**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES**,

*Appellee*,

v.

**JAELEN M. JOHNSON,**
Senior Airman (E-4),
United States Air Force,
*Appellant*.

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USCA Dkt. No. 25-0202/AF

Crim. App. Dkt. No. ACM 40537

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# BRIEF ON BEHALF OF APPELLANT

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## ISSUE PRESENTED

**Whether it was error to rely on appellant's incidental possession of two phones at the time of arrest as the basis to search the phones' contents going back more than eight months.**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).[2]

## RELEVANT AUTHORITIES

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure … against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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[1] The version of Article 66, UCMJ, as codified in the 2018 edition of United States Code and as amended by the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022), applied in this case.

[2] The current version of Article 67, UCMJ, applies to this case. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539C(a), 135 Stat. at 1699.

Military Rule of Evidence (Mil. R. Evid.) 311[3] provides in relevant part:

(a) *General Rule*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

(2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) 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.

(b) *Definition*. As used in this rule, a search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

[3] Unless otherwise stated, all references to the Military Rules of Evidence are to the version codified in the 2019 Manual for Courts-Martial.

(1) military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the Armed Forces, a federal statute applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312-317;

. . .

(c) *Exceptions*.

. . .

(3) *Good Faith Execution of a Warrant or Search Authorization*. Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by a competent civilian authority;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

(d) *Motions to Suppress and Objections*.

. . .

(4) *Challenging Probable Cause*.

(A) *Relevant Evidence*. If the defense challenges evidence seized pursuant to a search warrant or search authorization on the ground that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in subdivision (d)(4)(B).

. . .

(5) *Burden and Standard of Proof*.

(A) *In general*. When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search

> or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, that the evidence was obtained by officials who reasonable and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciate or such deterrence does not outweigh the costs to the justice system excluding the evidence.
>
> . . .
>
> (7) *Rulings*. The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.

## STATEMENT OF THE CASE

On May 2, 2023, a military judge sitting as a general court-martial convicted Senior Airman (SrA) Jaelen M. Johnson, contrary to his pleas, of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one specification of indecent recording, in violation of Article 120c, UCMJ, 10 U.S.C. § 920c. Joint Appendix (JA) at 040-041. SrA Johnson was sentenced to a reprimand, eighteen months of confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. JA at 042. The Convening Authority took no action on the findings or sentence. *Id.* On May 2, 2025, the Air Force Court affirmed the findings and sentence. JA at 034.

## STATEMENT OF FACTS

### A. It Started with Two iPhones.

On August 12, 2022, security forces at Aviano Air Base, Italy, (Aviano) received a call about a noise complaint at the temporary lodging facility (TLF). JA at 075. Upon arrival, the officers found D.F. pinning SrA Johnson down. *Id.* The officers detained SrA Johnson and questioned D.F. JA at 071, 075.

D.F. told the officers he woke up when he felt a light graze on his buttocks and a touch on his feet while he was sleeping. JA at 071, 222. D.F. kicked out and jumped onto his bed to turn the light on. *Id.* D.F. saw SrA Johnson on the ground

near the foot of his bed. *Id.* D.F. jumped on SrA Johnson and began punching him. *Id.*

Security forces arrested SrA Johnson and searched his person, where they found an iPhone 7 in his pants pocket. JA at 071, 075. During a later search of D.F.'s room, the Air Force Office of Special Investigations (AFOSI) found an iPhone 13 Max which did not belong to D.F. JA at 157.

### B. AFOSI Initially Believed Probable Cause Existed for Geolocation Data Only.

On the day SrA Johnson was arrested, Special Agent A.P., an AFOSI investigator, sought the first authorization in this case. JA at 158. The authorization requested, among other items, to seize and search SrA Johnson's iPhone for "all location data." JA at 088. Special Agent A.P. requested location data for the phone to place SrA Johnson "at the scene of the incident and the specific time it occurred." JA at 158. In his testimony, Special Agent A.P. explained that Cellebrite, a forensic software used by AFOSI to analyze cellphones, could isolate location data. JA at 175. According to him, if no location data existed, nothing would be displayed on the software. JA at 176. Special Agent A.P. did not believe there was probable cause to search for any information other than geolocation data. JA at 166-167.

Acting on the search authorization was Colonel (Col) J.F. JA at 138. It was his first search authorization. *Id.* Col J.F. was trained on conducting search

authorizations by the servicing Staff Judge Advocate office as part of his "new commanders" training, which consisted of a PowerPoint presentation. JA at 133-134. Col J.F. granted the authorization. JA at 088.

### C. AFOSI Expanded Search to Media and Messages Dating Back More Than Eight Months.

Because D.F. was an AFOSI agent at Aviano, AFOSI Internal Affairs took over the investigation. JA at 181. Accordingly, Special Agent J.A. became the lead investigator. JA at 170.

On August 31, 2022, Special Agent J.A. requested an expanded search authorization for both the iPhone 7 and iPhone 13 Max. JA at 181. Special Agent J.A. requested authorization to search the phones' contents from August 12, 2022, the date SrA Johnson was arrested, to December 29, 2021. But before Special Agent J.A. even requested the expanded authorization, the iPhone 13 Max was sent for digital analysis and extracted, despite no authorization to do so. JA at 095.

Special Agent J.A. requested to search the contents of both phones because SrA Johnson brought the phones with him to D.F.'s room, but left a gym bag and other items in his car. JA at 184. In his sworn affidavit, Special Agent J.A. said the presence of the phones indicate they were being utilized during the commission of sexual assault, assault, and burglary. JA at 091. It is unclear what evidence Special Agent J.A. believed would be on the phones. The affidavit also explained no reason for the expansive date range for the authorization.

Later, explaining the expansive date range when the resulting search was challenged at trial, Special Agent J.A. focused on an incident that apparently happened at Incirlik Air Base, Turkey (Incirlik), more than eight months before SrA Johnson's arrest at Aviano. JA at 189. That purported incident involved an allegation that a tall Black male, dressed in black clothes and a black mask, was seen in a dormitory room. JA at 186. The Government provided no information explaining what height was considered "tall."

SrA Johnson was stationed at Incirlik during the time of the report Special Agent J.A. relied on. JA at 186. However, the Incirlik report never identified SrA Johnson as the suspect, nor was there any other information connecting SrA Johnson to the alleged incident. JA at 149. Further, this allegation did not involve the presence or use of a cellphone. JA at 192. The Government never provided a copy of this report to include in the record.

Special Agent J.A. concluded SrA Johnson matched the physical description of the Incirlik report. JA at 187. The Government presented no information establishing SrA Johnson's height. Despite this, Special Agent J.A. concluded SrA Johnson may have been the individual reported in the December 2021 Incirlik report.

Based on this information, Special Agent J.A. met with Col J.F. and requested a second, expanded authorization to search all media, call logs, and

messages for both the iPhone 7 and iPhone 13 Max. JA at 96. Special Agent J.A. requested the date range for the authorization span more than eight months before the iPhones were seized. *Id.*

There was a disconnect between Special Agent J.A.'s basis for requesting the second authorization and Col J.F.'s basis for granting it. Special Agent J.A.'s affidavit supporting the second authorization did not contain any information about the Incirlik incident. JA at 90-91. The affidavit also included no basis or reason for the expanded date range. *Id.* Instead, Special Agent J.A. said he verbally told Col J.F. about the Incirlik incidents before the authorization was granted.

However, what Col J.F. knew about the Incirlik incident is unclear. Col J.F. could not remember whether he was told about the Incirlik incident before or after the second authorization. JA at 145. At one point Col J.F. said that the "OSI agent" told him SrA Johnson was involved in the Incirlik incident, when he otherwise testified he was never told that SrA Johnson was or was not implicated. JA at 138, 145-146, 150. In the end, Col J.F. disclaimed any reliance on the Incirlik incident as the basis for granting the second search authorization. JA at 139-140. Instead, he apparently based his probable cause decision solely on the fact that SrA Johnson possessed multiple phones. JA at 140. Col J.F. never explained why he believed there was probable cause dating back to December 29, 2021.

### D. Fruits of the Second Search Authorization.

During the search that followed Col J.F.'s second granted authorization, AFOSI found a significant number of pictures and videos of feet. JA at 207. No geolocation data was found. *Id.* Additionally, AFOSI found videos which appeared to have been taken of a male showering at the Aviano fitness center locker room on August 10, 2022. JA at 103.

AFOSI presented this information to Col J.F. to obtain a third search authorization to search both phones' contents without a specified date range.

AFOSI also continued to investigate the locker room videos and eventually identified Z.P. as the individual showering in the videos. JA at 254. This discovery led to the additional charge of unlawful recording. JA at 252.

At trial, the Government sought to introduce pictures and videos of feet obtained from the search of SrA Johnson's iPhone pursuant to Mil. R. Evid. 404(b). JA at 255-256. The military judge permitted this evidence to be introduced, over the defense's objection, to show SrA Johnson's motive and intent to commit the offenses alleged in Charges II and III. JA at 266.

### E. The Military Judge Denied the Defense Motion to Suppress.

At trial, the defense moved to suppress all evidence obtained from the two iPhones because probable cause did not exist to support either the second or third authorization. JA at 046.

The military judge ruled probable cause existed for all three search authorizations. JA at 251. But the military judge conceded the second search authorization was a "closer call." JA at 245. Further, the military judge ruled that, even if there was not probable cause for the second and third authorizations, the good faith exception applied. JA at 246.

In analyzing the second authorization, the military judge stated, "Col [J.F.] relied on all of the information presented to him." JA at 246. Omitted from the military judge's analysis was Col J.F.'s testimony narrowing his basis for granting the request to "there being multiple phones," and disclaiming reliance on any other information. JA at 140.

The military judge ruled a sufficient nexus existed between SrA Johnson's crimes and the iPhones to be searched because of the facts regarding SrA Johnson's "car, its contents, and [his] decision to take two phones with him into [D.F.'s] TLF room." JA at 245. The military judge also relied on the fact that "a JAG concurred on [Special Agent J.A.'s] probable cause determination. *Id.* The "JAG" referenced by the military judge, Captain (Capt) E.M., admitted there was no reason to believe that a phone was used in the commission of any offense allegedly committed by SrA Johnson. JA at 228.

The military judge did not provide an analysis on whether there was probable cause for the second authorization's expansive date range. The military

judge did not provide an analysis of whether the Incirlik information was sufficient to establish probable cause or whether the Incirlik information established a *nexus* to SrA Johnson's iPhones. JA at 226.

Regarding good faith, the military judge concluded there was no evidence that AFOSI intentionally or recklessly provided false information to Col J.F. JA at 246. The military judge omitted Col J.F.'s testimony that an "OSI agent" told him SrA Johnson was involved in the Incirlik incident, even though Special Agent J.A. knew SrA Johnson was not implicated in the report. The military judge did not reference or analyze the multiple inconsistencies from Col J.F.'s testimony. Further, the military judge asserted the "errors, and omissions" from the affidavits "were more form over substance." JA at 247.

Lastly, the military judge believed the exclusionary rule should not be applied because "it is hard to find any fault in the investigators' or Col [J.F.'s] approaches or decisions in this case." JA at 248. The military judge also relied on the fact that the evidence found on SrA Johnson's iPhones was "actually right." *Id.*

**F. The Air Force Court Ruled the Good Faith Exception Applied.**

The Air Force Court only addressed the good faith exception. JA at 012-013. The Air Force Court summarized SrA Johnson's argument regarding good faith as "insinuating that the magistrate was only permitted to rely upon information contained in the affidavit and not any previously incorporated sworn oral testimony

provided . . . .” JA at 013. The Air Force Court agreed information regarding Incirlik was omitted from the second authorization’s affidavit, but did not believe this omission was “fatal” because it was provided orally, while the agent was under oath, was evaluated by an attorney who agreed that probable cause existed, and a written affidavit is not required. JA at *Id.*

The Air Force Court found Col J.F. received information the Incirlik information and there was nothing before the military judge to conclude he was misled by AFOSI and that there was no basis to find AFOSI provided false information or acted in reckless disregard in providing information. JA at 014. As a result, the Air Force Court found the good faith exception applied, even if there was not a sufficient nexus for probable cause. JA at 015.

Like the military judge, the Air Force Court omitted Col J.F.’s testimony that he may not have been provided the information regarding Incirlik before granting the second authorization. The Air Force Court also omitted Col J.F.’s testimony that he did not consider the Incirlik information when granting the second authorization, as well as Capt E.M.’s testimony that, despite his ratification of a finding of probable cause, there was no reason to believe the phones were used in the commission of any offense. JA at 013.

## SUMMARY OF ARGUMENT

This Court should reverse the decision of the Air Force Court. The incidental possession of two iPhones at the time of arrest is insufficient to establish probable cause to search the contents of the iPhones as permitted by the second and third authorizations. Both the military judge and the AFCCA erred by holding the good faith exception applied to the search.

While an authorizing official's probable cause determination may be afforded deference in some circumstances, this case highlights the limitations of that deference. There was no evidence presented that SrA Johnson used either iPhone during the commission of any crime, at any place, at any time. Yet, Col J.F. operated under an idiosyncratic definition of probable cause, where the only two questions are: (1) Do we think you committed a crime? and (2) Did you have a phone with you? This plainly fails to comport with how "pervasive" and "insistent" the possession of cellphones is in modern society, as recognized by the Supreme Court in *Riley v. California*, 573 U.S. 373, 385 (2014) (holding that the ubiquity of cellphone usage means that incidental possession a phone during an arrest is insufficient to allow law enforcement to search the phone without probable cause).

Beyond Col JF.'s oversimplified version of probable cause, the expansive date range going back more than eight months before SrA Johnson's arrest was

even more unjustified. Col J.F. could not recall whether he even knew about the Incirlik incidents at the time he approved the request. Even if he had considered it, there was nothing more than bare speculation that SrA Johnson was the alleged perpetrator in the Incirlik incident and there was no evidence that the Incirlik perpetrator even used or possessed a cellphone of any kind, an iPhone, or either of the two iPhones found at Aviano. There was no justifiable basis to permit law enforcement to rummage through SrA Johnson's iPhones for contents dating back more than eight months before his arrest.

The exclusionary rule should have applied to all evidence derived from the unlawful searches. AFOSI either knowingly or recklessly misled Col J.F. to grant the second authorization and Col J.F. abdicated his role as a magistrate in this case. There was no good faith, and the evidence should have been excluded. Without this evidence, SrA Johnson's conviction for unlawful recording would not be supported by any evidence, and the evidence introduced under Mil. R. Evid. 404(b) to support his conviction for assault consummated by a battery would not have been introduced.

The search authority, his legal advisor, and the military judge failed to hold law enforcement accountable for their unreasonable overreach and disregard for the Constitution's protections. This Court should now do so to firmly set the standards for cellphone searches in future cases.

## ARGUMENT

**It was error to rely on SrA Johnson's incidental possession of two phones at the time of his arrest as the basis to search the phones' contents going back more than eight months.**

### A. Standard of review.

This Court reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Shields*, 83 M.J. 226, 230 (C.A.A.F. 2023). An abuse of discretion occurs when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)). This Court has held an abuse of discretion also occurs when a military judge "fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013)).

When reviewing a search authority's issuance of a search authorization, this Court reviews whether the search authority "had a substantial basis for concluding that probable cause existed." *United States v. Rogers*, 67 M.J. 162, 164-165 (C.A.A.F. 2009). A substantial basis exists "when, based on the totality of the

circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found in the identified location." *Id.* at 165 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). Such a basis must be grounded in information presented to the magistrate, rather than a "mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239.

### B. The military judge abused his discretion by denying the defense motion to suppress evidence from SrA Johnson's iPhones.

Of the four ways the military judge might have abused his discretion, he nearly hit for the cycle. Though he understood the law, (1) the military judge's finding of probable cause to search for content beyond location data is outside the range of choices reasonably arising from the applicable facts and law, (2) the military judge's finding of probable cause for the expansive date range is outside the range of choices reasonably arising from the applicable facts and law, and (3) the military judge made multiple erroneous findings of fact and failed to consider other important facts.

#### 1. The military judge misapprehended the applicable law to find probable cause to search the iPhones' contents beyond location data.

There was no probable cause to search the contents of SrA Johnson's iPhones beyond location data because there was no evidence that SrA Johnson used his phones during any alleged offense. The military judge's decision to uphold a search for content beyond location data was an abuse of discretion.

The Fourth Amendment protects against unreasonable searches and seizures by requiring that such searches and seizures be supported by probable cause. U.S. CONST. amend. IV. In *Gates*, the Supreme Court held that the issuing magistrate must "make a practical, common-sense decision" given the totality of the circumstances whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. 213, 238 (1983). Mil. R. Evid. 315(f)(2) defines probable cause as "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched."

In this case, the Government presented no articulable facts showing the use of any phones during either the incident at Aviano or the vague report at Incirlik. Instead, Col J.F. and the military judge incorrectly concluded the presence of two iPhones at the time of arrest established probable cause to search the contents of said iPhones. JA at 140. Such a conclusion misses how pervasive and ever-present cellphones are in modern society and the substantial intrusion on privacy arising from cellphone searches. *Riley*, 573 U.S. at 394-97. And such a conclusion has been rejected by both this Court in *Nieto* and numerous Circuit Courts of Appeals.

In *United States v. Nieto*, the Government received a search authorization to examine the accused's laptop after he was discovered using his cellphone to record others in the latrine. 76 M.J. 101, 106 (C.A.A.F. 2017). The investigator informed the magistrate that it was common practice for individuals to take photos on their

cellphones and backup the data on their laptops. *Id.* at 104. This Court rejected the generalized profile relied on to grant the search authorization and held that probable cause required articulable facts showing a nexus between (a) the alleged crime and (b) the item to be searched. *Id.* at 106.

Like the allegation of unlawful recording and the laptop in *Nieto*, there was no nexus between (a) the allegations of sexual assault, assault consummated by a battery, and burglary and (b) SrA Johnson's iPhones. The attempts to create a nexus by asserting SrA Johnson must have "sanitized" himself by leaving other items in his vehicle is a speculative conclusion. JA at 184. Unlike the investigator in *Nieto* who attempted to relay personal knowledge and experience regarding download practices, Special Agent J.A. presented no evidence showing SrA Johnson used his iPhones during any alleged offense. *Nieto*, 76 M.J. at 105. Instead, he merely listed how a phone *could* have been used or what evidence *may* be on the device, plainly saying "[w]hatever that was." JA at 187-188.

SrA Johnson made no admissions to using the iPhones. D.F. did not witness SrA Johnson using the iPhones. D.F. did not see a phone's light. D.F. did not hear the sound of a phone. D.F. did not hear SrA Johnson speaking on the phone. D.F. did not hear SrA Johnson texting on a phone. There was no connection between the phones and the alleged offenses.

All Special Agent J.A. and Col J.F. ultimately did was engage in guesswork: if SrA Johnson brought multiple phones with him to commit a sexual assault and burglary, he must have used the phones in a criminal manner, and they should be permitted to search any aspect of the phone to find out *how*. Col J.F.'s colloquy with the military judge highlights how speculative this search authorization was:

> And then you also testified that the phones – you granted search authorization because – I have it here that you said could have possibly been used during the crime. What did you – how did you think the phones might have been used?
>
> The fact that there was more than one phone led me to believe that those phones had a – there was a purpose for those phones beyond simply a communication device.
>
> Okay and again at the time, what did you believe? Did you have any idea how the phones could have been used? Because you're saying that they could have been used for something other than just basically picking it up and making a phone call.
>
> Right. Possibly pictures, possibly video, possibly recordings.
>
> What led you to believe that the phones may have been used to take pictures or videos?
>
> …
>
> [j]ust the fact that there were more than one phone led me to believe that those phones had a purpose beyond just ordinary course of business that we all carry a phone around. There was more than one of Airman Johnson's phone located at the crime scene, which gave me – that there was probable cause that they were involved in the crime itself.
>
> JA at 144-145.

This is precisely what both this Court and the Army Court of Criminal Appeals have disavowed. *See United States v. Hoffman*, 75 M.J. 120, 127 (C.A.A.F. 2016); *United States v. Morales*, 77 M.J. 567, 574 (A. Ct. Crim. App. 2017).

The soundness of *Nieto* is reinforced by numerous Circuit Courts of Appeals rulings. *Morales*, 77 M.J. at 574 ("it would be an inferential fallacy to assume without evidence that someone committing a sexual assault would also photograph evidence of the crime on their phone."); *Burns v. United States*, 235 A.3d 758, 777 (D.C. 2020) (adopting *Morales* to reject a finding of probable cause where the Government presented no facts tending to establishing a nexus between an alleged assault and data that might be recovered from the accused's cellphone); *United States v. Mora*, 989 F.3d 794, 802 (10th Cir. 2021) ("the government's bare speculation that Defendant may have kept a cell phone in his home, which he could have used in alien smuggling, does not justify the search of his home."); *United States v. Lewis*, 81 F.3d 640 (6th Cir. 2023) (rejecting probable cause to search cellphone based on "conclusory" affidavit containing "vague and insubstantial" assertion that defendant used it to view contraband images); *United States v. Ramirez*, 180 F. Supp. 3d 491, 494 (W.D. Ky. 2016) (no probable cause where defendant possessed cellphone when arrested and affidavit merely speculated that "individuals may keep text messages or other electronic information stored in their

cell phones which may relate them to the crime" but presented no evidence that phones were actually used in crime); *United States v. Palomino-Coronado*, 805 F.3d 127, 133 (4th Cir. 2015) ("the mere presence of a cell phone is not evidence of purpose."). Most notable among those—and most on-point for the case at bar—is *Griffith*.

In *United States v. Griffith*, investigators executed a warrant to search the defendant's home which included authorization to analyze any cellphones recovered during the search. 867 F.3d 1265, 1271 (D.C. Cir. 2017). The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) observed that "police needed reason to think not only that [the defendant] possessed a phone, but also that the device . . . would contain incriminating evidence about [the] suspected offense." *Id.* at 1273. However, "[t]here was no observation of Griffith's using a cell phone, no information about anyone having received a cell phone call or text message from him, no record of officers recovering any cell phone in his possession at the time of his previous arrest (and confinement) on unrelated charges, and no indication otherwise of his ownership of a cell phone at any time ." *Id.* at 1272. Accordingly, the D.C. Circuit rendered the warrant invalid, stating "[f]inding the existence of probable cause in this case, therefore, would verge on authorizing a search … almost anytime there is probable cause to suspect her of a crime." *Id.* at 1275.

The cautionary warning from the D.C. Circuit came to fruition in this case. *Id.* Col J.F. authorized a search of SrA Johnson's iPhones simply because two iPhones were present. JA at 144. There was no evidence that the iPhones were used in any offense or that any evidence of a crime would be found on the iPhones. The first AFOSI agent who sought a search authorization testified he did not believe there was probable cause to search for content beyond location data. JA at 166-167. The advising Judge Advocate testified there was no reason to believe any evidence of criminal activity was on the phone. JA at 228. The nexus in this case is scarcer than the one this Court rejected in *Nieto* and the military judge should have suppressed the evidence obtained from the second authorization. Col J.F. did not have a substantial basis for concluding probable cause existed to search for any content beyond location data. *Nieto*, 76 M.J. at 108.

**2. The military judge misapprehended the applicable law to find probable cause for the second authorization's expansive date range.**

Beyond the fact that possession of two iPhones was insufficient to justify a search of the iPhones' contents beyond location data, there was no probable cause to expand the date range for that search more than eight months before SrA Johnson's arrest.

The military judge glossed over the issue of the second authorization's date range by stating that Special Agent J.A. learned about the Incirlik information and that "it was clear that [Col J.F.] had been briefed on it." J.A. at 247. The military

judge failed to provide any analysis regarding whether SrA Johnson was sufficiently linked to the Incirlik information or whether the contents of his iPhones were. The military judge plainly failed to review whether the expansive date range was justified. It was not.

The Government failed to sufficiently tie SrA Johnson to the Incirlik incident to justify the second authorization's date range. The Government failed to tie SrA Johnson's iPhones to the Incirlik incident at all. Col J.F. did not rely on the Incirlik incident when he granted the second authorization and lacked a substantial basis to authorize the expansive date range.

**a. Relying on physical description was inadequate to find probable cause.**

There was no evidence that SrA Johnson was involved in the Incirlik incidents. While SrA Johnson was previously stationed at Incirlik, the Government failed to show he was physically present at Incirlik on December 29, 2021. This fact should have been a minimum requirement for probable cause to extend the second authorization to December 29, 2021. JA at 149.

Though missing the foundational fact that SrA Johnson was even at Incirlik on December 29, 2021, the Government strained to tie SrA Johnson to that earlier incident based on an unremarkable physical description. The Incirlik perpetrator was never identified, leaving only a vague sketch of a person: a tall Black man wearing black clothing and a black mask. How tall? We don't know. The same

height as SrA Johnson? We don't know. The Government failed to provide any details such as skin complexion, eye color, or hair color. Further, the Government's search in this case occurred more than eight months after the Incirlik perpetrator was seen in a location more than 1,600 miles from SrA Johnson's arrest.

This overbroad category, which would subject a large category of servicemembers to search, is insufficient to establish even a reasonable suspicion that it was SrA Johnson, let alone probable cause. *See Reid v. Georgia*, 448 U.S. 438, 441 (1980) (concluding law enforcement could not have reasonably suspected petitioner of criminal activity based on physical observations which described a large category of innocent travelers.)

In fact, even more detailed physical descriptions with closer temporal and geographic proximities have failed to meet probable cause, or even reasonable suspicion. *See United States v. Jones*, 619 F.2d 494, 497 (5th Cir. 1980) (finding that description of the perpetrator as "black male, 5 feet 6 inches to 5 feet 9 inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket" insufficient to create reasonable suspicion that the accused was the perpetrator); *United States v. Brown*, 448 F.3d 239, 247-48 (3d Cir. 2006) (holding that description of "African-American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running

south on 22nd Street, where one male was 5'8" and other was 6'" too general to create reasonable suspicion of the accused); *United States v. Rias*, 524 F.2d 118, 119-21 (5th Cir. 1975) (finding that suspects fitting description of "two black males in a black or blue Chevrolet" did not provide reasonable suspicion); *cf. United States v. Soza*, 686 Fed. Appx. 564, 567 (11th Cir. 2017) (holding that close proximity of the accused near a burglary site while matching the description of "Spanish male in his forties wearing a grey shirt and baseball cap" insufficient to give probable cause to arrest).

**b. There was no connection between SrA Johnson's iPhones and the Incirlik incident.**

Like *Griffith*, the Government presented no evidence that SrA Johnson even owned his iPhones on December 29, 2021. *Griffith*, 867 F.3d at 1271. This should have been a minimum requirement for Col J.F. to grant the authorization and for the military judge to deny the defense motion to suppress at trial. Further, there was no evidence that any phone, let alone SrA Johnson's iPhones, were present during the Incirlik incident. JA at 195.

The lack of nexus between the Incirlik incident and SrA Johnson's iPhones is parallel to the unlawful search in *Nieto*. Just as the Government in *Nieto* failed to establish a connection between the unlawful cellphone recording and the accused's laptop, the Government here failed to provide any connection between the Incirlik

incident – which made no mention of *any* cellphone – and SrA Johnson's iPhones. *Nieto*, 76 M.J. at 106.

**c. Col J.F. did not rely on the Incirlik incident.**

Beyond the insufficient nexus between the Incirlik incident and SrA Johnson's iPhones, Col J.F. lacked a substantial basis to grant the second authorization because he did not rely on the Incirlik incident to grant the authorization.

First, it is unclear whether Col J.F. even knew about the Incirlik incident when he granted the second search authorization. Like *Morales*, the affidavit accompanying the search authorization did not include any information related to Incirlik. 77 M.J. at 571; JA at 90-91. The military judge and the Air Force Court erroneously dismissed this significant omission because of the assertion that Col J.F. was verbally provided the information.

These conclusions are clearly erroneous. The Incirlik information is the only justification given for the second authorization's expanded date range. This information was necessary for a finding of probable cause. Its omission from the search authorization's affidavit should have resulted in a finding that probable cause did not exist. *See United States v. Hernandez*, 81 M.J. 432, 438 (C.A.A.F 2021) (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)) ("If an important fact is omitted from the affidavit, for a court to find that probable cause

did not exist, that fact 'must do more than potentially affect the probable cause determination: it must be 'necessary to the finding of probable cause.'")

Second, Col J.F.'s testimony contained repeated contradictions and confusing statements that cast doubt on what he was told. Col J.F. initially asserted he was never told whether the Incirlik allegations implicated SrA Johnson or not. JA at 138. Then he testified he was told by the "OSI agent" that the Incirlik incident involved SrA Johnson. JA at 145-146. Later, he testified no one implicated SrA Johnson in the Incirlik events. JA at 50. He went on to say that he could not even recall whether the Incirlik information was presented before or after the second search authorization. JA at 145. He ultimately testified he did not consider the events at Incirlik when he granted the second search authorization. JA at 139-140.

The review of Col J.F.'s probable cause determination must be grounded in the information presented to him. *Gates*, 462 U.S. at 239. Both the military judge and the Air Force Court presumed the Incirlik information was presented to and justified Col J.F.'s determination, despite its absence from the affidavit and his testimony to the contrary. Col J.F. did not rely on the Incirlik information. It is inconceivable how Col J.F. could have granted the second search authorization's date range when he either did not know about the Incirlik incident or did not consider it. He simply relied on the fact that two phones were present when

SrA Johnson was arrested on August 12, 2022. Affirming his probable cause determination and permitting the search of contents over an eight-month period before his arrest was clearly unreasonable.

**3. The military judge made erroneous findings of fact and failed to consider other important facts.**

The military judge affirmed Col J.F.'s probable cause determination based on erroneous accounts of Col J.F.'s testimony, and significant omissions from Col J.F.'s testimony, which should have resulted in a finding that Col J.F. did not have a substantial basis to find probable cause.

First, the military judge relied on facts regarding the contents of SrA Johnson's vehicle to find probable cause. JA at 245. The military judge plainly said "[t]ake away the facts about the Accused's car, its contents … the court might have applied Nieto and Morales and invalidated Col [J.F.'s] probable cause determination." *Id.* However, the military judge failed to consider Col J.F.'s testimony that he did not consider these additional facts when granting the second authorization. JA at 140. The military judge provided no analysis of Col J.F.'s testimony about what he personally based his probable cause determination on.

Second, the military judge omitted Col J.F.'s testimony that he could not remember if he was told about the Incirlik incident before granting the second authorization, or after. JA at 145. The military judge instead said it was clear Col J.F. had been briefed on this information. JA at 244. This statement not only

omits Col J.F.'s testimony but it also misrepresents how Col J.F.'s testimony developed through cross-examination and questioning by the military judge. If Col J.F. had not been informed of the Incirlik information, there could be no justification for the second authorization's date range. The military judge would also have been limited in what information he was permitted to consider when reviewing Col J.F.'s determination. *See Gates*, 462 U.S. at 238-239. Like the military judge in *Solomon*, the military judge in the instant case failed to grapple with Col J.F.'s important testimony which cast doubt on what information he knew and relied on to grant the second authorization. *Solomon*, 72 M.J. at 181.

Third, the military judge failed to properly consider Capt E.M.'s testimony that "there was no reason to believe a phone was used in the commission of any offense allegedly committed by" SrA Johnson. JA at 228. The military judge merely stated this critical fact was "interesting." JA at 228. This fact is more than "interesting." Both the military judge and the Air Force Court relied on the fact that Col J.F. consulted Capt E.M. to grant the second authorization. JA at 013, 245. The fact that the attorney advising on the authorization – when placed under oath and testified – said there was no reason to believe the iPhones were used in any offense is a significant fact because it impacts this Court's analysis as to the good faith exception and the deference the military judge gave to Col J.F.'s initial

probable cause determination. *United States v. Blackburn*, 80 M.J. 205, 212 (C.A.A.F. 2020); JA at 245.

These erroneous findings of fact and omissions constitute an abuse of discretion because they show the military judge either misinterpreted or wholly avoided important information which undermined the probable cause determination he affirmed in this case. Each of these three items should have been more thoroughly reviewed by the military judge to determine the impact they have on the review of the second authorization.

### C. The exclusionary rule should have been applied.

The exclusionary rule is a judicially created remedy for violations of the Fourth Amendment. *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (citing *Weeks v. United States*, 232 U.S. 383 (1914)). The rule applies to evidence directly obtained through violation of the Fourth Amendment as well as evidence that is the indirect product or "fruit" of unlawful police activity. *Id.* at 103 (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). The exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the "benefits of deterrence . . . outweigh the costs." *Herring v. United States*, 555 U.S. 135, 141 (2009).

The exclusionary rule should apply in this case. Both the appreciable deterrence test and the balancing test weigh in favor of exclusion.

Among the essential factors for applying these tests are "the costs to society and the benefits of deterrence that could flow from excluding the evidence." *United States v. Lattin*, 83 M.J. 192, 199 (C.A.A.F. 2023). While the Government's inability to prosecute the offenses against SrA Johnson may be one cost against society, the benefit of deterrence is essential. This is because the ubiquitous nature of cellphone usage in the present day calls for more exacting standards that can only be meaningful if the Government is held to account.

Cellphones present several interrelated privacy consequences because of their pervasive nature and ability to create a "digital record of nearly every aspect of [a person's life]." *Riley*, 573 U.S. at 375. This coupled with the reality that "carrying [a cell phone] is indispensable to participation in modern society" demonstrates the grave concern should the Government be allowed to rely on conclusory and generalized profiles to seek authorization to search. *Carpenter v. United States*, 585 U.S. 296, 298 (2018). This formed the basis of this Court's decision in *Nieto* to summarily apply the exclusionary rule without discussion of the balancing test. 76 M.J. at 108.

To hold otherwise here would permit the very thing that the Supreme Court ruled against in *Riley*: a law enforcement search of a cellphone—two in this case—merely because of its incidental presence during arrest. 573 U.S. at 402.

Deterrence is therefore essential so that the Government can fully appreciate the privacy interests at stake and to prevent future violations.

The necessity of deterrence also applies to the three players whose slipshod approach to probable cause resulted in the searches at issue: Special Agent J.A., Capt E.M., and Col J.F. Each of these individuals were central to the violation of SrA Johnson's Fourth Amendment rights. These three individuals should be forced to recognize the need for greater due diligence, proper scrutiny, and consequences of logical leaps without a sufficient foundation in fact.

The military judge's assessment of deterrence was also clearly unreasonable, as he said, "this case does not show unlawful or unreasonable overreach on the part of the [OSI], or Col [J.F.]." *Lattin*, 83 M.J. at 199; JA at 250. The decision to expand the second authorization more than eight months prior to SrA Johnson's arrest was a substantial overreach. The attempt to justify it by tying it to the Incirlik incident – and then Special Agent J.A.'s failure to include it in his affidavit and Col J.F.'s disclaimer that he did not base his decision on it – was plainly unreasonable.

Further, to come to his conclusion, the military judge again omitted key information which, in this instance, showed improper police practices. Though not cited by Col J.F. as a basis for his decision to grant the second search, an "OSI agent" told him at some point that the unfounded assertion that SrA Johnson was

involved in the Incirlik incident. JA at 145-146. This exemplifies the type of deliberate, wrongful police practice in which the deterrent value of exclusion "tends to outweigh the resulting costs." *Davis v. United States*, 564 U.S. 229, 238 (2011).

Further, the "principal cost" of applying the exclusionary rule would not materialize in this case. *See Herring*, 555 U.S. at 141. The military judge provided minimal analysis on this point, simply concluding the allegation of unlawful recording "represents a serious charge the nature of which is deeply concerning." JA at 248. This conclusory remark ignored the fact that SrA Johnson's conviction for the principal offense, which initiated the entire investigation, and trial on that allegation would be unaffected. SrA Johnson would have remained convicted of unlawfully entering D.F.'s room and would have been appropriately punished for his actions. The exclusion of unconstitutionally obtained evidence would not have let this "guilty and possibly dangerous defendant[] go free." *Herring*, 555 U.S. at 141.

While this is a cost to SSgt Z.P. as he would no longer be reflected in the result of SrA Johnson's trial, this cost is outweighed by the benefit of holding the military justice system accountable. In the decade since *Riley*, cellphones have remained just as, if not more, complex and present than the Supreme Court

recognized. The need to prevent unreasonable searches into these devices is substantial and warrants the exclusionary rule in this case.

**D. The good faith exception does not apply.**

The good faith exception does not prevent the exclusionary rule from applying in this case. The good faith exception does not apply in instances such as this when law enforcement is either knowingly or recklessly misrepresenting information to a magistrate to obtain approval for their request. *Franks v. Delaware*, 438 U.S. 154 (1978).

The good faith exception may be applied to the exclusionary rule, but only if the Government meets its burden to demonstrate the following three conditions are met: (1) the authorization was issued by "an individual competent to issue the authorization;" (2) the search authority had "a substantial basis for determining the existence of probable cause;" and, (3) the individuals executing the authorization "with good faith relied on the authorization . . ." Mil. R. Evid. 311(c)(3). The second prong requires the affidavit "not be intentionally or recklessly false, and it must be more than a 'bare bones' recital of conclusions." *United States v. Carter*, 54 M.J. 414, 421 (C.A.A.F. 2001) (citing *United States v. Leon*, 468 U.S. 897 (1984)).

The "good faith" exception is unavailable when *any* of the following four circumstances are present: (1) the affidavit was "so lacking in indicia of probable

cause as to render official belief in its existence entirely unreasonable;" (2) the magistrate acted as a "rubber stamp" and thus, abandoned his judicial role; (3) the authorizing official was given incorrect information that was either known to be "false or would have [been] known [to be] false except for . . . reckless disregard of the truth;" or (4) the warrant was facially deficient. *Leon*, 468 U.S. at 914, 923-24 (internal quotation marks omitted) (citations omitted).

In this case, the first three circumstances proscribed in *Leon* are present. Accordingly, the good faith exception may not be applied.

**1. The second authorization's affidavit was too deficient to justify the good-faith exception.**

The affidavit supporting the second authorization lacked any justification for searching the phones' contents beyond August 12, 2022. The military judge erroneously viewed the omission of the Incirlik information from the affidavit as "more form over substance." JA at 250. It was not. The Incirlik information was the only justification for expanding the second authorization's date range.

Special Agent J.B. carried out the search based on the written search authorization and affidavit. He was not present for the in-person conversation which may have discussed the Incirlik incident. However, like *Morales*, the affidavit contained no factual predicate to establish the date range for the second search authorization. *Morales*, 77 M.J. at 577. The affidavit was entirely lacking in justification for the date range and there was no nexus to search for any content

because the affidavit contained no evidence that the phones were used. It was unreasonable for Special Agent J.B. to have carried out the search based on the affidavit provided.

**2. Col J.F. acted as a rubber-stamp for law enforcement.**

In this case, Col J.F. abdicated his duty to remain neutral and detached, and became an arm of law enforcement by granting the second authorization's expansive date range without any meaningful basis. *United States v. Barnes*, 895 F.3d 1194, 1202 (9th Cir. 2018). Based on Special Agent J.A.'s affidavit and Col J.F.'s testimony, Col J.F. could not have acted as other than a rubber stamp by granting the second authorization. *United States v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996).

The affidavit in this case failed to include any explanation or justification for the second authorization's expansive date range. This falls far below even a 'bare bones' standard. *cf. Carter*, 54 M.J. at 422 (finding the affidavit went far beyond a "bare bones" affidavit because the affidavit was detailed and balanced, identified the sources of information, and identified conflicts and gaps in the evidence). Special Agent J.A. failed to include *any* information explaining the date range in his affidavit. This fails to provide even a scintilla of evidence, let alone being 'bare bones.'

Further, Col J.F.'s actions are a stark contrast from the search authorities this Court has upheld in the past. Throughout this testimony, Col J.F. repeatedly contradicted himself and had difficulty expressing his decisions and actions. When the defense attempted to clarify his testimony and plainly asked what he was told, Col J.F. replied, "I was told exactly what I just stated." JA at 138. When the defense confronted his claims, he admitted "I made a mistake." JA at 139. Lastly, Col J.F.'s testimony that he did not consider the Incirlik information when he granted the second authorization plainly shows he did not perform his duties because there could be no basis for the expanded date range without the Incirlik information and his sworn testimony. JA at 140.

Col J.F. did not take steps to ensure he received all relevant information. *cf. United States v. Leedy*, 65 M.J. 208, 218 (C.A.A.F. 2007) (the magistrate closely read the affidavit, questioned the investigator for more than twenty minutes, and raised concerns over the reliability of a witness and evidentiary concerns he had). He did not question the information that was being presented to him – to include asking whether SrA Johnson was mentioned in the Incirlik incident or even asking where the incident occurred. JA at 138. Despite his assertions about due diligence, Col J.F. failed to even ensure the affidavit was dated correctly. JA at 136-137. Col J.F. also failed to require law enforcement to establish how the iPhones were

allegedly used on August 12, 2022, or what evidence would be found on them. Instead, he joined law enforcement in simply speaking in possibilities. JA at 144.

Considering Col J.F.'s testimony that this information may not have even been provided until after he granted the second authorization – a fact the Government cannot prove due to the deficient affidavit – Special Agent J.A. should not have believed Col J.F. had a substantial basis to grant the second authorization. JA at 145. A federal investigator acting in good faith should have known a true magistrate would not grant the second authorization without requesting the affidavit address the date range, without explanation of what evidence specifically was believed to be on the phone, or any explanation of how the phones related to the alleged offenses.

**3. The information given to Col J.F. was false or reckless with regard to the truth.**

Even if the Incirlik incident had informed Col J.F.'s decision to grant the second authorization, the good faith exception should not apply because of the information law enforcement both did and did not provide to him.

In one instance, Col J.F. testified that the "OSI agent" told him SrA Johnson was involved in the Incirlik incident. JA at 148-149. This statement is plainly false and, by itself, does not allow the good faith exception as conceived by the Supreme Court to be applied. *See Leon*, 468 U.S. at 923.

In addition to this affirmative statement, Special Agent J.A.'s knowing or reckless omissions also do not allow the good faith exception to apply. Even when law enforcement only provides 'true' information to establish probable cause, the exclusionary rule is still appropriate when law enforcement knowingly or recklessly omits a fact which, if incorporated into the affidavit would vitiate probable cause. *See United States v. Tanguay*, 787 F.3d 44, 49 (1st Cir. 2015); *Colkley*, 899 F.2d at 300-01; *cf. United States v. Melvin*, 596 F.2d 492, 499-500 (1st Cir. 1979) (affirming finding that omission of key witness's recantation was merely negligent because of affiant's good-faith believe that recantation was incredible).

In the present case, Special Agent J.A. knew there was no evidence of a phone being present during the Incirlik incident and there is no evidence that he relayed this to Col J.F. JA at 192. This omission is material because the Incirlik information is the only basis Special Agent J.A. had for extending the second authorization's date range beyond the date of SrA Johnson's arrest. The fact that no phone was present at Incirlik eliminates any possible nexus between SrA Johnson's phones and Incirlik. Accordingly, if Special Agent J.A. had informed a neutral and detached search authority that he was requesting to expand the date range even for the search of the iPhones, even though no phone was present at Incirlik, that magistrate would have been required to scrutinize the

request and likely deny it. *See e.g. United States v. Perkins*, 78 M.J. 381, 389 (C.A.A.F. 2019) (wherein the search authority did not automatically authorize the search but requested additional information and details before making a decision.)

Special Agent J.A. also withheld the fact that SrA Johnson was *not* named as the Incirlik perpetrator. When the defense attempted to confront Col J.F. with the fact that SrA Johnson was not named in the Incirlik incident, he responded that he didn't understand the question. JA at 138. When the defense further questioned whether he was told that SrA Johnson was not named in the Incirlik report, he equivocated: "I was not told that his name was not mentioned or it was." *Id.*

Withholding these pieces of information which directly related to the nexus between SrA Johnson, his iPhones, and the second authorization's date range fails to comport with the law enforcement activities this Court has upheld, such as the investigator in *Carter* who identified conflicts and gaps in the evidence when requesting his search authorization. Carter, 54 M.J. at 422. These actions were not in good faith.

### E. Setting aside specification 2 of Charge II and the specification of the Additional Charge is required.

There was no probable cause to search the contents of SrA Johnson's phones dating back more than eight months before his arrest. The case presented a perfect storm of overreaching law enforcement, a search authority failing to uphold his duty, and reviewing authorities assigning too much deference when it was not

warranted. Permitting this violation to go unchecked will enable law enforcement to get away with searching the contents of a servicemember's cellphone, with virtually no limit on the scope, in nearly every case where they are suspected of committing a crime and contemporaneously possessed their phone.

Because the evidence obtained from the unlawful search of and the resulting fruits from SrA Johnson's iPhones should be excluded and the good faith exception should not apply, two convictions should fall.

The first is SrA Johnson's conviction for indecent recording, which loses all evidentiary support without the unlawful search. The video of SSgt Z.P. showering, and the resulting charge and testimony from SSgt Z.P., only emerged due to the unlawful search.

The second is the finding of guilty for assault consummated by a battery. The evidence offered to support the allegations of sexual assault and assault consummated by a battery largely mirrored each other and consisted of D.F.'s testimony. The former resulted in an acquittal, whereas the latter in a conviction. JA at 040-41. The difference was that, for the allegation of assault consummated by a battery, the Government was only permitted to introduce pictures and videos obtained from the second search authorization to explain why SrA Johnson may have committed the offense, pursuant to Mil. R. Evid. 404(b). JA at 266. The two convictions plagued by the unlawful search in this case should not persist.

WHEREFORE, this Honorable Court should set aside Charge III and its specification and the Additional Charge and its specification, with prejudice, and remand to the Air Force Court to either reassess the sentence or order a sentence rehearing. *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F 2022); *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(b) because it contains 10,069 words. This brief complies with the typeface and style requirements of Rule 37 because it uses Microsoft Word with Times New Roman 14-point typeface.

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## CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Court and electronically served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on September 17, 2025.

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