IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant/Cross-Appellee	)	REPLY ON BEHALF OF APPELLANT/CROSS-APPELLEE
v.	)	Crim.App. Dkt. No. 202200157
Jeremy W. HARBORTH, Chief Master-at-Arms (E-7) U.S. Navy Appellee /Cross-Appellant	)	USCA Dkt. No. 24-0124/NA USCA Dkt. No. 24-0124/NA

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976, fax (202) 685-7687
Bar no. 37314

JAMES P. WU ZHU
Lieutenant Commander, JAGC, U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 36943

IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 33211

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

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Pursuant to Rule 19(b)(3) of this Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer. (Appellee's Answer, Sept. 3, 2024.)

Argument

I.

THE MILITARY JUDGE PROPERLY FOUND THE IPHONE XS WAS SEIZED PURSUANT TO THE PLAIN VIEW EXCEPTION. HOWEVER, THE MILITARY JUDGE ERRED WHEN HE FOUND THE OTHER APPLE DEVICES ADMISSIBLE SOLELY BECAUSE THERE WAS PROBABLE CAUSE WHEN THE OTHER DEVICES WERE SEIZED. HE SHOULD HAVE RULED ON WHETHER MS. HARBORTH HAD ACTUAL OR APPARENT AUTHORITY TO CONSENT TO THE SEIZURE OR WHETHER MS. HARBORTH WAS A GOVERNMENT ACTOR WHEN SHE SEIZED THE DEVICES.

A. The Military Judge's understanding of probable cause was correct, and he correctly concluded there was probable cause. Regardless, Appellee's criticism that the "military judge had all but rejected the existence of probable cause by. . . asserting that law enforcement had no 'determinative' knowledge that any evidence of a crime would be found on them" is inapt.

1. The Fourth Amendment standard is reasonableness.

"As always under the Fourth Amendment, the standard is reasonableness." *United States v. Shields,* 83 M.J. 226, 232 (C.A.A.F. 2022).

Finding probable cause "merely requires that a person of reasonable caution could believe that the search may reveal evidence of a crime; it does not demand

any showing that such a belief be correct or more likely true than false." United States v. Hernandez, 81 M.J. 432, 438 (C.A.A.F. 2021).

"Probable cause determinations are inherently contextual." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). "The probable cause standard is a "practical, non-technical conception*."* *Illinois v. Gates*, 462 U.S. 213, 231 (1983).

"In order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized." *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). A nexus may "be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept." *Id.* (internal citation removed).

2. Reasonable suspicion is a lower standard.

A reasonable suspicion, in contrast, demands only a "minimal level of objective justification," which is something more than a hunch, but less than probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990).

3. The Military Judge's use of "reasonable" referenced the probable cause standard.

Appellee errs in faulting the Military Judge for determining that it was "*reasonable*" for law enforcement to seize the other devices with networking capabilities similar to those of the iPhone XS because they "*may"* have evidence of criminal conduct. (Appellee Br. at 15–16.) The Military Judge's reference to

reasonableness does not mean he employed the reasonable suspicion standard: "reasonableness" is inherent in the probable cause standard. *Shields*, 83 M.J. at 232.

Further, this Court recognizes that how the law applies is affected by the connectivity of internet-accessible devices and the ethereal nature of data. *United States v. Strong*, No. 23-0107, 2024 CAAF LEXIS 478, at *14 (C.A.A.F. Aug. 22, 2024) (due to ethereal nature of digital evidence, capacity for remote manipulation, law enforcement officials executing digital media warrant cannot simply take possession of physical device containing media). Connectivity of devices features heavily as the basis for the probable cause determinations for multiple devices in child pornography investigations. *See United States v. Clayton,* 68 M.J. 419, 424 (C.A.A.F. 2010) (ease with which laptop computers transported, and computer media replicated on portable devices, supported "practical, commonsense decision" that fair probability contraband existed in appellant's home).

In *United States v. Guihama*, No. 40039, 2022 CCA LEXIS 672 (A.F. Ct. Crim. App. Nov. 18, 2022), the appellant claimed no probable cause existed to search all his digital devices, given that some were not capable of using the Kik application—the application on which child pornography had first been traced to him. *Id*. at *9. The agent established probable cause by relating that he "knew the evidence at issue was readily transferrable over the internet and that appellant

could access the internet using a wireless connection inside his home." *Id.* at *33. The agent explained that given the ease of transferring files, there was a reasonable probability that child pornography would be found on devices in the appellant's home. *Id.* The court upheld the warrant as to the non-Kik enabled devices. *Id.* at *26.

Here, the police officers had probable cause because they knew at the time they took the devices that Appellee[1] had already transferred the images from the home security system to at least one of his phones. (J.A. 1350, 1353.) They knew the home security system and its cameras had been operating and in the step-daughter's room since the family moved in more than three years earlier, and Appellee complained about getting notifications on his phone each time it was unplugged. (J.A. 1358–59). It is common knowledge that other Apple products would have similar connectivity features as the iPhone on which they saw the images. (J.A. 428.) They did not need to know, also, and certainly did not need to know "determina[bly]" as Appellee implies, that the other devices connected to home security system. (Appellee Br. at 16); *see Guihama*, 2022 CCA LEXIS 672 at *9.

The probable cause determination for the devices was bolstered by the following facts: (1) the officers knew they were responding to a domestic argument

[1] Appellee is also Cross-Appellant.

about the["inappropriate photos regarding [Appellee's] stepdaughter" pictures; (2) in response to the police officer's statement that depending on what was depicted in the photos, no one was in trouble yet, Appellee said "it's bad. I need help. You should just arrest me now"; (3) Appellee had already attempted to delete some photos from his phone; and (4) Appellee admitted he "he'd thought about" masturbating to the photographs. (J.A. 728, 1349–50.) Considering his and his wife's statements and the fact that the officers saw illicit images on one device, this information was extremely reliable.

Therefore, the Military Judge articulated the probable cause standard, and correctly found there was probable cause, when he found it "reasonable" for law enforcement to seize the devices with similar networking capabilities because they "may" have evidence of criminal conduct.

B. Appellee errs when he argues that the Military Judge failed to consider important facts related to the probable cause findings.

A finding of probable cause is a legal question that is reviewed de novo based on the totality of circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007); *see United States v. Ralston*, 110 F.4th 909, 917 (6th Cir. 2024) (finding of probable cause a legal conclusion). An "officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Davenpeck v. Alford*, 543 U.S. 146, 153 (2004). Thus, an officer's own belief as to whether he or she had probable cause is not determinative; accordingly,

the Military Judge did not err by not specifically including their opinions in his Ruling.

And Appellee demands the impossible from the Military Judge: that he consider in his Ruling a Hawaii police officer's testimony from the court-martial, which was well in the future at the time of the Motions hearing and the Military Judge's Ruling. (Appellee's Br. at 18 (citing J.A. at 743); J.A. 386 (Trial Defense Counsel complained, "We don't even have [Honolulu Police Department] here. We didn't hear from them.").) The Military Judge did not err in omitting law enforcement's opinions in his written ruling.

II

THE LOWER COURT ERRED: THERE WAS ACTUAL AND APPARENT AUTHORITY FOR SEIZING THE ELECTRONIC DEVICES BECAUSE MS. HARBORTH WAS MARRIED TO APPELLEE, THE DEVICES WERE ALL IN THE SHARED HOME, AND APPELLEE/ CROSS-APPELLANT APPARENTLY TOOK NO STEPS TO PREVENT MS. HARBORTH FROM PHYSICALLY ACCESSING THE DEVICES. THE DELAY IN SEARCHING THE DEVICES WAS REASONABLE: APPELLEE'S POSSESSORY INTERESTS WERE MINIMAL DUE TO MS. HARBORTH'S CONSENT, HIS FAILURE TO REQUEST RETURN OF THE DEVICES, AND THE INFORMATION BEING AVAILABLE TO HIM ON REMOTE SERVERS.

A. Even if there was a Fourth Amendment violation, the exclusionary rule is inappropriate where, as here, the police had consent *and* probable cause to seize the devices, and the agent acted with thoroughness and caution when she sought an authorization to search the devices.

"The exclusionary rule does not apply every time law enforcement officials violate the Fourth Amendment." *United States v. Lattin*, 83 M.J. 192, 197 (C.A.A.F. 2023). Instead, for the exclusionary rule to apply, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." *Id.* (citing *Herring v. United States*, 555 U.S. 135, 147 (2009)). "The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligent." *Id.* at 200 (Ohlson, J., dissenting) (citing *Davis v. United States*, 564 U.S. 229, 237 (2011)).

Herring's rule is codified in Mil. R. Evid. 311(a)(3) (2019). If there is no appreciable deterrence against future unlawful seizures, *or* that deterrence does not outweigh the costs to the justice system of excluding the evidence, evidence should not be suppressed. *Lattin,* 83 M.J. at 197.

Under the Rule, the United States bears the burden of proving by a preponderance of the evidence either of the two avenues for admissibility. Mil. R. Evid. 311(d)(5)(A). An appellate court reviews whether the military judge's assessment was a "clearly unreasonable" exercise of discretion. *Lattin*, 83 M.J. at 198. This is a less deferential standard of review than the abuse of discretion

standard, because "[t]he magnitude of deterrence of future unlawful searches and seizures is more of a prediction of what is likely to happen in the future than an assessment of something that has already happened." *Id*.

In *Lattin*, the law enforcement agent obtained a search authorization for the appellant's phone, using an affidavit that cited text messages, sent during the alleged assault, by the sexual assault victim's boyfriend to the appellant. *Id.* at 194. The agent found those texts during her search, but continued to "rummage thought the phone for anything that might be interesting for the . . . investigation into [the] appellant." *Id.* She also continued to search the phone after the authorization expired. *Id.*

The agent found texts that ultimately led to the identification of a second victim, who testified against the appellant at trial. *Id.* As a "standard practice," the agent searched all information on all phones that came into the Government's possession, as she understood that "when there's probable cause for anything on the phone, you can search everything on the phone." *Id.* at 195. She also stated that she had learned this in training. *Id.* The military judge did not exclude the evidence. *Id*.

Assuming the search was unlawful, this Court nonetheless upheld the military judge's ruling that suppression was unwarranted. *Id.* at 195, 199. The appellant argued that suppression would result in the proper instruction and

practice of special agents in general, and the corrected practice of the special agent in the case. *Id.* at 199.

The United States countered that the cost of exclusion would be "particularly high" in the case because the second victim would be completely excluded from testifying, the evidence was particularly reliable, and the appellant's incapacity to commit future offenses would be shortened. *Id.* Moreover, the agent had applied for search authorization, had an attorney review her application, and searched the phone in accordance with what she believed the authorization to allow. *Id.* The record did not support that other military law enforcement were incorrectly trained or making the same type of mistakes. *Id.* at 199.

Although the United States did not raise this Issue at trial, Appellee argues in his Answer now that suppression is appropriate. Moreover, a party may defend the judgment below on a ground not earlier aired. *Greenlaw v. United States,* 554 U.S. 237, 250 n.5 (2008).

B. <u>There would be no appreciable deterrence against unlawful seizures here. Even if there was, such deterrence does not outweigh the costs to the justice system of excluding the evidence</u>.

The officers here showed, consistently, a concern for Appellee's rights. The initial Honolulu officers refused to take the devices Appellee's wife offered, except for the iPhone XS. (J.A. 1152, 1156.) And when the Naval Criminal Investigative Service Agent obtained the devices, she scheduled another interview with his wife

to go item-by-item through the devices to obtain search authorizations. (J.A. 330, 356, 362.) She also submitted the draft search authorization to staff judge advocate for review. (J.A. 1447.)

Although there was more than a month's delay between that interview and the issuance of the search authorization, the delay must be viewed in light of the Agent's belief that she had probable cause after interviewing the wife, and that she could not change the facts of the initial circumstances of the seizure. *See Mitan v. Clark*, No. 22-1883, 2023 U.S. App. LEXIS 8545 (7th Cir. Apr. 11, 2023) (citing *Gonzalez v. Village of West Milwaukee*, 671 F. 3d 649, 660 (7th Cir. 2012) ("continued retention of unlawfully seized property is not a separate Fourth Amendment wrong.")).

Likewise, there was no deliberate, reckless, or gross disregard of Appellee's rights when law enforcement accepted the devices they believed his wife had authority to provide to them. *See United States v. Eppes*, 77 M.J .339 (C.A.A.F. 2019) (no policy reason for applying exclusionary rule when violation not caused by deliberate misconduct). Nor does Appellee show systematic or recurring negligence by allowing a law enforcement agent to take a few days of leave and attend a short training. (Appellee Br. at 44.)

III

THE LOWER COURT ERRED: APPELLEE WAIVED THE ISSUE OF THE DURATION OF THE SEIZURE WHEN HE FAILED TO OBJECT WITH PARTICULARITY AT TRIAL.

"A party is required to provide sufficient argument to make known to the military judge the basis of the objection and, where necessary to support an informed ruling, the theory behind the objection." *United States v. Toy,* 65 M.J. 405, 409 (C.A.A.F. 2008) (internal citations omitted). "Where, however, all parties at trial fully appreciate the substance of the defense objection and the military judge has the full opportunity to consider it, waiver should not apply." *United States v. Brandell*, 35 M.J. 369, 372 (C.A.A.F. 1992).

Contrary to Appellee's assertion, he never raised as an issue at trial the length of time between when Naval Criminal Investigative Service first possessed the effects and when it applied for a search authorization. (Appellee Br. at 46–50.) Appellee's trial argument was specific: he argued that evidence from Appellee's Apple devices should be suppressed as fruit of the poisonous tree and there was neither consent nor probable cause at the initial seizure, and the issue of jurisdiction for the search authorization. (J.A. 423–25; 429, 430–37; 441; 1314–32.)

The argument differs substantially from the issue of how long Appellee's devices were held before law enforcement obtained a command-authorized search and seizure.

In referencing a punitive Article, this Court held that "a seizure is complete . . . when a person authorized to seize certain property has possession of the property and exercises dominion over it to the exclusion of all others." *United States v. Strong*, No. 23-0107, 2024 CAAF LEXIS 478, at *13 (C.A.A.F. Aug. 22, 2024) (published) (law enforcement had iPhone, but not exclusive control over digital content, thus seizure incomplete when iPhone seized). Appellee consistently argued that the police did not have probable cause or consent at the time the devices were seized. (J.A. 423, 424, 429.)

But Appellee never argued that the seizure was ongoing or that law enforcement waited too long to get an authorization to search the devices. This would have been an inherently different argument than fruit of the poisonous tree—as the Parties would have had to argue about the continuing validity of holding the devices, rather than the initial point in time when the devices were seized. *See Asinor v. District of Columbia*, No. 22-7129, 2024 U.S. App. LEXIS 20098, at *3 (D.C. Cir. Aug. 9, 2024) (law enforcement retention of phones for more than year unreasonable under Fourth Amendment, despite validity of initial seizure).

At trial, Appellee argued first that the on-site search of his iPhone XS was unconstitutional because he had a reasonable expectation of privacy in his cellphone that was infringed when the police looked through it with Appellee's wife. (J.A. 1325.) He argued that because the police had no knowledge or actual information regarding the contents of the other Apple devices, and only knew that they "apparently belonged to the accused and not Ms. Harborth." (J.A. 1326.) He next argued that because the police lacked probable cause to seize the devices, "the devices and their contents (including the forensically extracted data) are all evidence derived from these seizures." (Appellee Br. at 47.) Thus, according to Appellee, the derivative evidence was "fruit of the poisonous tree" which should be suppressed. (Appellee Br. at 47.)

Contrary to Appellee's argument before this Court, Appellee's references to the Agents' investigation encouraged the Military Judge to disregard the Agent's later steps because they did not go to the probable cause analysis or whether there was consent at the time of the search. (Appellee Br. at 44, 47–48; J.A. 447.) Nothing inherent in the fruit-of-the-poisonous-tree argument invoked the length of time law enforcement held the devices before they acquired an authorization to search them.

Appellee's argument would have been the same had the devices been searched one day or one year after Ms. Harborth delivered them. The length of

time is the crux of the argument, but under the specific Fourth Amendment arguments Appellee raised at trial, time was immaterial. (*See* J.A. 424 (Trial Defense Counsel argues "at the moment of seizure is when we have to judge the potential illegality").) Thus, the United States did not need to put on any evidence specifically regarding the reasonableness of the length of time between when it obtained the devices and when it searched them.

Here, the Military Judge had no opportunity to consider the reasonableness of the duration of the seizure because Appellee did not raise the issue. The issue is waived. *See Toy,* 65 M.J. at 409.

V, VI.

> ASSUMING THERE WAS A REASONABLE PROBABILITY THAT A MOTION TO SUPPRESS THE RESULTS OF THE SEIZURE AND SEARCH OF APPELLEE'S IPHONE XS WOULD HAVE BEEN MERITORIOUS, THE LOWER COURT CORRECTLY FOUND NO PREJUDICE BECAUSE APPELLEE FAILED TO MEET HIS BURDEN DUE TO THE OVERWHELMING ADMISSIBLE EVIDENCE.
>
> TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE BY NOT SEEKING SUPPRESSION OF ALL EVIDENCE DERIVED FROM THE UNLAWFUL SEIZURE OF [APPELLEE/CROSS APPELLANT'S] PROPERTY.

A. Appellee's argument that the lawful seizure of the iPhone XS could later became unlawful was a novel legal theory at the time of the court-martial. Assuming that there is a Fourth Amendment claim in the United States' retention of property, retention is reasonable where the object is evidence in an ongoing criminal investigation or court-martial.

In *Asinor v. District of Columbia*, No. 22-7129 and 22-7130, 2024 U.S. App. LEXIS 20098 (D.C. Cir. Aug. 9, 2024), the court addressed whether seizures valid at their inception were nonetheless subject to a continuing reasonableness analysis for the duration of the time the Government is in possession of the item. 2024 U.S. App. LEXIS 20098, at *21. The phones at issue were lawfully seized incident to arrest but the Government retained the phones for nearly a year despite deciding, on the same day the phone was seized, not to charge the owner. *Id*. at *4.

Ultimately, the court held that the seizures were subject to a reasonableness analysis for the duration of the Government's possession of the objects. *Id.* at *24–25. But even then, the Court explained "the Fourth Amendment prohibits only unreasonable seizures—which only modestly restricts the government's ability to continue retaining lawfully seized property. Of course it can reasonably retain contraband or evidence in an ongoing criminal investigation or trial." *Id.* at *25–26 (citing *United States v. Farrell,* 606 F.2d 1341, 1347 (D.C. Cir. 1979)). The Government could still seek warrants to search seized property, and nothing in the holding was to limit use of the seized property for "legitimate law-enforcement purposes." *Id.* at *26.

The *Asinor* concurrence detailed that the opinion created a circuit split with the First, Second, Sixth, Seventh, and Eleventh Circuits. *Id.* at *28 (J. Henderson, concurring). In "robust consensus," those circuits all held that "the Fourth Amendment does not support a claim for the government's retention of legally seized property." *Id. See Bennett v. Dutchess Cty.*, No. 19-2431, 832 Fed. Appx. 58, *60 (2d Cir. Oct. 22, 2020) (internal citation removed) ("A seizure claim based solely on the unlawful retention of property that was lawfully seized has been recognized as 'too novel a theory to warrant Fourth Amendment protection.'").

In fact, at the time of Appellee's court-martial, only one circuit supported that the government's retention of an item, rather than its initial seizure, implicated the Fourth Amendment. *Asinor,* 2024 U.S. App. LEXIS 20098 at *28 (J. Henderson, concurring) *(citing Brewster v. Beck,* 859 F. 3d,1194, (9th Cir. 2017)).[2]

B. *Mitchell* explains that the interest protected in the amount of time between seizure and a search authorization be reasonable is to ensure accused are not deprived of property of no evidentiary value.

In *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009), the court observed

> the purpose of securing a search warrant soon after a suspect is dispossessed of a closed container reasonably believed to contain contraband is to ensure its prompt return should the search reveal no such incriminating evidence, for in that event the government would be

[2] The lower court relied on *Brewster* for the proposition that "A seizure is justified under the Fourth Amendment only to the extent that the Government's justification holds force." 2023 CCA LEXIS 540 at *31 (*citing* 859 F.3d at 1196).

> obliged to return the container (unless it had some other evidentiary value). In the ordinary case, the sooner the warrant issues, the sooner the property owner's possessory rights can be restored if the search reveals nothing incriminating.

Id. at 1352.

Mitchell was not a case where the evidence was seized under the plain view doctrine, and its rationale does not extend to that evidence. In *Mitchell*, the appellant moved to suppress a computer seized without his consent. *Id.* at 1349. Because appellant told officers there was child pornography on the computer, the police had probable cause to seize it but delayed twenty-one days in seeking a warrant to search it. *Id.* at 1349, 1351.

The magistrate judge reasoned that until law enforcement examined the contents, they "cannot be certain that it actually contains child pornography, for a defendant who admit that his computer contains such images could be lying, factually mistaken, or wrong as a matter of law." *Id.* at 1351. The court found, under the circumstances, appellant's possessory interest was substantial, and there was no compelling justification for the delay. *Id.* at 1352.

Here, in contrast, the police officer who took Appellant's iPhone XS had consent, and had already seen the contraband photos on the phone. The phone had obvious evidentiary value. Had Trial Defense Counsel raised a claim about the delay of the iPhone XS search authorization, it would have failed.

C. Trial Defense Counsel are not ineffective for failing to raise novel legal issues.

Trial Defense Counsel are not ineffective for failing to see into the future. *McCoy v. State*, 387 So. 3d 261, 266 (Ala. 2023) (internal citation and quotation removed) (collecting circuit court cases). "Counsel's failure to raise a particular claim must be evaluated in light of the settled law that existed at that the time the claim allegedly should have been raised." *Id.* Both federal and state jurisdictions "have expressly held that counsel cannot be deemed ineffective for failing to raise a claim . . . that would have necessarily required counsel to advance novel arguments based on unsettled questions of the law." *Id.*

Here, Appellee's argument on the iPhone XS rests on the length of time between the lawful seizure and the search authorization. (Appellee Br. at 56–58.) He cites no military cases addressing the reasonableness of the United States' retention of property after the initial seizure.

Trial Defense Counsel, at the time of Appellee's court-martial, would have no reasonable indication that the United States' retention of the iPhone XS after its lawful seizure was a viable Fourth Amendment claim. Nor should he be faulted for failing to preserve the issue of the time between the iPhone XS's seizure and its search, as the rationale for such a claim did not apply to this seizure. *See Mitchell*, 565 F.3d at 1351.

D. If this Court finds Appellee overcame the presumption of competence, it should order a statement or Affidavit from Trial Defense Counsel.

Appellate courts must "obtain a response from trial defense counsel" when "allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence and there is no affidavit from defense counsel in the record addressing those allegations." *United States v. Melson*, 66 M.J. 346, 350–51 (C.A.A.F. 2008).

If this Court finds Appellee overcame his counsel's presumption of competence, it must "provide the [United States] an opportunity to submit a statement or affidavit from [Appellee's trial] defense counsel to rebut the allegations" before finding ineffective assistance or granting relief. *Id*. at 347.

E. Appellee's arguments about prejudice fail.

Appellee argues that suppressing his property would have also excluded witness testimony to prove its contents, but does not indicate which witnesses are covered by this broad argument. (Appellee Br. at 58.) R.C.M. 1007, testimony or statement of a party to prove content, would provide much of the testimony about the iPhone XS images at trial, regardless of whether the evidence from the forensic search of the iPhone XS was entered into evidence.

Additionally, Appellee's own statements (that he needed help and that he thought about masturbating to the images) and Ms. Harborth's and her daughter's testimony all show Appellee controlled the Vivint security system, had taken

screenshots from it, and that this was not by accident. (Appellee Br. at 59; J.A. at J.A. 484–95, 507–10, 598–608; 626–41, 685–700; 729–32.)

Likewise, Appellee errs in arguing that his statements to law enforcement "could be about anything." (Appellee Br. at 59.) But Appellee's statement, "It's bad. I need help. You should just arrest me now" was in response to the police officer's statement that depending on what was depicted in the photos, no one was in trouble yet. (J.A. 728, 1349–50.)

Conclusion

The United States respectfully requests that this Court vacate the lower court's decision and affirm the findings and sentence as adjudged.

Mary Claire Finnen Digitally signed by Mary Claire Finnen

//s//

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976
Bar no. 37314

JAMES P. WUZHU
Lieutenant Commander, JAGC,
U.S. Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7687
Bar no. 36943

//s//

IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate

//s//

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 33211

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on October 3, 2024.

Mary Claire Finnen Digitally signed by Mary Claire Finnen

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Appellate Government Counsel