IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

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

USCA Dkt. No. 25-0202/AF

Crim. App. Dkt. No. ACM 40537

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jaelen Johnson, the Appellant, hereby replies to the Government's Brief, filed on October 22, 2025.

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.

I. The military judge abused his discretion in evaluating probable cause.

SrA Johnson's incidental possession of two phones at the time of his arrest was insufficient to establish probable cause to search the phones' contents going back more than eight months before his arrest. The military judge abused his discretion when he denied SrA Johnson's motion to suppress the fruits of the unreasonable search because the search authority, Colonel J.F., and law enforcement relied on the possibility that evidence of a crime would be on the phones and there was an insufficient nexus between SrA Johnson's phones and the expansive date range to establish probable cause.

A. The search authority and law enforcement did not know what they were searching for.

Col J.F. granted the second search authorization even though he did not know what evidence was being sought on SrA Johnson's phone. Nonetheless, the Government asserts that SrA Johnson's possession of two phones created a reasonable belief that the phones contained evidence of criminal behavior. Gov.

Br. at 25. Ostensibly, this is because SrA Johnson left his keys, wallet, and gym bag in his vehicle but had his phones. Gov. Br. at 25. But this fails to explain what evidence of criminal activity Col J.F. reasonably believed would be on the phones. And it certainly cannot explain why Col J.F. believed such evidence would be found in the phones' pictures and videos. The Government can point to no information to show that Col J.F. had a reasonable belief of such evidence because none exists.

Instead, the Government argues that there was "possibly" a way the phones could have been used in furtherance of a crime. JA at 144-145. Like the search in *United States v. Morales*, this is a mistaken view of probable cause and relies on mere possibilities instead of a reasonable belief. 77 M.J. 567, 571-72 n.2 (A. Ct. Crim. App. 2017) ("We cite his views of probable cause to search for photographs to highlight how mistaken the probable cause review was in this case, relying on mere possibilities."). Because Col J.F. had no reasonable belief the phones contained evidence of a crime, and instead relied on the possibility of evidence being on the phones, this search was unreasonable.

B. The purported similarities between the Aviano and Incirlik incidents are insufficient to establish any level of suspicion, let alone probable cause.

SrA Johnson was arrested at Aviano Air Base, Italy, (Aviano) on August 12, 2022, for allegations of burglary, assault consummated by a battery, and sexual

assault. JA at 90. On December 29, 2021, at Incirlik Air Base, Turkey, (Incirlik) a Black man was found by Spanish military personnel in his bedroom without authority.

Col J.F. had no reliable evidence connecting SrA Johnson to the Incirlik incident and no evidence connecting his phones to the Incirlik incident. This case involved law enforcement assumptions based on information that federal courts have held fail to reach even reasonable suspicion, let alone probable cause. *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).

The Government contends the facts of this case are distinct from these cases because this case involves additional behavioral, verbal, and location components

that tied SrA Johnson to the Incirlik incident. Gov. Br. at 39. But the Government's distinctions are illusory and incorrect. The Government's argument demonstrates its failure to establish probable cause for the extended date range.

Behavioral: The Aviano incident involved allegations of SrA Johnson entering the complainant's room and touching him while he slept. The Incirlik incident involved a person returning to his room to find a perpetrator in the room. Unlike the alleged facts of this case, the Incirlik incident did not involve sleeping individuals or any allegations of physical touching. Unlike this case, the Incirlik perpetrator was not discovered with his pants off. The only similarity was that they both involved Black men unlawfully entering another's room. These are not the same behaviors, let alone the same alleged offenses. This was insufficient to connect SrA Johnson to the Incirlik incident.

Verbal: The Government relies on Special Agent J.A.'s assertion that the Incirlik perpetrator asked the witness not to call the police in the same manner that SrA Johnson asked D.F. not to call the police at Aviano. Gov. Br. at 38. However, as Special Agent J.A. conceded during cross-examination, there is no evidence that Incirlik perpetrator asked the victim not to call the police. JA at 192. Instead, he merely said, "I'm sorry" and then left. *Id.* Further, even if the Incirlik perpetrator had asked the witness not to call the police, such a request is not so unique under

the circumstances that it could identify SrA Johnson as the Incirlik perpetrator. This was insufficient to connect SrA Johnson to the Incirlik incident.

Location: The Government asserts "it was enough that the Government knew [SrA Johnson] had been stationed at Incirlik" to extend the permitted date range of the search back more than eight months. Gov. Br. at 38. This conclusory remark is incorrect and highlights the brazen approach the Government took in this case regarding SrA Johnson's constitutional rights. As the Government seems to concede, there was no evidence that SrA Johnson was physically present at Incirlik on December 29, 2021. Gov. Br. at 38. All the Government showed was that he was administratively assigned to Incirlik in December 2021. This is insufficient and fails to even rise to the level of cases that federal courts have found insufficient to give probable cause. *See e.g. 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).

In addition to these illusory connections, the Government ignores the fact that the Incirlik incident did involve the use or even presence of a phone. The Government simply asserts "Appellant's iPhones on 12 August 2022 would give rise to the reasonable belief that Appellant may have used his phones at the Incirlik incident." Gov. Br. at 41. This statement is conclusory and relies on the mere

possibility that, *if* SrA Johnson was the Incirlik perpetrator, he *may* have had his phones with him. This is insufficient to meet probable cause.

The lack of nexus between the Incirlik incident and SrA Johnson's iPhones is parallel to the unlawful search in *United States v. Nieto*, 76 M.J. 101 (C.A.A.F. 2017). 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.

Here, the expansive date range for the search authorization was based on multiple levels of assumptions of mere possibilities. There was an insufficient connection between SrA Johnson and the Incirlik incident, and there was no connection between SrA Johnson's phones and the Incirlik incident. There was no probable cause for expanding the date range of the search more than eight months before the Aviano incident.

II. The good-faith exception does not apply.

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). Here, the good faith exception is unavailable because at least one of the four circumstances outlined in *Leon* are present.

A. Special Agent J.A.'s affidavit was facially deficient.

The affidavit Special Agent J.A. provided to obtain the second search authorization contained no information about the Incirlik incident. JA at 90-91. The Government acknowledges this. Gov. Br. at 45. Despite this acknowledgment, the Government argues Special Agent J.A.'s affidavit was not "bare bones" and J.B.'s reliance on it was reasonable. *Id.*

But "it is 'somewhat disingenuous' to find good faith based on a 'paltry showing' of probable cause, 'particularly where the affiant is also one of the executing officers.'" *United States v. Pavulak*, 700 F.3d 651, 665 (3d Cir. 2012) (citing *United States v. Zimmerman*, 277 F.3d 426, 438 (3d Cir. 2002)); *see also United States v. Cordero-Rosario*, 786 F.3d 64, 72-73 (1st Cir. 2015) ("[T]he police cannot be said to be acting reasonably in then relying on a warrant that reflects those very same glaring deficiencies. And that is especially so when the deficiencies arise from the failure of the agent conducting the search to provide the required supporting information in the affidavit." (citations omitted)).

Special Agent J.A. omitted any information about Incirlik in his affidavit, even though it was his only justification for seeking the expanded date range. JA at 90-91. Special Agent J.B. carried out the search pursuant to Col J.F.'s probable cause determination. However, the only information Special Agent J.B. relied on was Special Agent J.A.'s affidavit. JA at 206.

Even if Special Agent J.B. believed Col J.F. had a substantial basis to find probable cause to search the content authorized, he had no explanation or basis for the expansive date range. Based on the information provided to Special Agent J.B., there was no objectively reasonable way to believe Col J.F. had a substantial basis for authorizing the expansive date range. *United States v. Carter*, 54 M.J. 414, 422 (C.A.A.F. 2001) (where the official executing a warrant relied on a magistrate's probable cause determination and the technical sufficiency of the warrant, the good faith exception requires that reliance to be objectively reasonable). Contrary to the Government's assertions, Gov. Br. at 16, the affidavit was "so facially deficient" as to the authorized date range that Special Agent J.B. could not have presumed the date range to be valid. *United States v. Leon*, 468 U.S. 897, 923 (1984).

B. Col J.F. was a rubber-stamp for law enforcement.

The Government asserts Col J.F. did not act as a rubber stamp because he sent the first authorization back to AFOSI for corrections and because "[i]t is reasonable to conclude he gave the same amount of attention to the information …

in support of the second authorization." Gov. Br. at 47. If this assertion were true, the only explanation for the Incirlik information being omitted from the second authorization and its affidavit is that he was not briefed on the Incirlik information.

Col J.F.'s behavior and unreliable testimony also highlight how he departed from his role as a neutral and detached magistrate. Col J.F.'s testimony was inconsistent, uncertain, and repeatedly contradicted by the Defense. *See e.g.* JA 136-39. The Government attempts to mitigate Col J.F.'s "seemingly contradictory response" and "confusion" as either the result of a non-specific question from the defense or by relying on his testimony from direct examination before he was confronted. Gov. Br. at 27-28.

But even when the defense asked Col J.F. plain questions, he was evasive or could not answer. Col J.F. originally testified that everything he was verbally told by Special Agent J.A. was in the written affidavit. JA at 139. The Defense confronted him with the fact that no information about Incirlik was in the affidavit. *Id.* After attempting to back-track his statements and being further confronted, he finally admitted he made a mistake. *Id.*

When the Defense confronted Col J.F. on whether he relied on information outside the affidavit to find probable cause, Col J.F. said he "signed those search authorizations based on the fact that there were multiple phones found at the incident" JA at 140. The Defense then sought to clarify Col J.F.'s decision:

Defense Counsel: "Okay, so it's your probable cause based on there being multiple phones?"

Col J.F.: "Correct."

Defense Counsel: "Not based off of that other stuff? That's what you just said – based off of the phones."

Col J.F.: "Correct."

Id.

Col J.F.'s testimony that he found probable cause only because two phones were present was not the result of a "non-specific" question from the defense as the Government asserts. Gov. Br. at 27. It was the result of Col J.F. being confronted with facts and challenged on his inconsistent testimony. Col J.F. testified he approved the search authorization on the fact that two phones were present. This was not the result of non-specific questioning or confusion.

Col J.F.'s inability to plainly explain why he believed probable cause existed or what evidence would be found shows a lack of conviction and confidence expected of search authorities. His testimony was "contradictory" and showed "confusion" because he did not have a substantial basis to find probable cause. He was presented with a search authorization request for a wide range of content and an expansive date range along with an affidavit that contained no justification for such a broad search. But he approved it anyway because SrA Johnson possessed

two phones when he was arrested. This is not the action of a neutral and detached magistrate. The good-faith exception should not apply in this case.

C. AFOSI misled Col J.F. to obtain the second search authorization.

It is "repugnant to the purpose and principles of the Fourth Amendment for an agent of the Government" to knowingly and intentionally, or with reckless disregard of the truth, mislead a magistrate. *See United States v. Garcia*, 80 M.J. 379, 382 (C.A.A.F. 2020). The Government concedes Col J.F. was told that SrA Johnson was involved in the Incirlik incident. Gov. Br. at 49. But if Col J.F. was told this, it was a lie. SrA Johnson was never named or implicated in the Incirlik incident. JA at 187. Such a material misrepresentation renders the good-faith exception inapplicable. *See Leon*, 468 U.S. at 923.

The Government attempts to minimize this testimony by making the conclusory assertion that "Col J.F.'s testimony made it clear Special Agent J.A. connected SrA Johnson to the Incirlik incident through similarities in the cases, not because SrA Johnson was named as a suspect." Gov. Br. at 50. But this assertion contradicts Col J.F.'s plain answers to the military judge's question of who told him that the Incirlik incident involved SrA Johnson. JA at 145-146 ("The OSI agent" told Col J.F. that SrA Johnson was involved in the Incirlik incident.). The Government cannot brush this testimony aside as a response to a "non-specific" question as it did with other portions of Col J.F.'s testimony. According to

Col J.F., an AFOSI agent told him SrA Johnson was involved in the Incirlik incident, even though that was at best an inference and not a fact. That is not good faith.

III. The exclusionary rule should have been applied.

The exclusionary rule should have been applied in this case because the Fourth Amendment right to be free from unreasonable search and seizure is "paramount." Oral argument at 51:00-51:13, *United States v. Braum*, No. 25-0046/AF (C.A.A.F. Oct. 8, 2025), https://www.armfor.uscourts.gov/newcaaf/CourtAudio13/20251008.mp3. Paramount means "superior to all others." *Paramount*, MERRIAM WEBSER'S DICTIONARY (online ed.). The Supreme Court has recognized that:

> [t]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself.
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> *Riley v. California*, 573 U.S. 373, 403 (2014).

The Government asks this Court to circumvent SrA Johnson's Fourth Amendment right because holding the Government accountable and suppressing the evidence would have "minimal deterrent value." Gov. Br. at 54. But less than one month ago, the Government treated the Fourth Amendment as an impenetrable shield that made it "insurmountable" for an accused to obtain evidence in the

Government's physical possession, custody, and control. Oral argument at 46:40, *United States v. Braum*, No. 25-0046/AF (C.A.A.F. Oct. 8, 2025), https://www.armfor.uscourts.gov/newcaaf/CourtAudio13/20251008.mp3. The Government argued "even when there are competing Constitutional considerations, [the Fourth Amendment right is] fundamental." *Id* at 50:25.

The Government is picking and choosing when it wants the Fourth Amendment applied. In the context of a participating witness or complainant, the Government argues the Fourth Amendment right is simply too powerful and the Government could never pierce it. But, for an accused, the Government can easily bypass this right simply by concluding that excluding the fruits of an illegal search would not correct law enforcement's behavior. This type of hypocrisy is unacceptable.

Col J.F. approved a search of his phones for all media and messages even though there was no connection between his phones and the alleged offenses being investigated. Col J.F. simply found it suspicious that he had *two* phones. Making matters worse, Col J.F. allowed Special Agent J.A. to extend the date range for this search more than eight months due to a tenuous-at-best connection between SrA Johnson and an incident involving another Black man at his previous duty station, even though SrA Johnson was never implicated and there was no information that even one phone, let alone two phones were present.

If *any* individual's Fourth Amendment right is superior to all other interests in the military justice system as the Government argued, SrA Johnson's Fourth Amendment right should also be superior to all other interests and the exclusionary rule should be applied for this violation.

Further, the military judge and Government showed a misunderstanding of the law by rationalizing that exclusion of evidence would not result in deterrence in this case because the agents and Col J.F. were "actually right." JA at 248. The fact that evidence was found on the phones does not mean there would be no deterrent effect. Such a holding would render the exclusionary rule moot because the only way an unlawful search could be challenged and for the exclusionary rule to be applied is when evidence is found from the search. Instead, if appellate courts decline to apply the exclusionary rule in cases where a Fourth Amendment violation occurs, then law enforcement will be emboldened to push the boundary even further and violate an accused's rights so long as they end up being "right" and find evidence.

"[The exclusionary rule's] purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). The only way to generate a deterrent effect against unlawful searches or law enforcement overreach is to exclude evidence in cases such as this.

IV. Setting aside Specification 2 of Charge II and the Specification of the Additional Charge is required.

The Government correctly acknowledges that if the military judge abused his discretion in admitting evidence derived from the unlawful search, then this Court should set aside the conviction for indecent recording. Gov. Br. at 56-57, n.3. This Court should also set aside the conviction for assault consummated by a battery because the error of admitting the pictures and videos pulled from SrA Johnson's phones was not harmless beyond a reasonable doubt.

If an "alleged error is of constitutional dimensions, we must conclude beyond a reasonable doubt that it was harmless before we can affirm." *United States v. Condon*, 77 M.J. 244, 246 (C.A.A.F. 2018). To conclude that such an error is harmless beyond a reasonable doubt, we must be convinced that the error did not contribute to the verdict obtained. *Id.* "The Government bears the burden of establishing that any constitutional error is harmless beyond a reasonable doubt." *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004).

The Government argues that failing to suppress the evidence here was not harmless beyond a reasonable doubt because D.F.'s testimony provided independent evidence to support the assault consummated by a battery. However, the Government ignores that D.F.'s testimony was also relied on for the sexual assault allegation which resulted in a finding of not guilty.

The difference between these two allegations is that the evidence obtained from SrA Johnson's phones was only admissible as to the assault consummated by a battery. JA at 266. This evidence was not admissible for the sexual assault. *Id.* The Government specifically sought to admit this evidence under Military Rule of Evidence 404(b) to show an intent to commit the assault consummated by a battery. *Id.* The pictures of D.F.'s feet were specifically relied on by trial counsel to argue SrA Johnson had a motive to touch feet. JA at 269. This evidence was not unimportant and did contribute to the verdict. This error was not harmless beyond a reasonable doubt.

CONCLUSION

This 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 3,759 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 November 5, 2025.

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