 1 and 2 of Charge II into one offense for findings and sentencing. (JA 022, 246). The CCA incorrectly stated that the specifications were merged only for sentencing. (JA 04).

CCA LEXIS 131 (Army Ct. Crim. App. Mar. 22, 2024) (unpub.). (JA 003-021). This Court granted appellant's petition for grant of review and ordered briefing under Rule 25. (JA 01).

STATEMENT OF THE FACTS

1. Challenge to the Military Judge

The government alleged that appellant's misconduct occurred on various dates from May 24, 2019, to April 6, 2021. (JA 035-038). The charges were referred by the Commander, 25th Infantry Division [ID]. (JA 038).

At arraignment, the military judge informed the parties that he had served as the Special Victims Prosecutor [SVP] for Hawaii from 2018 until approximately May 2021, when he became a military judge. (JA 039). He called himself the "subject matter expert for all of Hawaii," including the 25th ID, in cases involving sexual assault, child abuse, and domestic violence investigations. (JA 039).

In response to the defense counsel's [DC] question about what the military judge knew about appellant's case, the military judge assumed that it was related to Operation Keiki Shield [OKS], an undercover operation targeting crimes against children in Hawaii. (JA 041). He was familiar with OKS and had worked on OKS cases between 2019-2020. (JA 041). The military judge denied any knowledge of appellant's case. (JA 041-042). He kept a log of cases over which he could not preside, and appellant's case was not one of them. (JA 042).

The defense challenged the military judge under R.C.M. 902(a) because his impartiality might reasonably be questioned due to his assignment as the Hawaii SVP "during a timeframe in which some of this misconduct did arise."[3] (JA 043-044). The government had no response to the challenge. (JA 044).

The military judge summarily denied the challenge. (JA 045). Although the military judges stated that he would raise the issue with the chief circuit judge, the Record of Trial [ROT] does not memorialize or otherwise report the advice, if any, of the chief circuit judge. (JA 045).

2. The Undercover Operation and Appellant's Apprehension

On April 4, 2021, a joint military and civilian task force participated in OKS. (JA 279). That day, appellant contacted an undercover Criminal Investigation Command [CID] agent posing as a teenager named "Skyler" on a messaging app. (JA 153). Following a discussion of sexual acts, appellant planned to meet "Skyler" later that day for sex. (JA 249). Agents apprehended appellant upon his arrival at a predetermined location, seized his cell phone, and stored the phone in the CID evidence room. (JA 048, 165-67, 169).

An agent advised appellant that he was suspected of various offenses, including sexual assault of a child and possession and/or distribution of child

[3] The defense also challenged the military judge under R.C.M. 902(b)(1) and (2). (JA 044).

pornography, even though there was no discussion of or reference to any child pornography during the chat with "Skyler." (JA 143, 310, 548). Appellant invoked his Article 31(b), UCMJ, rights. (JA 310, 548). A military magistrate denied a verbal search authorization request for evidence of child pornography on the seized cell phone. (JA 144-145). The commander of Joint Base Pearl Harbor-Hickam later authorized a search of the seized phone. (JA 381).

After appellant was released, his company commander, Captain [CPT] RZ, ordered him to check in with the staff duty desk in person every four hours. (JA 049, 276). Captain RZ believed that appellant looked "shaken" following his arrest. (JA 059).

3. The Facebook Messages

At 2312 Hawaii Standard Time [HST], on April 4, 2021, appellant sent four messages to his husband, DBC, through Facebook Messenger. (JA 073, 311-313, 391-393). DBC had moved to Michigan to set up their new home in anticipation of appellant's pending administrative discharge. (JA 071-072). The messages stated:

> [DBC], come IMMEDIATELY back to Hawaii, don't come alone. Come with [name redacted]. This is not a joke, I'm not drunk or anything. I need you to book the next available flight as soon as you see this message
>
> When you guys get here, the car is going to be parked in front of Polo beach . . . I left the keys in the windshield drain (next to the driver windshield wiper)

> When you guys get to the house, look inside the green hoover, under the bag (you have to open the little door to get to it). You will find my phone there. The password is [redacted]. Go to the images, there will be videos in the folder titled "camera"
>
> If for any reason the car key is gone, I left the valet key on the little table next to my wallet. You guys should pass by the house first to pick it up in case it's missing on the car when you get to it

(JA 311-313, 391-393) (capitalization in original).

At 0112 HST on April 5, 2021, appellant sent DBC another message:

> [DBC], please disregard the previous messages. I had a crisis. I'm better now

(JA 313, 393).

DBC called appellant's cell phone because he did not know that the phone had been seized by CID. (JA 073, 074). When appellant's phone rang without answer, DBC called him through Facebook Messenger. (JA 073, 074). Appellant assured his husband that everything was fine. (JA 075). By the end of the call, DBC was no longer worried about appellant, so he did not fly to Hawaii or notify appellant's command. (JA 075-077).

4. Staff Duty Check-in

On Sunday, April 5, 2021, appellant complied with CPT RZ's check-in requirements. (JA 049, 058, 250-251).

Appellant did not check in with staff duty at 0600 on April 6, 2021. (JA 049-050). Captain RZ asked if anyone had seen appellant that morning, but no one had. (JA 050). During trial, the government disclosed that appellant had been on chargeable local leave on April 6, 2021. (JA 149-150, 591).

Captain RZ drove to appellant's home. (JA 050). When he did not see appellant's car and appellant did not answer the door, CPT RZ became concerned. (JA 050). Around 0730, a military police officer [MP] and the housing community director, who had the master key, arrived at appellant's home. (JA 050, 068).

Sometime before 0900 HST, CPT RZ called DBC in Michigan. (JA 050-051). He informed DBC that appellant had been charged with sexual harassment and asked if he knew where appellant was. (JA 061-062, 077). DBC did not know where appellant was, but he relayed that he spoke to appellant the previous night, and that he did not believe there was a risk of appellant dying by suicide. (JA 050, 062). He told CPT RZ about the Facebook Messenger messages, including the final message telling DBC to "disregard" the previous messages. (JA 054, 078).

Captain RZ asked DBC for consent to enter appellant's home to conduct a health and welfare check on appellant. (JA 050, 061). DBC verbally consented. (JA 050). DBC had served twelve years in the Army and understood a health and welfare check to consist of a limited inspection to ensure the safety of a Soldier. (JA 078).

Captain RZ, the MP, and the housing community director entered appellant's house and "looked around the house for about 60 minutes" but did not find appellant. (JA 051, 398). Still concerned despite DBC's assurances, CPT RZ asked DBC if there was anything else he could think of. (JA 051). DBC told CPT RZ to look inside a Hoover vacuum for a phone. (JA 051, 083). The commander did not find a phone in the vacuum. (JA 051).

At 1238, CPT RZ asked appellant several times for his whereabouts via Facebook Messenger because he knew that CID had confiscated appellant's cell phone the previous night. (JA 051-052, 061, 395-396). He believed that appellant was in a "fragile mental state" and seemed "shaken" because of the arrest and the allegations against him. (JA 043-044, 058-059). He worried that appellant would harm himself. (JA 053).

Captain RZ notified SA KJ, CID's Special Victims Unit team chief, of appellant's failure to report and asked CID to help locate appellant.[4] (JA 054-055, 062-064, 085). Captain RZ told SA KJ about the Facebook messages. (JA 085-

[4] While a search for a missing Soldier typically did not fall within CID's responsibilities, the negative publicity surrounding the recent death of Specialist [SPC] Vanessa Guillen, a female Soldier in Texas, led to a "policy change," according to SA KJ and another CID agent. (JA 107). The government did not produce this "policy change," despite a request by the military judge. (JA 147-148).

86). She asked him to send screenshots of the messages, including the message about a phone in the vacuum cleaner and the phone's passcode. (JA 085-086).

Captain RZ and the first sergeant searched appellant's favorite places on the island. (JA 055, 063).

5. CID Searches Appellant's Home

Around noon, SA KJ called DBC and asked for consent to enter the home "to check for signs of life" and "to check for anything that might help us and assisting us locating" appellant. (JA 086, 088). DBC consented. (JA 086-087).

Special Agent KJ asked DBC for appellant's bank accounts and passwords to identify recent purchases to locate appellant. (JA 079). Because appellant and DBC did not share any bank accounts, DBC could not provide that information, but he told SA KJ that appellant had accounts with First Command, USAA, and Wells Fargo banks. (JA 079-080, 090).

SA DS found the vacuum phone. (JA 086-087). Special Agent KJ called DBC and asked, "Do you give us consent to seize and search the phone *to locate anything that might help us*?" (JA 087) (emphasis added). DBC understood the question to refer to the search for appellant and replied, "yes." (JA 087). Special Agent KJ told DBC that CID needed to get into appellant's phone to find his banking information in order to locate him. (JA 080). DBC replied, "do whatever you have to do *to find my husband*." (JA 081, 084) (emphasis added).

Appellant and DBC did not share a cell phone account, and DBC did not have the passcode to appellant's everyday cell phone. (JA 081-082). Even though SA KJ knew that the vacuum phone was not appellant's everyday phone, no one told DBC that CID had seized appellant's everyday cell phone and that the phone they sought was not appellant's everyday cell phone. (JA 082, 096). Indeed, DBC assumed that the phone in the vacuum was appellant's everyday cell phone. (JA 082).

6. CID Searches and Seizes the Vacuum Phone

After retrieving the phone from the vacuum, SA DS placed the phone in airplane mode, which prevents the phone from making and receiving any calls or texts and also preserves evidence. (JA 101, 103).

Special Agent DS searched the vacuum phone for the videos referenced in the Facebook messages and watched them. (JA 101-102, 109). In the videos, appellant apologized for his conduct and expressed love for his family members. (JA 253, 386). He did not indicate his location. (JA 253, 386).

According to SA DS, the purpose of searching the vacuum phone was to identify appellant's whereabouts before he harmed himself. (JA 102). He testified that there were exigent circumstances to search for the videos, but not exigent enough to search other parts of the phone for clues as to appellant's location. (JA 111). He did not look at appellant's Google search history. (JA 113). Instead, he

collected the device and sent it to the CID evidence room so that the digital forensic examiner [DFE] could search it in the most "forensically sound" manner later that day. (JA 110-112).

CID continued to search appellant's house after SA DS seized the vacuum phone. (JA 108). Among other things, CID found a receipt from the Schofield Barracks PX dated April 5, 2021, for two bottles of Benadryl and one box of cough drops. (JA 115, 119, 410). One agent testified that he believed Benadryl could be used for an attempted overdose or suicide. (JA 117). Based on the receipt, he surmised that exigent circumstances existed. (JA 118).

Special Agent KJ asked SA JP, the DFE, to perform an extraction at CID of the vacuum phone for "signs of life," recent activity, financial transactions, and the videos appellant referenced in his Facebook messages. (JA 121-122, 127).

Special Agent JP conducted a logical extraction approximately three hours after the phone was found. (JA 122). He knew that appellant had been apprehended pursuant to the sting operation two days prior. (JA 128). He found the four videos and a thumbnail image of what appeared to be a prepubescent male. (JA 122-124, 131). SA JP discovered messages that discussed sex with a child. (JA 124).

While SA JP did a timeline search for recent USAA transactions, he did not search for First Command or Wells Fargo transactions, nor did he enter a date

range to narrow down any clues for appellant's whereabouts. (JA 125, 133-134). He did not look for appellant's Google search history. (JA 135, 138). A subsequent review of the phone revealed that appellant had searched for "Tallest hotels in Waikiki," among other things, in the forty-eight hours before he failed to check in with staff duty. (JA 136-137). The calendar app showed a hotel reservation for April 2-4, 2021. (JA 146).

Special Agent JP concluded his search around 1900. (JA 126). He did not document or report any findings that may have assisted in the search for appellant; instead, he informed SA KJ via email that he found videos and possible child pornography, among other things, on the vacuum phone. (JA 092, 125, 139, 142). He advised SA KJ that CID should seek magistrate authorization for the suspected child pornography. (JA 125). The phone remained in airplane mode when SA JP locked it overnight for additional review the following day.[5] (JA 125).

7. The Digital Evidence

After a subsequent search authorization and a lab request, SA JP conducted extractions of appellant's everyday phone and the vacuum phone. (JA 211-214). He found videos and pictures allegedly containing child pornography, as well as messages about sexual acts. (JA 260-273).

[5] The next day, appellant called the police to report a theft. (JA 418). Officers found him at a Honolulu hotel, suffering from an apparent overdose. (JA 416, 419, 420).

8. Motion to Suppress

The defense moved to suppress the evidence discovered from SA JP's April 6, 2021, search of the vacuum phone and all derivative evidence obtained from that search, pursuant to the Fourth Amendment and Mil. R. Evid. 311. (JA 278).

The military judge denied the motion, concluding that (1) the search for appellant was an emergency search under Mil. R. Evid. 314(i) to locate and save an officer from potential suicide; (2) DBC had common authority under Mil. R. Evid. 314(e); he granted consent to search the home and the vacuum phone to locate appellant; and the "disregard" message did not sever DBC's ability to consent to the search; and (3) CID did not exceed the broad scope of DBC's consent. (JA 561-576).

Additional facts are contained in the analysis below.

SUMMARY OF ARGUMENT

Issue I

Immediately preceding his assignment as the military judge presiding over appellant's court-martial, the military judge served as Special Victims Prosecutor [SVP] in the jurisdiction where appellant was tried. While serving as the professed "subject matter expert for all of Hawaii" for a narrow set of crimes, including sexual assault and child abuse, the military judge had knowledge of and participated in prosecutions involving OKS, the investigation that led to the

charges against appellant. The charged offenses occurred during the military judge's tenure as SVP. This SVP assignment immediately preceded his assignment as a military judge in the same jurisdiction where he served as the highest-ranking and most experienced sex crimes and child sex crimes prosecutor. Accordingly, the appearance of partiality for the prosecution existed and the military judge erred in not disqualifying himself from appellant's court-martial. This Court should reverse appellant's conviction to vindicate the public's confidence in the military justice system.

Issue II

Appellant's one-time failure to check in with staff duty did not constitute exigent circumstances for the warrantless search of the vacuum phone. Appellant was missing, but the evidence was insufficient to warrant the presumption that his life was in danger. Under the government's logic, a Soldier is always at risk of self-harm when that Soldier is missing, such that exigent circumstances exist for a warrantless search. Such a rule casts too wide a net.

Appellant's husband authorized CID to search the vacuum phone for the limited purpose of finding appellant. DBC consented to the search because CID convinced him that exigent circumstances existed, despite insufficient evidence for an emergency search. Appellant's husband did not have common authority over the vacuum phone and could not consent to its search. Even if DBC had common

authority over the phone, he limited his consent to any information essential to locating appellant. CID exceeded the scope of consent by preserving the phone for a forensic extraction rather than taking rudimentary steps to determine appellant's location. Accordingly, the search was objectively unreasonable. Because CID acted with blatant disregard of the scope of DBC's consent and the necessity to act in good faith, exclusion of the evidence is necessary and warranted to appreciably deter future unlawful searches under the pretext of emergency searches. Although there are costs to the military justice system of applying the exclusionary rule, deterrence of CID's disregard for appellant's constitutional rights outweighs these costs. This Court should set aside and dismiss the findings with prejudice to guarantee the protections of the Fourth Amendment.

ARGUMENT

I.

THE LOWER COURT ERRED IN FINDING THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE FAILED TO RECUSE HIMSELF FROM APPELLANT'S COURT-MARTIAL FOR THE APPEARANCE OF BIAS.

Standard of Review

This Court reviews a military judge's disqualification decision for an abuse of discretion. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (citation

omitted). A military judge abuses his or her discretion when a ruling is arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *Id*.

Law and Analysis

"An accused has a constitutional right to an impartial judge." *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001) (citations and internal quotation marks omitted). "The validity of the military justice system and the integrity of the court-martial process 'depend[] on the impartiality of military judges in fact and in appearance.'" *Uribe*, 80 M.J. at 446 (quoting *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012) (per curiam)). Accordingly, "actual bias is not required; an appearance of bias is sufficient to disqualify a military judge." *Id*. (citation omitted). "There is a strong presumption that a judge is impartial." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted).

The military judge abused his discretion in denying the disqualification challenge because he failed to consider important facts and because his ruling was arbitrary and clearly unreasonable.

A. The military judge's ruling is accorded less deference.

The military judge did not apply R.C.M. 902(a) and relevant caselaw to the facts when he denied the defense challenge. Accordingly, his ruling was arbitrary and clearly unreasonable.

Because the military judge failed to place his findings and analysis on the record, his ruling is accorded less deference. *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014). Less deference is especially warranted when the standard of review is abuse of discretion. *Id.* at 312 (citations omitted) ("Without a proper statement of essential findings, it is very difficult for an appellate court to determine the facts relied upon, whether the appropriate legal standards were applied or misapplied, and whether the decision amounts to an abuse of discretion or legal error.").

While the CCA ostensibly gave the military judge's ruling "little deference," it nonetheless "surmise[d] from his forthcoming responses during voir dire" that he did not abuse his discretion in denying the challenge for the appearance of bias. (JA 010). The military judge was not forthcoming. While he sua sponte revealed his assignment as the Hawaii SVP and his professional relationships with three counsel assigned to appellant's case, he only disclosed his knowledge of OKS and his participation in training courses with these counsel upon questioning by the DC.

B. The military judge should have recused himself because of the appearance of bias.[6]

[6] Although appellant argued to the CCA that the military judge should have recused himself for actual and apparent bias, the CCA incorrectly stated that appellant alleged only the appearance of partiality before that court. (JA 010). Here, appellant asserts that the military judge should have recused himself for the appearance of bias.

Rule for Courts-Martial [R.C.M.] 902(a) addresses the appearance of bias. The rule requires a military judge to disqualify himself or herself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). The test for identifying an appearance of bias is "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *United States v. Sullivan*, 74 M.J 448, 453 (C.A.A.F. 2015). This is "an objective standard." *Id*. "Recusal based on an appearance of bias 'is intended to promote public confidence in the integrity of the judicial process." *Id*. at 453-54 (quoting *Hasan*, 71 M.J. at 418) (internal quotation marks omitted)).

The military judge served as the most experienced and highest-ranking prosecutor in Hawaii for a narrow set of crimes, including sexual assault and child abuse, from 2018 through May 2021. He also prosecuted Soldiers for Internet-based offenses under OKS. The government charged appellant with offenses within that narrow set of crimes: attempted sexual assault of a child and attempted sexual abuse of a child, discovered during an OKS mission, as well as wrongful possession and distribution of child pornography. Moreover, the timeline of these charged offenses – May 24, 2019, to April 2021 – occurred during the military

judge's tenure as the SVP and in the same jurisdiction where he served as the "subject matter expert for all of Hawaii." (JA 039).

The CCA insists that the military judge advised law enforcement only on "specific" OKS cases when he was SVP, as if his knowledge of the undercover operation targeting Internet-based sex crimes against children in Hawaii was somehow constrained to only those cases. (JA 010). Similarly, the CCA notes that the military judge's "expertise regarding sexual assault crimes" is "true of many military judges, particularly those with recent litigation experience." (JA 010). This reasoning deliberately ignores the military judge's statement that he was the "subject matter expert for all of Hawaii" not just for sexual assault crimes in general, but for the specific crimes in a specific undercover operation that appellant was accused of committing. This reasoning also ignores the fact that the military judge served as SVP in the same jurisdiction immediately before taking the bench. Had the military judge served as the SVP anywhere in the continental United States, Europe, Africa, or Asia immediately before assuming the bench, then it may be fairly argued that he had general criminal law experience and a general knowledge of investigative facts, but that is not the case. The military judge was familiar with OKS and had worked on OKS cases, such that he likely knew particular details about OKS, including but not limited to, tactics and techniques used by undercover agents that would be known only by the "subject matter expert

for all of Hawaii." In other words, he knew details about the undercover operation that arrested appellant, many of which were disputed at trial and on appeal. These details would not be known by an SVP with "expertise regarding sexual assault crimes" and "recent litigation experience" from any other jurisdiction who subsequently became a military judge in Hawaii.

The test for identifying an appearance of bias is an objective test: "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *Sullivan*, 74 M.J. at 453. Given that the charged offenses occurred during the military judge's tenure as the SVP, his SVP assignment immediately preceded his assignment as a military judge in the same jurisdiction where he served as the highest-ranking and most experienced sex crimes and child sex crimes prosecutor, and the military judge's mentorship of the prosecutors in appellant's case, the appearance of partiality for the prosecution existed and the military judge erred in not disqualifying himself from appellant's court-martial.

C. Reversal is warranted to vindicate the public's confidence in the military justice system.

When a military judge abuses his discretion in denying a recusal motion, this Court will determine whether reversal is warranted under the three factors articulated in *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988):

> (1) What is the risk of injustice to the parties in the particular case?
>
> (2) What is the risk that the denial of relief will produce injustice in other cases?
>
> (3) What is the risk of undermining the public's confidence in the judicial process?

Uribe, 80 M.J. at 449.

Under the first factor, the risk of injustice to appellant is high. Appellant elected to be tried by the military judge. The military judge was required to assess the credibility of the witnesses, including the OKS agents with whom he had previous experience; determine the reasonableness of the CID agents' actions in the search and seizure of the vacuum phone; find whether appellant was guilty beyond a reasonable doubt; and after finding him guilty, exercise his considerable discretion in sentencing appellant. *See Uribe*, 80 M.J. at 455 (Stucky, C.J., dissenting). The DC argued for a sentence of three years confinement, but the military judge's sentence to confinement was more than triple that at nine years and ten days. (JA 247, 248).

The military judge adversely ruled on appellant's motion to suppress, which was the critical issue in appellant's case, aside from the sufficiency of the evidence. (JA 561-576). He also granted most of the government's motion to admit evidence pursuant to Military Rule of Evidence [Mil. R. Evid.] 404(b). (JA 577-589). Appellant appealed these decisions to the CCA and appeals the ruling

on the motion to suppress to this Court. *See* Granted Issue II, *infra*. Moreover, the rulings on the motion to suppress and on the Mil. R. Evid. 404(b) evidence required the military judge to make discretionary rulings. The risk of injustice is greater when a judge who has an apparent or actual partiality toward the government renders discretionary rulings. *See Uribe*, 80 M.J. at 455 (Stucky, C.J., dissenting).

A military judge's adverse rulings on an accused's motions and objections "does not necessarily demonstrate any risk of injustice," *Uribe*, 80 M.J. at 450, but this military judge's adverse ruling on the motion to suppress was not a typical ruling. First, the military judge had specific knowledge of the undercover operation at issue based on his experience as the SVP and as the "subject matter expert for all of Hawaii." The language in this ruling came close to crossing the line from judicial detachment to persuasive advocacy on behalf of the government. The opening line of the ruling is "*A missing Officer, a worried spouse, a suicide fear, and a 24-hour search of Oahu*." (JA 561) (italics in original). The headings for the findings of fact include, "*The Sting Operation*," "*Signs of Distress and Absence*," "*Cause for Concern Following Arrest/Release*," and "*Epilogue: The Later Discoveries of the Accused and Additional Materials*." (JA 562, 564, 568) (italics in original). Because of the military judge's self-professed expertise while serving as the SVP immediately preceding his assignment as military judge, his

familiarity with the undercover operation in appellant's court-martial, and the tone of the ruling on the motion to suppress, there was a risk of injustice to appellant if the military judge did not disqualify himself. Accordingly, this factor weighs in appellant's favor.

Under the second factor, there is a risk that the denial of relief in appellant's case will produce, or already produced, injustice in other cases. It is reasonable to assume that the military judge presided over other courts-martial involving internet-based child sex abuse offenses in the same jurisdiction where he served as SVP immediately before taking the bench. The risk of partiality for the government existed in every court-martial presided over by the military judge involving allegations of child sex abuse where the accused was apprehended under OKS. Accordingly, this factor weighs in favor of appellant.

The analysis for the third factor is similar to the standard applied in the R.C.M. 902(a) analysis. *United States v. Martinez*, 70 M.J. 154, 159-60. In the remedy analysis, this court is "not limited to facts relevant to recusal;" instead, this court reviews "the entire proceedings, to include any post-trial proceeding, the convening authority action, the action of the Court of Criminal Appeals, or other facts relevant to the *Liljeberg* test." *Id.* at 160.

Under this factor, there is an enormous risk of undermining the public's confidence in the judicial process if this court does not reverse appellant's

conviction. No matter how fair the military judge believed he was by not disqualifying himself, a reasonable member of the public or the armed forces who was aware of all the aforementioned circumstances would harbor doubt about the fairness of appellant's proceedings. The military judge had been "the subject matter expert for all of Hawaii" for the overwhelming majority of the charged offenses immediately preceding his assignment in the same jurisdiction in which he had served as SVP and charged offenses were allegedly committed and investigated while the military judge served as SVP. Under these circumstances, a reasonable observer would question whether the military judge was an impartial arbiter and would lose confidence in the military justice system.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS EVIDENCE DISCOVERED FROM APPELLANT'S "VACUUM PHONE."

Standard of Review

A military judge's denial of a motion to suppress under Mil. R. Evid. 311(a) is reviewed for an abuse of discretion. *United States v. Lattin*, 83 M.J. 192, 197-98 (C.A.A.F. 2023) (citation omitted). A military judge abuses his or her discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a

way that is clearly unreasonable; or (4) the military judge fails to consider important facts. *Id*. at 198 (quoting *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted)).

An abuse of discretion must be more than a mere difference of opinion; the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022) (citation omitted).

In reviewing a ruling on a motion to suppress, this court typically pierces through the CCA and examines the military judge's ruling and then decides whether the CCA erred in addressing the ruling. *United States v. Shields*, 83 M.J. 226, 230 (C.A.A.F. 2023). The evidence is considered in the light most favorable to the prevailing party. *Id*. at 230-31 (quotation marks and citation omitted).

Law and Analysis

The military judge abused his discretion in denying the motion to suppress because he failed to consider important facts and his application of correct legal principles to the facts was clearly unreasonable.

A. The Fourth Amendment protects cell phones.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const., amend. IV. Just as people have the right to be "secured in their persons, houses, papers and effects," pursuant to the Fourth Amendment, people

also have a reasonable expectation of privacy in their cell phones. *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014). Cell phones "may not be searched without probable cause and a warrant unless the search falls within the one of the recognized exceptions to the warrant requirement. *Id*. Warrantless searches are presumptively unreasonable unless they fall under one of the several exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967).

B. Appellant's one-time failure to check in with staff duty did not constitute exigent circumstances for the warrantless search of the vacuum phone.

An emergency search to save a life or for related purposes does not require probable cause. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). Military Rule of Evidence 315(a) permits the admission of evidence obtained under exigent circumstances when relevant and not otherwise inadmissible under the Military Rules of Evidence or the Constitution. Military Rule of Evidence 314(i) provides:

> Evidence obtained from emergency searches of persons or property conducted to save life, or for a related purpose, is admissible provided that the search was conducted in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

In determining whether emergency circumstances exist, the question is not whether an actual emergency existed, but whether the police officer reasonably believed that one existed under the available facts and circumstances known at the time of entry. *United States v. Muniz*, 23 M.J. 201, 208 (C.M.A. 1987).

The military judge reasoned that "[t]he urgent need to locate the Accused and prevent harm stemmed from several factors before and after CPT [RZ] and CID entered his house." (JA 571). Regarding the pre-entry factors, the military judge concluded that three things justified the warrantless search of the vacuum phone as an emergency search: (1) appellant's "shaken" appearance following his arrest (2) his messages to DBC, and (3) his disappearance from home and failure to check-in with his unit and show up for formation. (JA 571).

First, most people would appear "shaken" following an arrest for a child-sex-related offense, but the arrest occurred two days before appellant failed to check in with staff duty.

Next, the messages to DBC were alarming when appellant wrote them, but his "crisis" ended two hours after he sent them. Appellant assured DBC that he was better now and instructed him to "disregard the previous messages." Appellant's language is important: if he had continued to experience feelings of self-harm, he likely would have told DBC that he was "having a crisis." He would not have told his husband to "disregard the previous messages." By the end of the call, DBC believed appellant's assurances that he was fine. Had DBC believed that appellant intended to commit immediate or ongoing personal injury, *see* Mil. R. Evid. 314(i), then he would have flown to Hawaii or notified appellant's command, but DBC no longer felt concerned after talking to appellant.

Third, appellant complied with the conditions on liberty after sending the messages to DBC. There was no evidence of any intent to harm himself when he showed up in person to check in with staff duty. Had appellant appeared "shaken" or had he given any indication that he intended to harm himself, the government could have presented the testimony of the Soldiers working staff duty on April 5, 2021. Appellant had not "disappear[ed];" rather, appellant missed one check-in with staff duty and his commander and CID did not know where he was. CPT RZ decided that this was a worst-case-scenario situation when appellant did not check in at 0600 on April 6, but he did not check with appellant's immediate supervisor, who knew that appellant was on local leave that day. CPT RZ became concerned when he did not see appellant's car at home and appellant did not answer the door.

Regardless of whether appellant had violated the conditions on liberty by not checking in at 0600, the fact that he did not answer the door and that his car was not on the premises did not warrant the presumption that he was in imminent danger of self-harm. One possibility was that appellant had gone absent without leave. Another possibility was that appellant did not want to answer the front door. Additionally, there are any number of possibilities for why a Soldier's car would not be parked in his usual spot. Nonetheless, CPT RZ was determined to get inside appellant's home (JA 060) even though DBC had assured him that there was no risk of appellant dying by suicide because appellant's "crisis" had ended

approximately thirty-two hours prior. If CPT RZ believed that appellant was suicidal, then it defies logic that he did not contact behavioral health or other relevant personnel for advice before, during, or after the search.

Under the government's logic, a Soldier is always at risk of self-harm when the Soldier is missing or has gone AWOL following an apprehension for allegations of child sexual abuse and seems "shaken" by the apprehension, and this situation automatically constitutes an exigent circumstance. This amounts to a per se rule that any circumstance involving a missing Soldier justifies a warrantless search. Such a rule casts too wide a net because a Soldier can absent himself or herself without creating an exigent circumstance that would justify a warrantless search.

DBC consented to a limited health and welfare check of the house he previously shared with appellant. Based on his prior military service, DBC understood that CPT RZ's health and welfare inspection would be a limited inspection. Neither CPT RZ, the housing community director, or the MP found anything in the house that suggested appellant had killed himself or that he intended to do so during their hour-long search for appellant. Although the health and welfare inspection uncovered no signs of self-harm, CPT RZ was convinced that exigent circumstances existed, so he asked DBC if there was anything else he could think of. At this point, DBC told CPT RZ about appellant's Facebook

messages and told him to look inside the Hoover vacuum for a phone. Had DBC believed that appellant was in imminent danger of harming himself, he would have told CPT RZ about these messages when the commander called him. He did not because there was no evidence of immediate or ongoing personal injury. DBC felt confident that appellant was fine.

Despite a lack of evidence indicating that appellant intended to harm himself, CPT RZ was convinced that appellant was in a fragile mental state merely because appellant did not respond when he asked for appellant's whereabouts via Facebook Messenger at 1238. The military judge failed to consider these pre-entry facts when concluding that the warrantless search was an emergency search.

Next, the military judge concluded that three post-entry factors justified the warrantless search of the vacuum phone as an emergency search: (1) discovery of a receipt for the purchase of Benadryl and cough drops, which indicated a potential effort to overdose, (2) discovery of the vacuum phone and (3) "a cursory review of that cellphone which had 'goodbye videos' for loved ones indicating a clear intent to cause himself immediate self-harm or disappearance." (JA 571).

This is the point at which the consent and emergency search justifications for the warrantless search converged. DBC consented to the search of appellant's home because CPT RZ and CID convinced him that exigent circumstances existed, despite insufficient evidence for an emergency search and DBC's belief that

appellant did not intend to harm himself. Nonetheless, the CCA addressed only DBC's common authority to consent and the scope of his consent despite relying heavily on the testimony regarding the purported emergency. (JA 011-015).[7] Here, the CCA erred by (1) failing to apply the legal principles regarding emergency searches and (2) by applying only the legal principles regarding consent to the facts in a way that was clearly unreasonable.

Returning to the military judge's analysis of the post-entry factors, discovery of the receipt was a feeble justification for an emergency search. The receipt was just a receipt. CID did not connect the receipt to appellant's bank accounts even though SA JP later searched for financial transactions on the vacuum phone, nor did they look for the Benadryl in appellant's home. If the agents had found the Benadryl in appellant's home, then their theory that appellant planned to overdose on the medicine would have been debunked. It was easier for them to claim that appellant was at risk of overdosing on Benadryl to justify a warrantless emergency search rather than find the medication and lose this justification.

[7] The CCA majority stated, "As we find the military judge did not abuse his discretion denying appellant's motion to suppress evidence regarding DBC's consent to search the vacuum phone, the issue of whether CID's search was also proper under an emergency exception is mooted." (JA 015, n. 9). The majority fails to recognize that the purported emergency search and DBC's consent were inextricably intertwined. DBC would not have consented to the search but for CID's insistence that exigent circumstances existed.

Next, the "finding of a secret, hidden cellphone in a vacuum,"[8] in itself, did not constitute "[t]he urgent need to locate" appellant. CID did not "find" the phone; rather, DBC told CPT RZ where to look, but CPT RZ did not find it. Ultimately, SA DS later located the phone. When CID later asked DBC for consent to search and seize the phone, they failed to inform him that this was not appellant's everyday cell phone. CID and CPT RZ knew that appellant's everyday cell phone had been seized but DBC did not know.[9] CID led DBC to believe that the vacuum phone was appellant's everyday phone and that information to locate appellant would be found on that phone. Because DBC believed that the phone was appellant's everyday phone, he granted permission to "do whatever you need to do to find" appellant. The military judge failed to consider these important facts.

Finally, the military judge erred in concluding that the "cursory review" of the vacuum phone necessitated an emergency search. The military judge ignored appellant's instruction to DBC to disregard the four messages because his "crisis" had ended and ignored the fact that CPT RZ and CID knew that appellant told DBC to disregard his previous instructions. Because the "crisis" had ended, the

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[8] (JA 571).

[9] The military judge found that the vacuum phone was appellant's "primary" cellphone. (JA 574). The only phone CPT RZ, CID, and DBC called was in the evidence room, leading to one conclusion: the seized phone was appellant's everyday, or primary, phone. Thus, this finding was unsupported.

goodbye videos were no longer evidence of appellant's "clear intent to cause himself immediate self-harm or disappearance." (JA 571).

Other facts make clear that the warrantless search of the vacuum phone was not an emergency search. SA DS insisted that placing the vacuum phone in airplane mode was a "best practice." By "best practice," he meant best practice for digital forensic examination at a later date and not for an immediate, real-time determination of appellant's location at the moment of seizure. If circumstances were as exigent as several CID agents testified, then not placing the phone in airplane mode would have allowed the phone to receive messages and notifications as they occurred. These messages or notifications could have provided real-time information about appellant's location and/or activities or could have provided the opportunity to communicate with appellant or others who might know his whereabouts.

If circumstances were as exigent as these agents insisted and they wanted to find *any* signs of life, then SA DS would have examined appellant's Google search history, but he did not. He testified that there were exigent circumstances to search for the videos, but not exigent enough for him to search other parts of the phone for clues regarding appellant's location. The military judge failed to make this finding of fact.

If circumstances were exigent, then CID would not have wasted time transporting the vacuum phone to CID offices for a digital forensic extraction later that day. CID could have sought a magistrate authorization to search the vacuum phone like it did for the everyday phone two days earlier. Instead, as soon as SA DS watched the video in which appellant admitted that he was interested in things he should not be interested in, he wondered what those likely criminal "things" were and he secured the phone for an eventual extraction to obtain evidence, rather than searching appellant's Google history for clues as to appellant's location.

This was no emergency search; it "was a search for a missing person, plain and simple." (JA 017). In his dissent, Judge Hayes concluded that CID acted inexplicably when (1) SA DS immediately put the phone in airplane mode; (2) SA DS "did not conduct any rudimentary searches of the phone beyond a review of the 'goodbye' videos already known [by DBC] to exist (for example, no attempt was made to discover recent searches or calls or messages); (3) SA DS configured the phone to search it in the most "forensically sound" manner; and (4) after finding evidence of alleged child pornography on the phone, SA JP did not document or report any findings that might have assisted in the search for appellant. (JA 017).

Finally, CID already had appellant's everyday phone in the evidence room. This phone likely had information to help CID locate appellant. Both a magistrate and the Commanding General had already authorized a search of this phone.

Rather than search the everyday phone, CID rummaged through the vacuum phone because it was more interested in uncovering evidence of a crime than in rendering aid, obtaining information to assist in rendering aid, or preventing immediate or ongoing personal injury to appellant. The agents' actions were textbook subterfuge – they investigated alleged misconduct under the guise of a health and welfare check.

C. DBC did not have common authority over the vacuum phone and could not consent to its search.

One "jealously and carefully drawn" exception to the warrant requirement "recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citations omitted). "Voluntary consent to search may be obtained from the person whose property is to be searched or from a fellow occupant who shares common authority over the property." *United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009) (citations omitted). "A person may grant consent to search property when the person exercises control over that property." Mil. R. Evid. 314(e)(2). A third party has authority to consent to a search when he possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)) (quoting *United States v. Matlock*, 415 U.S. 164, 171 (1974)); *See also Black*, 82 M.J. at 451.

"The government bears the burden of proving by clear and convincing evidence that a third party has joint access and control to the degree that such control confers a right to consent to search." *Id*. at 451 (citing Mil. R. Evid. 314(e)(5)).

Even if the third-party purporting to give consent lacks actual authority to consent, the search may still be reasonable "if the facts known to the police when the purported consent is given 'would [warrant a man of reasonable caution to conclude]' that the consenting party had authority over the premises." *United States v. White*, 40 M.J. 257, 258-59 (C.M.A. 1994) (quoting *Terry v. Ohio,* 392 U.S. 1, 21-22 (1968)).

The military judge concluded that DBC's consent was valid because DBC's instruction to "Do what you have to do to find my husband" was "necessarily broad" and because DBC had common authority of the property. (JA 572-573). Both premises are flawed and clearly unreasonable.

First, DBC's "broad"[10] consent resulted from CID's insistence that exigent circumstances existed. Several CID agents, and SA KJ in particular, used the vague, ambiguous, and ominous term "signs of life" multiple times to frighten

[10] Contrary to the military judge's finding, DBC authorized CID to search the vacuum phone *to find his husband*. (JA 081, 084).

DBC into consenting. If the circumstances had been as exigent as the agents insisted, then they would not have sought DBC's consent.

Next, the military judge asserted that DBC had common authority over the property because of appellant's message to pick up the valet key by his wallet and because there was no evidence that DBC could not "access or control any part of the house they shared." (JA 572). The military judge incorrectly focused on the house when the property at issue is the vacuum phone. The CCA does not disagree. (JA 012-015).

DBC did not have common authority over the vacuum phone. He and appellant did not share a cell phone account, which meant that the vacuum phone was owned solely by appellant. DBC did not know the password to appellant's everyday cell phone. He never used the vacuum phone and he did not know its phone number. He did not know the vacuum phone's password until reading appellant's third Facebook message. Thus, DBC did not have mutual use of the vacuum phone because he did not generally have joint access or control over it for most purposes. *See Black,* 82 M.J. at 451; *Matlock*, 415 U.S. at 171, n.7. Because DBC did not have access or control over the vacuum phone, he could not grant consent to CID to search the phone. *See* Mil. R. Evid. 314(e)(2). Therefore, the military judge used incorrect legal principles on this point.

The military judge erred in finding that appellant's "Disregard" message "was not a recission of authority." (JA 573). The military judge speculated: "The message may have indicated the Accused no longer needed [DBC] to follow through with the five-step plan. . . . He was never told he could not come to the house or unlock and view the phone." (JA 573). While the military judge was unsure of the meaning and effect of appellant's message, DBC was not. He did not get on the next plane to Hawaii and complete the steps from appellant's Facebook messages.

The military judge reasoned that "[t]he 'disregard' message was not a 'disallow' message," and that DBC "was never told he could not come to the house or unlock and view the phone." (JA 573). The military judge seems to require that Appellant use magic words to revoke DBC's authority over the phone, but "magic words are not required to effectuate withdrawal of consent." *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018) (citation omitted). Appellant needed only to make his intent clear through some unequivocal act or statement. *Id*. When appellant explicitly instructed DBC to "disregard the previous messages" at 0112 HST, DBC complied. His subsequent consent to CID was invalid.

Moreover, it was evident to DBC that the rest of appellant's instructions had been rescinded, such that the instruction to access the vacuum phone had also been rescinded. Law enforcement personnel knew that DBC was not in Hawaii and had

disregarded appellant's instructions to fly to Hawaii immediately and retrieve his car, yet they conveniently concluded that DBC still possessed common authority over the vacuum phone, despite all evidence to the contrary. CID failed to ask DBC whether he recognized the phone, had ever used it, or whether the phone was part of a phone plan with appellant. CID failed to gather information necessary to determine that DBC had common authority over the phone and could consent to its search. Because of this failure, CID could not reasonably believe that DBC had authority to consent to a search. *See Black*, 82 M.J. at 451, n.1 (citation omitted).

Other facts support the recission of authority. Contrary to appellant's second and fourth Facebooks message to DBC, his car was not parked in front of Polo Beach and his valet key was not on the little table next to his wallet. Whatever appellant's plan was, he abandoned it, and he explicitly withdrew his consent for DBC to unlock the phone with the passcode. Accordingly, the military judge's conclusion that appellant did not withdraw consent was erroneous.

D. CID exceeded the scope of DBC's consent.

Assuming *arguendo* that appellant's "disregard" message was not a rescission of authority, CID exceeded the scope of DBC's consent. "Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property, and may be withdrawn at any time." Mil. R. Evid. 315(e)(3). The test for measuring the scope of consent is one of "objective

reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991).

Determining the scope of a consent to search requires an evaluation of the totality of the circumstances "including the interaction between the parties, the purpose of the search, and the circumstantial evidence surrounding the search." *Black*, 82 M.J. at 459 (Sparks, J., dissenting) (quoting *United States v. Beckmann*, 786 F.3d 672, 679 (8th Cir. 2015)).

Because CID convinced DBC that exigent circumstances existed, DBC authorized CID to search the vacuum phone *to find his husband*. Several CID agents corroborated DBC's limited authorization. (JA 087, 088, 095, 102). Nonetheless, the military judge concluded that DBC placed no limits on his consent to search. (JA 572, 573). The CCA majority opinion concurred:

> First, the language "do whatever you need" places no restriction on the time, place, or manner that CID was authorized to search the vacuum phone. This segmented language supports the military judge's finding of fact that DBC placed "no restrictions" on CID's search of the vacuum phone. The language "to find my husband," however, places a condition on the scope of CID's search in that it must related to the purpose of finding appellant. When we review the entirety of DBC's statement in this context, there is a restriction placed on the scope of the CID search of the vacuum phone: the method of the search must relate to the purpose of finding appellant. As long as CID's search of the vacuum phone was related to the purpose of finding appellant, we agree with the military

> judge that DBC gave broad consent regarding the time, place, or manner of the CID search.

(JA 013).

DBC did not give broad consent regarding the time, place, or manner of the search. The majority agrees with appellant that the method of the search must relate to the *purpose* of finding appellant, however, CID's search did not limit itself to the *purpose* of finding appellant. The military judge's failure to recognize the parameters of DBC's authorization as a limit on the scope of the consent amounted to error. As Judge Hayes explained:

> [T]he seizing agent did not conduct any rudimentary searches of the phone to discover recent searches or recent calls or messages, but instead seized the phone and sent it to digital forensic examination in order to search it for the most "forensically sound" manner. As a result, the phone remained in airplane mode and locked up overnight after the DFE agent found evidence of child pornography on the phone. It is hard to imagine any action by law enforcement that would have been more clearly outside the scope of consent or more inconsistent with the goal of finding appellant.

(JA 017).

Special Agent DS learned nothing about appellant's whereabouts from his review of the vacuum phone. The military judge agreed. (JA 574). As discussed above, SA DS did not endeavor to look for recent calls or messages, nor did he check appellant's calendar, his map apps, or his Google history, which could have

provided some of the most valuable information about appellant's state of mind, the things that concerned him, and any plans he had. Instead, SA DS sent the phone to CID for digital forensic examination to search it in the most "forensically sound" manner. Nonetheless, the military judge insisted that the digital forensic extraction was a "wise decision." (JA 574). The CCA majority agreed. (JA 015). Not only did the military judge and the CCA err by failing to recognize the limited scope of DBC's consent, but they also erred by endorsing the ways CID exceeded that limited scope.

The military judge noted that SA JP "was aware of the child sex abuse investigation but was given specific guidance to search for recent activity within the understanding that he had consent from the Accused's spouse to search the phone for anything that could help locate the Accused." (JA 574). While the military judge casually dismissed SA JP's knowledge of appellant's arrest for alleged child sex abuse crimes, SA JP did not. He knew of OKS, appellant's arrest, and the offenses of which appellant was suspected, including wrongful possession and/or distribution of child pornography, pursuant to the DA 3881 prepared by another agent. Instead of searching for recent financial transactions, directions to recently visited locations, events on the calendar, and appellant's Google search history, SA JP configured the search to find recent photos and videos. In other words, he knew what he was looking for. The search was

objectively unreasonable. Given that appellant was convicted of wrongfully possessing child pornography found on the vacuum phone, the military judge's error materially prejudiced appellant. *See* Art. 59(a), UCMJ, 10 U.S.C. 859(a).

Multiple CID agents corroborated DBC's limitation on the search parameters. They deliberately ignored the limits of his consent and did practically everything but search for information to locate appellant. The CCA relied on *Shields*, 83 M.J at 232, to find that CID's actions were suboptimal but reasonable. (JA 015). *Shields* involves the reasonableness of a cell phone search for criminal activity pursuant to a search authorization. Here, there was no search authorization. Instead, CID claimed to be searching for a missing person, but undertook a search to find and preserve evidence of criminal activity. Thus, *Shields* is inapposite.

Under *Jimeno*'s objective reasonableness test, a typical reasonable person would have understood that CID's search of the vacuum phone was limited to any information that would locate appellant and that CID's action exceeded that scope. 500 U.S. at 250-51. The military judge's conclusions regarding the scope of consent were clearly unreasonable.

E. Exclusion is necessary and warranted to deter future unlawful searches. Deterrence outweighs the costs to the military justice system.

Although the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the Supreme Court long

ago created an exclusionary rule that forbids the use of improperly obtained evidence at trial. *Lattin*, 83 M.J. at 197 (citing *Arizona v. Evans*, 514 U.S. 1, 10, (1995); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (cleaned up). "[I]f the government cannot use evidence that the police obtained by violating the Fourth Amendment, the police will have an incentive not to violate the Fourth Amendment." *Lattin*, 83 M.J. at 197. *See* Mil. R. Evid. 311(a).

When an accused makes a timely motion to suppress, evidence obtained as a result of an unlawful search or seizure by a person acting in a governmental capacity 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).

The prosecution bears the burden of proving 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(a)(3). *See Lattin*, 83 M.J. at 197. A military judge's assessment of these matters is reviewed for a clearly unreasonable exercise of discretion, which is a less deferential standard than clear error. *Id*. at 198 (citation omitted).

On April 6, 2021, CID was aware that appellant was arrested two days prior for alleged child sex abuse offenses, including the possession and/or distribution of

child pornography, and that his everyday phone had been seized. Special Agent KJ convinced DBC that appellant was about to kill himself, if he had not already done so, such that CID required his consent to search the vacuum phone for "signs of life." DBC consented because CID intentionally failed to inform him that the vacuum phone was not appellant's everyday phone. Naturally, DBC told CID to do whatever they could to find appellant. Special Agent DS did not undertake good faith efforts to find signs of life: he did not search appellant's Google history, his map applications, his calendar, his messages, or his email for any information that could have provided clues to find appellant. Instead, CID took an hours-long pause to keep the phone "forensically sound" and SA JP searched the phone's artifacts for media. In other words, he searched for videos and images because he suspected appellant of possessing suspected child pornography. Then he locked the phone in airplane mode overnight, thereby preventing any outgoing or incoming calls or data that could have provided clues to locating appellant.

As Judge Hayes explained:

> [T]he text of Mil. R. Evid. 314(i) requires a good faith effort to render aid, obtain information that will assist in rendering aid, or to prevent immediate or ongoing personal injury. Similar to these law enforcement agents' actions when provided consent, their actions in the face of a life-threatening emergency belie any intent to save appellant's life or prevent injury to his person.

(JA 018-019).

Under these circumstances, in which CID "acted with careless disregard of both the scope of the consent to search and the necessity to act in good faith in an emergency search," it is necessary to exclude the evidence. (JA 021).

Under the appreciable deterrence test, exclusion is necessary. CID's blatant disregard for appellant's constitutional rights must not be tolerated in the military justice system. Exclusion of the evidence obtained from the vacuum phone is necessary to deter future unlawful searches and/or seizures under the pretext of emergency searches. The government's witnesses testified that the search for appellant was necessary because of "policy changes" following the death of Specialist [SPC] Vanessa Guillen. (JA 107, 147).[11] Putting aside the fact that SPC Vanessa Guillen was the alleged victim in that case and appellant was the accused in this case, the government never produced any "policy change" regarding emergency searches for missing Soldiers. Exclusion of the evidence is necessary to deter CID from claiming that emergency searches of Soldiers' cell phones, which contain a nearly unlimited amount of personal information, are necessary in cases in which a Soldier fails to be at the assigned place of duty.

Under the balancing test, exclusion is necessary. While there are costs to the military justice system of excluding evidence of indecent language and the

[11] Specialist [SPC] Guillen was reported missing on April 23, 2020. Her body was later discovered. https://home.army.mil/hood/index.php/find-vanessa-guillen. (last visited on May 28, 2024).

possession and distribution of child pornography, deterrence of CID's deliberate and reckless disregard of appellant's Fourth Amendment rights outweighs these costs. The loss of appellant's convictions for wrongfully communicating indecent language and the wrongful possession and distribution of child pornography will resonate within the military law enforcement community. It will ensure the proper instruction at the various classes and training for CID and the proper practice by CID agents in the field. Moreover, OKS is an ongoing law enforcement operation that targets suspect child sex abusers, including servicemembers. The state of Hawaii and the armed forces have an interest in protecting children from child sex abuse crimes. To ensure the integrity of that joint operation, it is necessary to ensure that searches and seizures of cell phones satisfy the Fourth Amendment and the Military Rules of Evidence and to deter law enforcements agents from using purported health and welfare checks as a pretext for unreasonable searches.

The cost to the justice system may be high, but the deterrent effect would be greater and is required in this case. As Judge Hayes explained:

> Having previously been denied an initial warrant to search appellant's other phone for evidence of child pornography, a warrant which was later granted, the DFE SA used the exigent circumstances of appellant's disappearance to search for evidence of additional crimes. Once he found that evidence, no other findings were documented or reported that evening. For all intents and purposes, he turned off the lights and went home – while appellant was still missing. Such action cannot be condoned and most certainly should not be rewarded.

(JA 021).

Affirming the military judge's ruling essentially grants law enforcement carte blanche to use a search for a missing person as a search for evidence of crimes without adhering to the requirements of the Fourth Amendment. *See Lattin*, 83 M.J. at 204 (Ohlson, C.J., dissenting). This Court should not condone and reward CID's blatant disregard for appellant's constitutional rights.

CONCLUSION

WHEREFORE, appellant respectfully requests that this Honorable Court set aside and dismiss the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains approximately 11,039 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with this Court and served on the Government Appellate Division on October 28, 2024. Copies of the brief and the Joint Appendix were also delivered via courier service to the Court on October 28, 2024.

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