IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. No. 40537
Senior Airman (E-4) **JAELEN M. JOHNSON** United States Air Force *Appellant.*	)	USC Dkt. No. 25-0202/AF 22 October 2025

BRIEF ON BEHALF OF THE UNITED STATES

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

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 (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

RELEVANT AUTHORITIES

The Fourth Amendment to the United States Constitution states, "[t]he 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."

In relevant part, Military Rule of Evidence (Mil. R. Evid.) 311 provides:

> (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:
>
> > (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) . . .;

(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 was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend . . .; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence.
>
> . . .
>
> (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 judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of indecent recording in

violation of Article 120c, UCMJ; one specification of assault consummated by a battery in violation of Article 128, UCMJ; and one specification of unlawful entry in violation of Article 129, UCMJ. (Joint Appendix (JA) at 040-041.) The judge sentenced Appellant 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.) The Air Force Court affirmed the findings and sentence. (JA at 034.)

STATEMENT OF THE FACTS

The Unlawful Entry and Assault

DF, a civilian Air Force Office of Special Investigations (AFOSI) Special Agent (SA), arrived at Aviano Air Base and began staying at the family Temporary Lodging Facility (TLF) by himself. (JA at 2.) On the early morning of 12 August 2020, DF awoke to pressure on his anus. (JA at 3, 068.) DF swiped at the feeling with his hand, felt nothing, and went back to sleep. (Id.)

DF woke again when he felt a "rhythm or massage" on his left foot. (JA at 3.) DF noticed that it was "a constant rhythm," a "circular motion," and so believed there was an intruder in his room. (Id.)

Because DF thought someone was in the room with him, he slid his right foot up as if he was still asleep and then kicked. (Id.) DF saw the intruder, later identified as Appellant, laying on the ground at the base of his bed. (Id.) Appellant

was wearing a black beanie, a black mask, a black shirt, and underwear, but Appellant's pants were off and lying on the floor. (Id.) DF also saw a cellphone that did not belong to him on the floor at the "end" or "foot" of the bed. (JA at 3, 85, 182.)

DF got out of bed, punched Appellant several times, and instructed him to get in the prone position with his hands behind his back. (JA at 3-4.) Appellant complied, and Appellant told DF that he was able to get into his TLF unit because it was unlocked. (JA at 4.) Appellant told DF "let's work this out. Don't call security forces, let's work this out." (Id.) Holding Appellant's hands behind his back, DF walked Appellant into the hallway of the TLF building and yelled for someone to call the police. (Id.) Security forces members arrived and found DF pinning Appellant to the floor in the hallway. (JA at 4, 221.)

Appellant did not have his pants on and asked to put them on, which security forces allowed before restraining him. (JA at 4, 221.) During a pat-down search after Appellant put his pants on, security forces found an iPhone 7 on Appellant's person. (Id.) Upon searching the room, an AFOSI SA AP found an iPhone 13 that belonged to Appellant. (JA at 4.)

The First Search Authorization

On 12 August 2022, SA AP initially sought a search authorization for the iPhone 13 and iPhone 7 to search for geolocation data to place Appellant at the

crime scene. (JA at 5, 158.) SA AP met with his AFOSI detachment commander, a military magistrate named Col JF, and an attorney from the base legal office (who participated telephonically). (JA at 5, 129-130, 223.) Col JF had not issued a search authorization before, but he had received training on search authorizations from an attorney at the base legal office which consisted of an 80-slide PowerPoint presentation. (JA at 133-134.) Col JF placed SA AP under oath. (JA at 5, 131.)

Based on the information provided by AFOSI, Col JF believed there was probable cause to search Appellant's iPhone 13 for geolocation data. (JA at 5-6, 130.) After granting oral authorization to search Appellant's iPhone 13 on 12 August 2022, Col JF requested edits to the written search authorization for both iPhones before signing it on 23 August 2022. (JA at. 5-6, 133.)

The Second Search Authorization

On 12 August 2022, SA JA, another OSI agent, became involved with the investigation. (JA at 181.) SA JA learned the details of the assault from DF's interview on 12 August 2022. (JA at 182.) SA JA learned that after the assault, Security Forces took Appellant to his vehicle to pick up Appellant's personal belongings and to retrieve his wallet. (JA at 7, 184.) Appellant's car was parked in a parking lot adjacent to a different TLF building and the CDC, but not in the parking lot adjacent to DF's TLF. (JA at 7, 185.) SA JA learned Appellant had left his keys, wallet, and a gym bag with other civilian clothes in his unlocked

vehicle. (JA at 7, 184.) Based on this information, SA JA believed Appellant had "sanitized himself essentially and all he had was the two phones on him during" the assault. (JA at 184.) Because Appellant had left all his other belongings in his vehicle, SA JA believed there was a strong likelihood Appellant was using his phones for something. (JA at 187.) According to SA JA, the decision to leave his keys and wallet in the car but to take the phones made SA JA suspicious about the phones. (Id.) SA believed Appellant "was likely using the phones in the commission of what he was out to do." (Id.) SA JA continued, "So that led us to believe that he was either A, communicating with somebody in some manner or may have been taking pictures or videos. Something that would be commonly used for having a phone on you." (JA at 187-188.)

SA JA also reviewed Appellant's prior history and contacted AFOSI at Incirlik AB, where Appellant had previously been stationed. (JA at 7, 185.) Incirlik AFOSI stated that on 29 December 2021, an incident occurred where two separate individuals reported seeing an individual matching Appellant's physical description and wearing all black. (JA at 186.) One individual reported waking and seeing a tall black male dressed in all black crawling in his bedroom. When confronted, the individual made a comment to the effect of "please don't call law enforcement." (Id.) Shortly after that, a female saw someone matching the same description in the dormitories, and she said something to him. (Id.) The individual

ran into a bathroom, locked himself in there, and stayed there for a few minutes before departing the scene. (Id.) SA JA learned Appellant was stationed at Incirlik at that time. (Id.) Considering all the similarities between these two incidents, SA JA believed "there was a probability that there was a series of behavior or repeat behavior" in play, although Appellant was never named a suspect in the Incirlik incident. (JA at 186-187.) SA JA also suspected, based on Appellant's similar behavior on 12 August 2022, having only his phones on him and being dressed the same, that Appellant's phones may have evidence of not only the incident at Aviano on 12 August 2022, but of potential incidents at Incirlik. (JA at 188.)

Based on this information , SA JA sought an additional search authorization related to Appellant's cellphones to search communications and media such as pictures or videos. (JA at 188-189.) When asked at trial why he requested the expanded search, SA JA first recounted the facts of the evening which included: (1) DF waking to Appellant in his room; (2) Appellant dropped a phone during the ensuing altercation; (3) Appellant pleaded for DF not to call the police; (4) Appellant was dressed in all black, including a black beanie, black face mask, and black shirt; (5) Appellant was not wearing pants when law enforcement arrived; (6) law enforcement found another phone on Appellant when he was apprehended; (7) Appellant's car was parked nearby, but not in the TLF parking lot; and (8) Appellant's keys, wallet, and gym bag were in the vehicle. (JA at 202-03.)

On 31 August 2022, SA JA consulted with an attorney at the base legal office, who agreed probable cause existed to expand the search. (JA at 189.) SA JA and the attorney contacted Col JF and requested the added search authorization of the cellphones for media ranging from 29 December 2021 (the date of the Incirlik incident) to 12 August 2022 (the date of the Aviano incident). (Id.) Col JF placed SA JA under oath, and SA JA relayed to Col JF the facts surrounding the assault, Appellant's car, and the Incirlik incident. (JA at 132, 189.) SA JA explained to Col JF that the date range for the second search authorization captured the dates between the Aviano incident on 12 August 2022 and the Incirlik incident on 29 December 2021, and so he was asking for a search authorization's limited in scope to that timeframe. (JA at 189-190.)

Although SA JA prepared an affidavit to support the second search authorization, it was not a "verbatim" transcript of the entire conversation with Col JF. (JA at 191.) Both SA JA and Col FJ agreed the Incirlik incident was not captured in the affidavit. (JA at 139, 193.)

During a motions hearing on 27 April 2023, Col JF recalled the request for an expanded search authorization for the iPhones' media, including photos, videos and messages. (JA at 131.) Col JF said, "That request was centered on the fact that there were multiple phones found on the location and there was reason to believe that those phones were actually used during the alleged crime." (Id.) Col

JF also considered the facts surrounding Appellant's car and his possessions left in the car. (JA at 132.)

Col JF also considered the allegations from the Incirlik incident. Col JF said, "There was [sic] allegations of very similar behavior at a previous location. Very similar complaints and very similar methods, which convinced us there was probable cause to look into the phones for any capturing of media, pictures, videos, anything of that sort." (Id.) Col JF continued, "So the discussion was centered on the fact that there were possible pictures taken of individuals while they were sleeping. Unauthorized entry into residences and the pattern of behavior that was presented seemed very similar to allegations from a previous base." (JA at 134.) Col JF granted the additional search authorization on 31 August 2022. (JA at 93.)

Col JF first testified that he was told about the allegation at Incirlik "during conversations about the second search authorization." (JA at 137.) At the time of his testimony, he could not recall that the other incident had occurred at Incirlik specifically, although he recalled being briefed on the allegations at a previous location that "mirrored" the allegations at Aviano. (JA at 138.) Col JF could not recall if Appellant's name was specifically mentioned with respect to the previous incident. (JA at 139.) With respect to the Incirlik incident, Col JF later admitted he could not remember if he was told about that incident for the second search authorization or the third one. (JA at 145.) Col JF testified that he was told "there

were very similar allegations from a previous location that [Appellant] had been assigned at and those allegations happened during the time of his assignment at the previous location." (JA at 149.)

Col JF emphasized that he based his probable cause determination "on the fact that there were multiple phones found at the incident, therefore it led me to believe that those phones could possibly be used in the act of a crime and weren't just a random phone that fell out of someone's pocket." (JA at 140.)

On redirect examination, Col JF stated he considered the location of Appellant's car, Appellant's possessions left in the car, and the presence of the phones at the crime scene. (JA at 143-145.) Col JF said 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." (JA at 144.) Because Appellant had two phones with him while in the victim's room, Col JF believed "that there was probable cause that they were involved in the crime itself." (JA at 145.) Specifically, Col JF thought the phones could have been used for "possibly pictures, possibly videos, possibly recordings." (JA at 144.)

Result of the Search Authorizations

As a result of the second search authorization on the iPhone 13, the Government found "repeat[ed] albums of photos" from 29 December 2021 to 12 August 2022 "of people's feet taken while they were sleeping" on the iPhone 13.

(JA at 103). There was an album of nude buttocks from 27 February 2022 and videos of a nude male showering in the locker room taken on 10 August 2022. (Id.)

The nude male from 10 August 2022 was identified as ZP by cross referencing males from the base gym during the time of the video and an interview with ZP. (JA at 2, 21, 254.) The Government also found on the iPhone 13 "a significant amount of pictures of what appeared to be feet around the same time as the incident" involving DF at Aviano on 12 August 2022. (JA at 3, 207.)

Military Judge's Ruling

Trial defense counsel moved to suppress all evidence obtained from Appellant's iPhones or, in the alternative, all evidence beyond location data, on the grounds that (1) the search was not supported by probable cause; (2) the good faith exception did not apply; and (3) applying the exclusionary rule was appropriate. (JA at 46, 61, 63.)

The judge denied Appellant's suppression motion, upholding both the first and second search authorizations. (JA at 221.) With respect to the second search authorization, the judge found as fact that SA JA's affidavit recapped previously provided information as well as additional information, including: (1) Appellant's car was parked at the base but not at DF's TLF building; (2) the car was found unlocked and Appellant's keys, wallet, and gym bag (filled with civilian clothes) were inside; and (3) Appellant was found on 12 August 2022 wearing all black

clothing, with no pants on, and only had a cellphone on his person. (JA at 225, 244.) SA JA's affidavit also summarized his education, training, and experience, as well as SA JA's belief that Appellant used his cellphones during the commission of the alleged crimes against DF and that SA JA presented all of this information to a judge advocate who agreed there was "probable cause to expand the search of [Appellant's] cell phones in order to seize all . . . media produced between 29 December 2021 and 12 August 2022." (R. at 226, 244.)

The judge was not persuaded by trial defense counsel's argument that the affidavit did not explain the expanded date range, and found the argument, "ignores the in-person meeting that also took place between SA [JA], JA and Col [JF]." (Id.) The judge found that "although Col [JF] was unable to provide many details about this, it was clear that he had been briefed on" the Incirlik incident.

The judge agreed that the facts of the 12 August 2022 incident and the Incirlik incident alone did not provide facts sufficient to "go rummaging about in [Appellant's] cell phones." (JA at 245) However, the judge continued, that even if it was a "closer call," "[w]hat saves this evidence for the Government here is the facts about the car, its contents, and the fact [Appellant] was carrying two phones – which Col [JF] found particularly compelling." (Id.)

The judge held these facts created a nexus between Appellant's crimes and the phones. The judge likewise found Col JF was not "simply ratifying the bare

conclusion of [SA JA]," because SA JA's "conclusion was fairly supported by the facts and his training and experience." (Id.) The judge also noted that a judge advocate concurred with SA JA on the probable cause determination. (Id.)

The judge also considered the legal sufficiency of the execution of the search authorization by SA JB, the special agent who performed the searches on the iPhones. (JA at 246.) The judge found SA JB's testimony "particularly convincing on this point," because SA JB testified that he printed out the search authorizations on his desk while performing the searches on the iPhones, implemented functions. . . to limit the data to be searched by the timeframe allowed in the search authorization," and did not expand the search of the phones until a third search authorization was signed. (Id.)

The judge also found SA JA did not knowingly or recklessly provide false information to Col JF, and Col JF did not "rubber stamp" the search authorization for AFOSI. The judge found Col JF "thoughtfully considered all evidence presented to him, considered the advice of the JAG and determined probable cause existed." (JA at 245.) The judge held, "the court finds Col [JF] could reasonably have found a substantial nexus, and thus, the court will grant Col [JF] the substantial deference owed him under the law." (Id.)

Even though the judge upheld Col JF's probable cause determination, he also analyzed this case for good faith and the exclusionary rule. (JA at 246-248.)

The judge again found "no evidence that . . . SA [JA] intentionally or recklessly provided false information to Col [JF]" or provided "bare bones" conclusions. (JA at 247.) The judge found SA JA "provided sufficient facts that put meat on the bones of their conclusions" and these facts "persuaded JA and Col [JF] that probable caused existed." (Id.) The judge held, "[b]ased on the facts in this case, the court also finds a reasonable law enforcement [sic] would have an objectively reasonable belief that Col [JF] had a 'substantial basis' for determining the existence of probable cause." (Id.)

The judge also found the third prong of the good faith test weighed against Appellant. (Id.) He repeated that there was "no evidence Col [JF] wholly abandoned his judicial role and merely acted as a rubber stamp for OSI." (Id.) The evidence provided verbally to Col JF and in the affidavits "were not so facially deficient that it would be objectively unreasonable to presume they were valid." (Id.) In analyzing the third prong, the judge found (1) Col JF was trained in search authorizations; (2) the verbal and written evidence provided to Col JF was sworn; (3) the authorizations were reduced to writing and subjected to judicial scrutiny; (4) any defects were more form over substance; and (5) SA JA sought and received a concurrence from the base legal office on probable cause. (Id.) Therefore, the judge held "the Defense motion must fail as the good faith basis exception applies in this case." (Id.)

Pursuant to Mil. R. Evid. 311(a)(3) and United States v. Lattin, 83 M.J. 192 (C.A.A.F. 2023), the judge did not believe "the exclusion of the evidence here would result in appreciable deterrence of future unlawful searches and any such deterrence does not outweigh the costs to the justice system of excluding the evidence." (JA at 247.) The judge found no unreasonable or unlawful overreach by AFOSI or Col JF. (Id.) The judge found their "judgment calls . . .were based on the facts developed and presented." (Id.)

The judge again considered SA JB's execution of the search authorizations. (Id.) The judge found SA JB "took several measures to ensure he did not exceed the limits of the authorizations," and "when he found incriminating photos with the limited and authorized time frame, he did not immediately jump into a full search of the phones" without waiting for a further expansion of the search authorization. (Id.) The judge stated, "it is hard to find any fault in the investigators' or Col [JF's] approaches or decisions in this case." (JA at 248.)

Lastly, the judge found the charge of indecent recording "represents a serious charge the nature of which is deeply concerning." (Id.) The judge further found "the deterrent effect would be minimal," and "[s]ocietal interests and the justice system demand the court consider the rule that suppression is a remedy of last resort." (Id.)

Court-Martial and Convictions

Appellant was charged in relevant part with (1) assault consummated by battery for touching DF's foot with this hand on 12 August 2022 in violation of Article 128, UCMJ; (2) burglary for unlawfully entering DF's room with the intent to commit assault consummated by battery on 12 August 2022 in violation of Article 129, UCMJ; and (3) indecent recording for filming the private area of ZP without his consent on 10 August 2022 in violation of Article 120c, UCMJ (JA at 41.)[1]

At trial, the Government introduced several pieces of evidence from the iPhone 13: a video of Appellant recording someone's feet through their window on 4 August 2022 (JA at 24, 532); a video of Appellant attempting to record a naked male showering in the gym on 8 August 2022 (JA at 23-24); a video of ZP's showering naked in the men's locker room on 10 August 2022 (JA at 2); photos of DF's feet taken at the time of the Aviano incident on 12 August 2022, (JA at 3, 113); and testimony by SA JB and SA JA about the "hundreds" of photos and recordings of individual's feet on Appellant's iPhone 13 (JA at 268.)

[1] Appellant was acquitted of the charge of abusive sexual contact for touching DF's anus in violation of Article 120, UCMJ, and of assault consummated by battery for striking DF on the torso and arms with his hand, in violation of Article 128, UCMJ. (JA at 40).

Appellant was convicted of assault consummated by battery for touching DF's foot, for the lesser included offense of unlawful entry for going into DF's room, and for indecently recording ZP's private area without his consent. (JA at 41.)

SUMMARY OF THE ARGUMENT

When law enforcement discovered that Appellant broke into DF's TLF room wearing all black, including a black beanie and black mask, and carrying only his two cellphones, there was a reasonable belief that Appellant was using his cellphones in the commission of his crime. When law enforcement found evidence that Appellant may have committed a similar crime eight months prior, they had a reasonable belief that evidence of criminal activity between that time and the present would also be found on Appellant's cellphones. The judge did not abuse his discretion by (1) finding probable cause existed to support the search of Appellant's iPhones; (2) finding that the good faith exception would apply; and (3) finding any benefit of suppression would be outweighed by the cost on the justice system.

Based on the search authorization, accompanying affidavit, and SA JA and Col JF's testimony, the judge did not make clearly erroneous findings of fact because the record more adequately supported what information Col JF considered to determine probable cause existed.

The judge did not abuse his discretion by finding that the military magistrate had a substantial basis to believe probable cause existed to search Appellant's cellphones beyond location data. SA JA and Col JF both testified to the facts that made up the basis for the expanded search authorization, which included Appellant's notable black outfit, his black beanie and mask, his decision to leave all his belongings except two cellphones in his unlocked car, and the presence of one cellphone dropped at the foot of DF's bed after DF awoke to Appellant touching his foot on 12 August 2022. Appellant's iPhones were not incidentally in his possession, as contemplated by the Supreme Court of the United States in Riley v. California, 573 U.S. 373, 385 (2014). Anyone knowing all the evidence would have a reasonable belief that Appellant was using his phone during the crime, and Col JF did. Once the matching details from the Incirlik incident on 29 December 2021 were known to Col JF, including starkly similar physical descriptions, outfit, and behavior, Col JF also had a substantial basis to support probable cause for a search of Appellant's cellphones going back to that date. There was a reasonable belief in the minds of SA JA and Col JF that Appellant was the intruder at Incirlik the same way he was the intruder in DF's room. Because of this and the previously mentioned evidence about the location of his other possessions, SA JA and Col JF had a reasonable belief that Appellant was using his cellphones during the Incirlik incident as he was in DF's room.

The judge did not abuse his discretion by applying the good faith basis to the search of Appellant's cellphone. The affidavit and search authorizations from SA JA and Col JF had sufficient details that SA JB could objectively execute it in good faith. Col JF did not act as a rubber stamp because he received training on search authorizations, considered all the facts presented to him, considered the concurrence of an advising attorney, and had previously requested corrections to a search authorization. There was no evidence that SA JA provided false information to Col JF about the search authorization. Both men testified that SA JA informed Col JF about the details surrounding a similar incident at Appellant's prior duty station as the basis to expand the search of Appellant's phone to 29 December 2021. Applying the good faith exception was well within the range of reasonable choices available to the judge, and not an abuse of discretion.

As the judge recognized, SA JA and Col JF made "judgment calls" in finding probable cause to search Appellant's cellphones. (JA at 247.) Even if they erred in those judgment calls, such mistakes were not the kind of grievous misconduct that warrants application of the exclusionary rule under Mil. R. Evid. 311(a)(3). Given the nature of the highly probative evidence found on Appellant's phone, which included hundreds of pictures of individual's feet taken when they had an expectation of privacy and a non-consensual recording of a fellow airmen

showering at the base gym, it was not a clearly unreasonable exercise of discretion for the judge to determine that any benefit of deterrence in suppression would not outweigh the cost to the justice system.

Even if this evidence should have been suppressed, Appellant suffered no prejudice regarding his conviction for assault consummated by battery because DF credibility testified that he woke up to Appellant touching his foot and apprehended Appellant at the scene.

This Court should afford the military magistrate and judge the appropriate deference when analyzing the probable cause determination, and this Court should find that the judge did not abuse his discretion.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING PROBABLE CAUSE TO SEARCH APPELLANT'S CELLPHONES' MEDIA CONTENT GOING BACK EIGHT MONTHS.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for abuse of discretion. United States v. Cote, 72 M.J. 41, 44 (C.A.A.F 2013). "A military judge's determination of whether probable cause existed to support a search authorization is reviewed for an abuse of discretion." United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005); *See also* United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010).

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (*quoting* United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)).

"[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) (internal citation omitted.)

An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002). The findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. Cote, 72 M.J. at 44.

Law and Analysis

In the *Manual for Courts-Martial, United States* (2019 ed.) (MCM), the Military Rule of Evidence (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."

"Probable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act[.]'" Illinois v. Gates, 462 U.S. 213, 241 (1983).

This Court has echoed the low threshold for probable cause, stating:

> It is not a technical standard, but rather is based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. . . . there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present. The duty of the reviewing court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.

United States v. Leedy, 65 M.J. 208, 212 (C.A.A.F. 2007).

The evidence discovered on Appellant's iPhones was lawfully obtained pursuant to a search authorization supported by probable cause, as is required by the Fourth Amendment to the Constitution of the United States. U.S. CONST. amend. IV. Therefore, it was correctly admitted at trial.

Mil. R. Evid. 311(a) provides that evidence obtained from an unlawful search is inadmissible if:

> (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.

Mil R. Evid. 311(c)(3) also provides for a good faith exception that would allow for such evidence to be admitted, even if obtained as the result of an unlawful search.

A. The military judge did not abuse his discretion in denying Appellant's motion to suppress the evidence because probable cause supported the search of Appellant's iPhones.

The crux of Appellant's argument is that the presence of his two cellphones at the scene of the crime was irrelevant to probable cause to search his phones beyond location data. (App. Br. at 19). His argument fails because his cellphones were not searched merely because they were present when Appellant was arrested; they were searched because he *only* brought his cellphones to the crime scene and left his other possessions in his unlocked car. This created a reasonable belief that he was using his cellphones in the commission of crimes, and the phones therefore would contain evidence of criminal behavior.

Appellant is not entitled to relief because, first, the judge's findings of fact were not clearly erroneous. Second, the judge did not abuse his discretion in finding probable cause existed to search beyond the location data in the cellphones.

Finally, the judge did not abuse his discretion in finding probable cause for the expanded date range of the search authorization.

1. *The military judge's findings of fact were not clearly erroneous.*

The judge made appropriate, well-supported findings of fact based on Col JF's testimony, SA JA's testimony, and the written search authorizations. Appellant's argument against probable cause relies heavily on the premise that the judge's findings of fact were clearly erroneous with respect to (a) what specific evidence Col JF considered to find probable cause and (b) a JAG's perspective on probable cause. (App. Br. at 30-31). This Court should reject Appellant's arguments because each finding is supported by the record.

"A finding of fact is clearly erroneous when there is no evidence to support the finding, . . . or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" United States v. Criswell, 78 M.J. 136, 141 (C.A.A.F. 2018) (quoting United States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001)) (internal quotation marks omitted).

First, Appellant argues that Col JF stated he did not consider evidence related to the contents of Appellant's car in reaching probable cause, and so the judge's finding that Col JF reached probable cause with those facts was clearly erroneous. (JA at 30.) In doing so, Appellant asks this Court to consider Col JF's

affirmative response to trial defense counsel's question that his finding on probable cause was "based on there being multiple phones" and "not based off of that other stuff" as the end of the inquiry. (JA at 140.) But to do so would be to disregard Col JF's other testimony. (JA at 244.) The judge's finding of fact that Col JF relied on the evidence surrounding Appellant's vehicle to support probable cause was supported by the record. Col JF testified that he knew of Appellant's unlocked car with Appellant's keys, wallet, and gym bag. (JA at 132.) In response to the judge, Col JF said that the "facts that led to [him] granting probable cause" included the location and content of Appellant's vehicle and their proximity to the crime scene. (JA at 142-44.) Col JF also testified that he believed that a phone was used during the commission of the crime based on the similar allegations "at a previous location." (JA at 131-32.) That Col JF emphasized the presence of two cellphones at the crime scene in reaching his probable cause determination did not mean he did not consider other relevant facts. His seemingly contradictory response was likely the result of being asked a non-specific question by trial defense counsel (i.e. asking if the probable cause was "[n]ot based on that other stuff," without clarifying what the "other stuff," was.) (JA at 140.) The judge's finding on the evidence Col JF considered was supported by the entirety of the testimony and was not clearly erroneous.

Second, the judge found as a fact that Col JF was briefed on the Incirlik incident prior to the second search authorization, and Appellant argues that was erroneous. (App. Br. at 30-31). While Col JF did at one point express some confusion regarding when exactly he was informed of the Incirlik incident (JA at 145), his other testimony and SA JA's testimony indicated that he had been briefed on it prior to the second search authorization. Col JF testified that he was told about the allegation at Incirlik "during conversations about the second search authorization." (JA at 137.) And since Appellant argues that the Incirlik incident was the only justification for the expanded date range (JA at 28), the expanded date range on the search authorization itself made it *more* likely that Col JF was, in fact, briefed about the Incirlik incident prior to the second search authorization. Col JF testified that he "would have not granted the search authorization" if he "felt that OSI did not present enough evidence or enough facts to support probable cause." (JA at 133.)

SA JA also testified that he told Col JF about the Incirlik incident during their conversation on 31 August 2022, which was the date of the second authorization. (JA at 189.) Even if Col JF was confused about the timeline, the judge could have credited SA JA's testimony alone to make his finding. The finding of fact was therefore supported by evidence in the record, and not clearly erroneous.

Third, Appellant argues that the judge failed to consider testimony by EM, a JAG from the base legal office, that "there was no reason to believe a phone was used in the commission of any offense allegedly committed by" Appellant. (App. Br. at 31). This both mischaracterizes EM's testimony and the judge's analysis: The judge found that EM concurred that probable cause existed for the expanded search authorization on 31 August 2022. (JA at 91, 228.) At a motions hearing in Appellant's case regarding speedy trial in February 2023, EM was asked if there was any indication that the recovered cellphone was used in the 12 August crime. (JA at 297.) EM responded, "At that point in time, we did not know." (Id.) But from the entire context of the testimony, it appears that "at that point" referred to the date of the pretrial confinement hearing – 18 August 2022. (JA at 274.) It was reasonable for the judge to conclude that EM's opinion related to probable cause might have changed between 18 and 31 August, based on further investigation or reflection.

Indeed, the judge did not consider EM's February 2023 testimony because "what is relevant for purposes of this motion is what [EM]'s advice was to SA [JA] and Col [JF] on 31 August 2022." (JA at 228.) The judge continued that based "on the evidence before the court, at the relevant time, [EM] advised SA [JA] and Col [JF] that probable cause existed for the requested expanded search." (Id.)

This was neither an incorrect finding, based on the evidence, nor an incorrect view of the law regarding motions to suppress.

In sum, each of the judge's conclusions had an adequate basis in the record based on Col JF and SA JA's testimony, as well as the documentary evidence presented. Therefore, the judge's findings of fact were not clearly erroneous. This Court should not be left with "the definite and firm conviction that a mistake" was committed. Criswell, 78 M.J. at 141.

2. *The military judge correctly applied the law to find probable cause existed to search the iPhones' contents beyond location data.*

Probable cause existed to search Appellant's phone beyond the location data because there was a reasonable belief that Appellant had used his phone in DF's room.

As an initial matter, our Supreme Court has found that "[r]easonable minds frequently may differ on the question [of] whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination." United States v. Leon, 468 U.S. 897, 914 (1984).

Under the parameters set by Mil. R. Evid. 315(f)(2), "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . [concluding]' that probable cause existed." Gates, 462 U.S. at 238-39 (*quoting* Jones v. United States, 362 U.S. 257, 271 (1960)). This Court has applied four key

principles in reviewing probable cause determinations under M.R.E. 315: (1) it views the facts in the light most favorable to the prevailing party; (2) it gives substantial deference to the probable cause determination made by a neutral and detached magistrate; (3) it resolves close cases in favor of the magistrate's decision; and (4) it views the facts in a commonsense manner. United States v. Huntzinger, 69 M.J. 1, 7 (C.A.A.F. 2010) (*citing* United States v. Macomber, 67 M.J. 214, 218 (C.A.A.F. 2009)).

There must be a nexus between the suspected offenses and Appellant's iPhones. A nexus inquiry "focuses on whether there was a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Nieto, 76 M.J. 101, 106 (C.A.A.F. 2017) (internal quotation marks and citation omitted). "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 quotation marks and citation omitted).

While Appellant relies heavily on Nieto to argue there was no nexus between Appellant's iPhones and the alleges offenses (App. Br. at 19), the facts in Nieto are distinct from those here. In Nieto, an accused was caught surreptitiously recording other soldiers in the restroom with his cellphone. 76 M.J. at 106. Where a search authorization went afoul was in seizing and searching the accused's *laptop*

on the general premise that people can transfer images from their cellphones to their laptops. Id. at 107. This Court found insufficient probable cause to search the appellant's laptop because there was no connection between the cellphone and laptop besides a generalized profile.

In contrast here, Appellant's cellphones were found at the scene of the crime on his person and in DF's room. (JA at 3, 4, 222.) The iPhone 13 was found on the floor of DF's room at the base of his bed shortly after DF kicked Appellant backwards away from his foot, suggesting that Appellant had his cellphone out and was using it during the crime. (JA at 3.) Further, Appellant *only* took his cellphones with him when he entered DF's room. His other belongings were left behind in his unlocked car. (JA at 7, 184.) This created a direct nexus in the minds of SA JA, Col JF, and, later, the judge, to find that probable cause existed to search Appellant's phones beyond the location data. They reasonably believed that Appellant intended to use his phone during the commission his crime as opposed to simply having the phones on his person. (JA at 147, 187, 245.) Unlike Nieto, there was no attempt to search separate devices in the hopes that Appellant had backed-up or transferred evidence of a crime to a separate device. The search authorization focused on the two cellphones found at the scene of the crime. (JA at 90-91.)

Using his training and experience as an investigator, SA JA reasonably concluded that Appellant left everything else behind but brought his cellphones to use those items in the commission of his crimes. (JA at 187.) Appellant left his other belongings in the car yet brought his two cellphones. If Appellant had not intended to use his cellphones, it is more likely that he would have left them in his car with his other belongings. SA JA's belief that Appellant had "sanitized" himself was a reasonable one. (JA at 184.) Col JF arrived at the same conclusion when considering the facts presented to him, as well as the fact that Appellant had *two* cellphones on his person instead of one. (JA at 147.) While carrying a cellphone is the norm, carrying two is not. Considering this evidence in the light most favorable to the Government and viewing them in a commonsense manner, it was reasonable for SA JA and Col JF to believe that two cellphones by themselves in the possession of a man dressed and masked in black was using the cellphones in the commission of his crime. And logically, this led to the conclusion that evidence of the crime might be found on Appellant's phones. Huntzinger, 69 M.J. at 7.

That DF did not see or hear Appellant using his cellphone is not compelling. (App. Br. at 20.) The use of video recording or the cellphones camera does not automatically make noise or create a light that would be visible to a witness, particularly one who was asleep and facing away from Appellant until after the

kick. It is more compelling to consider that the iPhone 13 was already out and on the floor by the time DF noticed it. (JA at 3.) Since Appellant was not wearing his pants, there is no sound argument that the iPhone 13 merely slipped free from a pocket during the fight between DF and Appellant. (Id.) The only way the iPhone 13 could have gotten on the floor while the iPhone 7 remained in Appellant's pant pocket would be if it was out before DF first kicked Appellant. It was reasonable to believe that the iPhone 13 was out because Appellant was *using* it in the commission of his crime. Even if there could be other innocent explanations for Appellant's iPhones being his only possessions at the time, such as for a flashlight (JA at 212), "'probable cause does not require' that the 'innocent explanation for suspicious facts' be ruled out; rather, the relevant question is 'the degree of suspicion that attaches to particular types of noncriminal acts.'" United States v. Bavender, 80 M.J. 433, 440 (C.A.A.F. 2021) (quoting District of Columbia v. Wesby, 583 U.S. 48, 61 (2018)).

Appellant overreaches to liken his case to Riley v. California for the premise that the search of his phones was a "substantial intrusion on privacy." (App. Br. at 19). His argument fails to distinguish between a warrantless search of a cellphone seized incident to an accused's arrest and Appellant's own circumstances. In Riley, the Supreme Court found that the Government could not ordinarily search the contents of cellphones seized incident to arrest without a warrant. 573 U.S. at

401. But the Supreme Court's rationale in Riley did not create a heightened standard to search cellphones in general; it just required the Government to first obtain a warrant supported by probable cause. (Id. at 401.) The Government therefore followed the Supreme Court's "accordingly simple" directive to "get a warrant" to search Appellant's cellphones. Id. at 403.

This case is also distinguishable from Hoffman, Morales, and Griffith. In Hoffman, this Court found that there was no automatic nexus between the accused's attempts to lure little boys away with him and possession of child pornography. 75 M.J. 120, 127 (C.A.A.F. 2016). CAAF found that the CCA erred by inferring that someone who would lure small boys is likely to have child pornography to gratify their sexual desires. CAAF found there was no inherent connection between child molestation and child pornography, and so without a specific connection in that case, there was no link to support probable cause for a search of the accused's cellphone. Id.

The same logic was applied in United States v. Morales, where the Army Court of Criminal Appeals found that it was "an inferential fallacy to assume without evidence that someone committing sexual assault would also photograph evidence of the crime on their phone." 77 M.J. 567, 574 (A. Ct. Crim. App. 2017).

In Griffith, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that a warrant to search the accused's home for a cellphone that lacked a "reason to suspect that Griffith in fact owned a cell phone, let alone that any phone belonging to him and containing incriminating information would be found in" his home was unsupported by probable cause. United States v. Griffith, 867 F.3d 1265, 1270 (D.C. Cir. 2017). Part of this failure came from the fact that the affidavit for the search warrant did not include an observation of Griffith's using a cellphone, information about anyone having received a cellphone call or text message from him, or a statement that a cellphone was recovered from Griffith at his previous arrests. Id. at 1272. The D.C. Circuit stated it was not aware of a case that would allow law enforcement "to search a suspect's home for a cellphone without any particularized information that he owned one." Id. at 1273.

However, neither Hoffman, nor Morales, nor Griffith address the circumstances of this case. Here, there *was* a connection between Appellant's cellphones and the offenses: Appellant brought only his two cellphones into the room with him, left all his other belongings in the car, and one of the cellphones was found in DF's room. (JA at 3.) That DF did not directly see Appellant using his cellphone does not put this case into the realm of Griffith or Morales; DF saw the cellphone on his own floor immediately after kicking Appellant for breaking in

and massaging his foot, and the parties knew the cellphone belonged to Appellant. (JA at 3, 4.) That created a nexus between the iPhone and the offenses that was missing Appellant's cited cases.

A nexus existed between Appellant's iPhones and the offenses when considering Appellant's actions in the light most favorable to the Government and in a commonsense manner. Huntzinger, 69 M.J. at 7. Col JF had a substantial basis to conclude probable cause existed, and his determination should be given substantial deference. Gates, 462 U.S. at 236. This Court should find that the judge did not abuse his discretion by denying Appellant's motion to suppress on the basis that probable cause existed to search Appellant's phone. The judge acted well within the range of choices available to him. Gore, 60 M.J. 178, 187. He did not abuse his discretion.

3. *Based on the connection to the Incirlik case, probable cause existed for the expanded date range.*

While Appellant argues that there was "no evidence" that Appellant was involved in the Incirlik incident (App. Br. at 26), he attempts to increase the Government's burden to show probable cause. Probable cause is a *reasonable belief* that the . . . evidence sought is located in the place . . . to be searched." Mil. R. Evid. 315(f)(2). The standard is more than bare suspicion, but is lower than a preponderance of the evidence. Leedy, 65 M.J. at 212. The judge did not abuse his discretion in finding that the Government met this standard.

While the Government did not pull Appellant's leave or temporary duty station records prior to issuing the second search authorization, they did not need to: SA JA knew Appellant had been stationed at Incirlik on 29 December 2021. (JA at 7, 185). The Government's evidence did not need to sustain a conviction to be enough for probable cause, and the Government did not charge Appellant with any offenses stemming from the incidents at Incirlik. Leedy, 65 M.J. at 212. At the time the search authorization was issued, it was enough that the Government knew Appellant had been stationed at Incirlik (in addition to the factors laid out below).

The total description provided to SA JA and later to Col JF regarding the Incirlik incident created a nexus between Appellant, Appellant's phone, and the incident. Both incidents involved (1) a tall black male; (2) dressed in all black; (3) crawling in another person's bedroom; (4) roaming around dormitories; (4) the perpetrator asking the victim not to call law enforcement when confronted; and (5) Appellant being assigned to that installation at the time. While Appellant protests that the physical description was not detailed enough to create a nexus to him, he ignores the other factors that connected him to the Incirlik incident in addition to his build and dress: the behavior of the individual at Incirlik matched Appellant's behavior with DF, the individual's request not to call law enforcement was the same as Appellant with DF, and Appellant was stationed at Incirlik on 29

December 2021. (JA at 186-187.) These facts increased the "probability" that Appellant was the intruder in both incidents enough to create probable cause. Leedy, 65 M.J. at 212. Considering these facts in the light most favorable to the Government and in a commonsense manner, it was reasonable for Col JF to believe Appellant was the intruder in both scenarios. And since the evidence suggested that Appellant was using his phone in perpetrating the Aviano crime, it was similarly reasonable to believe he was using his cellphone when perpetrating the similar Incirlik crime as well. *See* Huntzinger, 69 M.J. at 7.

This case is distinct from the cases cited by Appellant below because each of those cases lacked the behavioral, verbal, and location component that tied Appellant to the Incirlik incident.

In Reid v. Georgia, 448 U.S. 438, 441 (1980), the Drug Enforcement Administration stopped two black men profiled as "drug courier[s]" without additional compelling evidence. In United States v. Jones, 619 F.2d 494, 497 (5th Cir. 1980), a law enforcement official completed a Terry stop with only a partial description of a suspected robber that described many people. In United States v. Brown, 448 F.3d 239 (3d Cir. 2006), an officer heard a broadcast for "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 the other was 6'." Id. at 247. The officer only stopped Brown and his companion because they were

"the only two black males at that location." Id. The Circuit Court found this description to be too broad to create reasonable suspicion. In United States v. Rias, 524 F.2d 118, 121 (5th Cir. 1975), because an officer knew of a blue or black automobile being used by two black males to commit armed robbery, he "simply stopped two black males because they were in a black Chevrolet. This fact alone, without additional reliable evidence sufficient to warrant the conclusion that either or both of the men had been or were involved in criminal activity, did not constitute cause to stop the vehicle." Id. United States v. Soza, 686 Fed. Appx. 564, 565 (11th Cir. 2017) similarly had a broad description of a Spanish male in his forties wearing a grey shirt and baseball cap.

Many of these cases carried the stigma of racial profiling to justify a search. That is not the situation in Appellant's case. Appellant was caught red-handed committing the crimes at Aviano, so there was no question as to his identity for that crime. Then Col JF and the judge considered the physical description, outfit, behavior, statements, and Appellant's assignment to conclude that there was a connection between the Aviano and Incirlik incidents. (JA at 132, 134, 149, 226, 244.) AFOSI believed there was a probability of a "series of behavior or repeated behavior" by Appellant, which gave rise to the expanded timeframe from 12 August 2022 to 29 December 2021. (JA at 186.) While the Incirlik incident report did not mention a phone, the suspect at Incirlik escaped without being caught.

Appellant's iPhones on 12 August 2022 would give rise to the reasonable belief that Appellant may have used his phone at the Incirlik incident. Once the connection was drawn to the Incirlik incident, SA JA and Col JF[2] reasonably believed that evidence related to the crimes under investigation would be found in the media on Appellant's phone going back to the Incirlik incident on 29 December 2021. They appropriately limited the search authorization to that window of time, so the search authorization was not overbroad. (JA at 93.) *See* United States v. Bryson, 2025 U.S. Dist. LEXIS 201150, at *14 (E.D. Ky. Sep. 22, 2025) ("[f]ailure to limit broad descriptive terms by relevant dates, *when such dates are available to the police,* will render a warrant overbroad.") (internal citation omitted).

In the end, taking all the evidence in the light most favorable to the government, it was reasonable to believe that searching Appellant's phones for evidence within the expanded timeframe would yield evidence of a crime. The judge correctly applied the law by giving substantial deference to Col JF's probable cause determination, even if it was a close call. Huntzinger, 69 M.J. at 7. The judge did not abuse his discretion.

[2] As discussed above, the judge's finding of fact that Col JF was briefed about the Incirlik incident before authorizing the second search was supported by the record and not clearly erroneous.

B. The military judge did not abuse his discretion by applying the good faith exception to this case.

The judge did not abuse his discretion in finding that the good faith exception would apply to Appellant's case. United States v. Hernandez, 81 M.J. 432, 442 n.7 (C.A.A.F. 2021). Under the good-faith exception, evidence obtained from of an unlawful search will not be excluded if the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Mil. R. Evid. 311(b)(3)(C). In United States v. Carter, 54 M.J. 414, 421-22 (C.A.A.F. 2001), this Court stated that the President, in promulgating Mil. R. Evid. 311(c)(3)(B), was seeking to codify the good faith exception in Leon. Under this exception, evidence obtained as a result of an otherwise 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) . . . ;
>
> (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.

Mil. R. Evid. 311(c)(3).

In Leon, the Supreme Court determined that there were four circumstances under which the good faith exception does not apply: (1) a false or reckless affidavit; (2) a "rubber stamp" judicial review; (3) an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) a facially deficient warrant. 468 U.S. at 914-15.

Mil. R. Evid. 311(c)(3)(B) "addresses the first and third exceptions noted in Leon" regarding whether the affidavit was intentionally reckless or false and whether it was "more than a bare bones recital of conclusions." Hernandez, 81 M.J. at 440-441 (internal quotations omitted). Mil. R. Evid. 311(c)(3)(C) "addresses the second and fourth exceptions in Leon," so "objective good faith cannot exist when the police know that the magistrate merely rubber stamped their request, or when the warrant is facially defective." Id. at 441. Based on this analysis, the judge did not abuse his discretion by applying the good faith exception in this case (JA at 246-247.)

Law enforcement's behavior in this case reinforced that the search and seizure of Appellant's cellphones was done in good faith. Seeking a search authorization is prima facie evidence of good faith, and it is unequivocal in this case that SA JA did so. United States v. Koerth, 312 F.3d 862, 868 (7th Cir. 2002).

1. *The search authorization and affidavit were not too deficient for the good faith exception.*

Taking the third factor under Leon, Appellant argues that the omission of details of the 29 December 2021 Incirlik AFB incident from the affidavit meant that the search authorization was too deficient for the good faith exception to apply, and so SA JB could not have executed the search authorization in good faith. (App. Br. at 37.) Appellant relies on Morales, which cited Carter, to support this argument. (Id.) In Carter, this Court said, "the second prong of Mil. R. Evid. [311(c)(3)] is satisfied if the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause." 54 M.J. 414, 422 (C.A.A.F. 2001).

Col JF's authorization and the accompanying affidavit were not "so facially deficient" that the executing officers could not "reasonably presume it to be valid." Leon, 468 U.S. at 923 (citation omitted); *see also* United States v. Perkins, 78 M.J. 381, 389 (C.A.A.F. 2019) ("[T]he search authorization was not facially defective because it identified the place to search . . . and described in detail what to look for.") The second search authorization directed AFOSI to search Appellant's cellphones to "seize media produced . . . between 29 Dec 21 and 12 Aug 22 related to the violation of" sexual assault, assault, and burglary. (JA at 93.) This clearly identified the "place to search" and "what to look for." Perkins, 78 M.J. at 389.

SA JB testified, and the judge found, that SA JB relied on the search authorization when conducting the search of Appellant's cellphone in September 2022, although SA JB did not mention specific details. (JA at 246, 247.) SA JB stated that he would refer back to the search authority to make sure he was "staying within my bounds" while conducting the search. (JA at 206.) While the Incirlik incident was not captured in the affidavit, SA JB would have been able to see SA JA's affidavit regarding the two cellphones found in DF's room and on Appellant's person, as well as the details about Appellant's all black outfit and unlocked car with Appellant's other possessions. (JA at 90-91.) SA JB would have seen that this was not a "bare bones" affidavit, Carter, 54 M.J. at 421, and it was not "so lacking in indicia of probable cause as to render official belief in its existence *entirely* unreasonable." Leon, 468 U.S. at 923 (internal quotation marks and citation omitted) (emphasis added). As the Eighth Circuit has noted, "'[e]ntirely unreasonable' is not a phrase often used by the Supreme Court, and we find nothing in Leon or in the Court's subsequent opinions that would justify our dilution of the Court's particularly strong choice of words." United States v. Carpenter, 341 F.3d 666, 670 (8th Cir. 2003). Even if Col JF erred in finding probable cause, it would not have been *entirely* unreasonable for AFOSI to rely on the probable cause determination. Thus, the judge did not abuse his discretion in applying the good faith exception.

2. *It was not clearly erroneous to find Col JF did not act as a rubber stamp.*

Second, Appellant argues that Col JF only acted as a rubber-stamp for law enforcement because (1) the affidavit lacked information on the expanded date range and thus fell below the "bare bones" standard (JA at 38); and (2) Col JF's actions demonstrated he "joined law enforcement in simply speaking in possibilities" (JA at 39-40.)

Appellant "rubber stamp" argument first fails based on Col JF and SA JA's testimony. (JA at 38.) While the affidavit did not contain information about the Incirlik incident to explain the date range, the judge found as fact that Col JF was briefed on the incident and, as stated above, this was not a clearly erroneous finding. (JA at 248.) SA JA and Col JF both testified that they had a conversation about the Incirlik incident when discussing the second search authorization when SA JA was under oath. (JA at 132, 137, 149, 189.) The matching details about the two incidents included Appellant's dress, physical description, behavior, and statements on 12 August 2022 as compared to the unnamed individual's on 29 December 2021 at Incirlik.

Regarding Col JF's actions, the judge found Col FJ did not "wholly abandon[] his judicial role and merely acted as a rubber stamp for OSI." (JA at 247.) This finding was supported by the record and was not clearly erroneous. *See* United States v. Qose, 679 F. App'x 761, 763-64 (11th Cir. 2017) (review the

underlying facts upon which a good faith determination is based for clear error, *citing* United States v. Robinson, 336 F.3d 1293, 1295 (11th Cir. 2003)).

The evidence showed Col JF was trained on conducting search authorizations, that evidence provided to Col JF both verbally and in writing was sworn, and that search authorizations were reduced to writing and were subjected to judicial scrutiny. (JA at 247.) Col JF read the search authorization and affidavits carefully enough that he sent the first search authorization back to AFOSI for corrections. (JA at 6, 133.) It is reasonable to conclude he gave the same amount of attention to the information in the affidavit and in JA's sworn statements in support of the second authorization. Moreover, the military recognized that Col JF consulted with the JAGs before making his ultimate decisions. These were not the actions of someone who had wholly abandoned his judicial role. The judge's finding that Col JF did not merely act as a rubber stamp for OSI was supported by the record and not clearly erroneous.

3. *It was not clearly erroneous to find that SA JA did not intentionally or recklessly provide false information to Col JF.*

The judge's finding that AFOSI did not intentionally or recklessly mislead Col JF also had a factual basis and was not clearly erroneous. *See* Hernandez, 81 M.J. at 441 (analyzing this issue as finding of fact reviewable for clear error). Appellant argues that AFOSI recklessly disregarded the truth by (1) telling Col JF that Appellant was involved in the incident in Incirlik; (2) omitting that there was

no evidence of a cellphone being used at the Incirlik incident; and (3) omitting that Appellant was not named a suspect in the Incirlik incident. (App. Br. at 40-42).

To start in his motion to suppress, Appellant did not allege that OSI recklessly *omitted* any material fact from the affidavit that would have defeated probable cause if included. (JA at 61-62.) When alleging a lack of probable cause based on omission of a material fact, the defense must first make a substantial preliminary showing to request a hearing, and then, at that hearing, establish knowing and intentional falsity or reckless disregard for the truth. Mil. R. Evid. 311(d)(4)(B).

At trial, the defense seemed to generally argue that it was "reckless" for OSI not to include more evidence to support probable cause (JA at 355), but that is not the kind of reckless omission of a material fact that Mil. R. Evid. 311(d)(4)(B) or Leon was concerned about. Logically, a material fact is one that could have undermined probable cause if presented to the magistrate. Appellant failed to make a showing of a specific reckless omissions and thus failed to sufficiently preserve the issue. Since the defense followed none of the requirements of Mil. R. Evid. 311(d)(4)(B), this Court should consider Appellant's argument about intentional or reckless omissions to be waived. Mil. R. Evid. 311(d)(2)(A); Perkins, 78 M.J. at 390 (accused must make a particularized objection to the admission of evidence or issue is waived) (internal citations omitted).

In any event, Appellant's argument on appeal once again disregards the total testimonies of Col JF and SA JA. Taking the first and third points together, they somewhat countermand each other. Either Col JF was told Appellant was involved or "named" in the incident in Incirlik or he was not. AFOSI could not have simultaneously affirmatively told Col JF that Appellant was the individual from the incident in Incirlik while also somehow omitting that Appellant was not named as the suspect. To reach this conclusion, AFOSI would have had to lie to Col JF outright, which is not supported by the evidence. SA JA testified that the intruder at the Incirlik incident was never named and that they connected Appellant to that intruder based on the physical similarities, the black outfit, black face mask, the request not to call law enforcement, and Appellant's assignment to Incirlik at that time. (JA at 186-187.) Col JF testified that an AFOSI agent told him that Appellant was involved in the prior incident. (JA at 145-146.) But Col JF also testified that he was not specifically told whether Appellant was "named or not named in those allegations." (JA at 149.) Based on SA JA and Col JF's testimony, the only way for Appellant to be involved in the incident at Incirlik would have been as the intruder wearing all black and crawling on the bedroom floor (JA at 186), since no one was operating under the belief that he was involved as a witness to the intruder or another victim. Col JF's and SA JA's testimony provided adequate support in the record for the judge's finding of fact. Harris, 78 M.J. at

437; *citing* Criswell, 78 M.J. at 141. The judge did not clearly err in finding there was no evidence that SA JA intentionally or recklessly disregarded the truth when his and Col JF's testimony made it clear that SA JA connected Appellant to the Incirlik incident through the similarities in the cases, not because Appellant was named as a suspect.

Returning to Appellant's argument that OSI omitted from the affidavit that there was no evidence a phone was used during the Incirlik incident, the record is limited because Appellant never made this specific argument at trial. SA JA only testified that there was no mention of a phone in the report of the Incirlik incident – he never testified about what he told Col JF one way or another. (JA at 192.) Considering the arguments advanced at trial, the judge did not err in not addressing the alleged omissions. Instead, the judge properly considered the similarities between the Aviano and Incirlik incidents that SA JA *did* relay to Col JF, which were the same as those listed above. Even if the judge had found that any of the now-alleged omissions from the affidavit constituted material facts, it still would have been well within the judge's discretion, having heard and seen the witnesses, to find that the omissions were merely negligent or innocent mistakes, rather than intentional or reckless. Hernandez, 81 M.J. at 441. The judge's finding that there was no evidence the OSI agents intentionally or reckless provided false information to Col JF was supported by the record and not clearly erroneous.

The good-faith exception recognizes the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 918-19. The judge's decision to apply the good faith exception to evidence from Appellant's cellphones was within the range of choices available to him because (1) SA JA provided Col JF with information about Appellant's car, its contents, his cellphones, and the Incirlik incident to create more than a "bare bones" conclusion; (2) Col JF considered this information and had a substantial basis to determine probable cause existed; and (3) the JAG available at the time concurred that probable cause existed. (R. at 247.)

For these reasons, this Court should agree with AFCCA's conclusion that the good faith basis applied in this case. (JA at 13, 15.) This Court should also affirm AFCCA's finding that the judge's findings of fact were not clearly erroneous (JA at 14), and that the judge did not abuse his discretion in applying the good faith exception to the search of Appellant's phones. (JA at 15.)

C. The military judge did not engage in a clearly unreasonable exercise of discretion by declining to apply the exclusionary rule under Mil. R. Evid. 311(a)(3).

The judge's decision not to apply the exclusionary rule was not clearly unreasonable. To apply the exclusionary rule, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." Lattin, 83 M.J.

at 197. When reviewing a judge's decision whether to apply the exclusionary rule under Mil. R. Evid. 311(a)(3), the court asks "whether the military judge's assessment of these matters was a 'clearly unreasonable' exercise of discretion." Id. at 198.

The judge did not commit a "clearly unreasonable" exercise of discretion in determining the deterrent value of suppression did not outweigh the costs to the justice system. Id. at 198. The judge held there was no unlawful or unreasonable overreach on the part of AFOSI or Col JF. (JA at 247.) He determined there would be no deterrent value in applying the exclusionary rule based on AFOSI and Col JF's actions. SA JA thoroughly investigated the case into Appellant, consulted colleagues about the Incirlik incident, and sought legal advice from judge advocates before seeking a search authorization. (JA at 7, 185, 187, 189.) SA JA discussed the case with Col JF and provided an affidavit to Col JF to support his search authorization request in addition to making sworn statements to Col JF regarding the evidence that supported probable cause. (JA at 90-91, 189.)

The AFOSI agents did exactly what society would expect them to do in this case: They seized Appellant's phones upon his arrest when they had probable cause to search his location data, but they waited to request a more in-depth search until their investigation developed more evidence to support such an intrusion into Appellant's privacy. They sought legal advice as to whether they had probable

cause to support the search. Even if probable cause was a close call, the evidence was not so lacking that no reasonable agent could have believed it existed – especially based on the legal advice received. The judge accurately stated, "it is hard to find any fault in the investigators' or Col [JF's] approaches or decisions in this case." (App. Ex. XX at 28). As the judge described it, Col JF and SA JA made "judgment calls" based on the facts. (JA at 247.) There is little deterrent value found in penalizing a special agent or magistrate for making the wrong judgment call on probable cause, absent more egregious errors. Here, there was no "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" that triggers suppression. *See* Davis, 564 U.S. at 238. Indeed, OSI attempted to honor Appellant's rights by first seeking search authorizations and then ensuring they only searched within their scope. This was not the privacy intrusion from in Riley, as Appellant argues, where a phone was searched incident to an arrest without a warrant.

In contrast, suppressing the evidence would be at a high cost to the justice system. The Government found a video filmed by Appellant of a fellow military member showering in the base gym without his consent and "hundreds" of photos and recordings of individual's feet, including DF's, when they had an expectation of privacy. (JA at 2-3, 8, 268-269.) Military members and the public in general should feel able to use the locker room, bathroom, and showers at the gym without

worrying that another individual is filming or taking pictures of them without their consent. This is especially true when individuals in these places are frequently undressed or entirely naked. (Id.)

That Appellant would still be convicted of unlawfully entering DF's TFL room is not compelling, nor is his application of Herring v. United States, 555 U.S. 135 (2009). (App. Br. at 35). The Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." Id. at 141. As the judge noted, indecent recording is "a serious charge the nature of which is deeply concerning." (JA at 248.) Further, the judge made this comment when trial defense counsel was only arguing that suppression of the evidence would remove the charge of indecent recording. But as addressed below, now Appellant seeks to have this evidence thrown out to do away with both his conviction for indecent recording *and* assault consummated by battery for touching DF's foot. (Id.)

The minimal deterrent value of suppression did not outweigh the high cost to the justice system. This Court should find that the judge's assessment of these matters was not a "clearly unreasonable" exercise of discretion and, thus, should not be reversed.

D. This Court should not set aside Specification 2 of Charge II because Appellant was not prejudiced.

Appellant argues that Appellant's convictions for assault consummated by battery for touching DF's foot (Charge II) and for indecent recording for recording ZP naked in the shower (Additional Charge) must be set aside because evidence from Appellant's phone was offered with respect to those charges. (App. Br. at 43).

If this Court finds the judge abused his discretion in failing to suppress the evidence from the expanded search authorization, this Court still should not set aside Appellant's conviction for assault consummated by battery for touching DF's foot. Hoffmann, 75 M.J. at 128 ("we may not set aside the finding of the court-martial 'unless the error materially prejudices the substantial rights of the accused.'" Article 59(a), UCMJ.) "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (internal citations omitted).

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous....To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Id., (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991)).

Evidence of pictures of feet from Appellant's iPhone 13 was unimportant in relation to everything else the judge considered concerning the assault consummated by a battery charge. DF testified at length regarding Appellant's unlawful entry into DF's TLF room, DF's awareness of Appellant in his TLF room, the feeling of someone rubbing his foot in a rhythm, and DF's capture of Appellant when Appellant attempted to flee. (JA at 3-4.) Appellant was apprehended by law enforcement outside DF's room wearing a black beanie, black mask, black shirt, and underwear while his pants and iPhone 13 were on the floor of DF's room. (JA at 4.) Even if Appellant's phone had never been searched, his presence in DF's room at TFL, his state of dress, his all black outfit, and his iPhone 13 on the floor in DF's room all provided independent evidence of Appellant's offenses. Unlike in Hoffman, the evidence from Appellant's phone was not "the only evidence supporting Appellant's conviction." 75 M.J. at 128.

Even if this Court finds the evidence from the search of Appellant's phones should have been suppressed, the introduction was harmless beyond a reasonable doubt and Appellant was not prejudiced by the introduction of such evidence. This Court should not set aside Appellant's conviction for assault consummated by battery.[3]

[3] The United States acknowledges that if the judge abused his discretion in admitting the video of ZP showering found on the iPhone 13, that error would not

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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have been harmless beyond a reasonable doubt with respect to the indent recording offense in the Specification of the Additional Charge.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division on 22 October 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because:

This brief contains 12997 words.

This brief complies with the typeface and type style requirements of Rule 37.

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Attorney for the United States (Appellee)

Dated: 22 October 2025