APPENDIX A

COURT OF APPEALS FOR THE ARMED FORCES DECISION

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Tyler G. EPPES, Captain
United States Air Force, Appellant

No. 17-0364
Crim. App. No. 38881

Argued November 8, 2017—Decided April 10, 2018

Military Judge: Shaun S. Speranza

For Appellant: *William E. Cassara,* Esq. (argued); *Major Annie W. Morgan* (on brief).

For Appellee: *Lieutenant Colonel Joseph J. Kubler* (argued); *Colonel Katherine E. Oler* (on brief); *Colonel Julie L. Pitvorec* and *Mary Ellen Payne,* Esq.

Amicus Curiae for Appellant: *Seantyel Hardy* (law student) (argued); *Angelica Nguyen* (law student) (on brief); *John H. Blume*, Esq. (supervising attorney) (on brief) — Cornell Law School.

Judge SPARKS delivered the opinion of the Court, in which Chief Judge STUCKY and Judge OHLSON joined. Judge RYAN filed a separate opinion concurring in part and concurring in the result. Senior Judge EFFRON filed a separate opinion concurring in part and dissenting in part.

Judge SPARKS delivered the opinion of the Court.[1]

A military judge sitting alone convicted Appellant, in accordance with his pleas, of conspiracy, false official statement, larceny of military and non-military property, fraud against the United States government, and conduct unbecoming an officer in violation of Articles 81, 107, 121,

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[1] We heard oral argument in this case at Cornell Law School, Ithaca, New York, as part of the Court's Project Outreach. This practice was developed as a public awareness program to demonstrate the operation of a federal court of appeals and the military justice system.

132, and 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 907, 921, 932, and 933. The military judge sentenced Appellant to a dismissal, a $64,000 fine, forfeiture of all pay and allowances, and ten years confinement—with a contingent additional three years confinement should he fail to pay the fine. The convening authority approved the adjudged sentence. The United States Air Force Court of Criminal Appeals affirmed. We granted review of the following issues:[2]

> I. Whether the search of Appellant's personal bags exceeded the scope of the search authorization where the agent requested authority to search Appellant's person, personal bags, and automobile, but the military magistrate authorized only the search of Appellant's person and automobile and did not authorize the search of Appellant's personal bags.
>
> II. Whether Appellant's right to freedom from unreasonable search and seizure under the Fourth Amendment was violated when there was no probable cause for the 7 December 2012 warrant.

I. Background[3]

Appellant was convicted of submitting fraudulent travel vouchers and tax documents, falsifying insurance claims, stealing money and cameras from the United States government, and conspiring to unlawfully possess an intoxicating substance. The investigation into Appellant's misconduct was far-reaching and complex, and involved numerous searches and seizures. We are concerned with only two of these searches: the December 7, 2012, search of Appellant's home and the February 5, 2013, search of Appellant's bags in his workspace.

Appellant, an Air Force Office of Special Investigations (AFOSI) agent, began his duties as the Air Force Chief of

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[2] Pursuant to his pretrial agreement, Appellant entered guilty pleas conditioned upon his right to raise the suppression issue on appeal.

[3] This background is taken substantially from the military judge's findings of fact. The parties do not contend these particular findings are clearly erroneous as they relate to the two searches at issue here.

Staff's personal security advisor in July 2012. He and his coworkers shared an office at the Pentagon and had equal and unfettered access to the desks and computers therein.

In November 2012, Appellant arranged to have his wedding at a hotel in Dallas, Texas, fraudulently claiming it was an official Air Force function. He prepared fake travel orders for his coworkers, maintaining they were his "security team," and applied for tax exempt status for himself and his wedding guests, including his family members. Appellant also paid his enlisted coworker to take leave to act as his assistant during the wedding and even provided his coworker with false documents indicating the wedding was an official Air Force function. On November 13, 2012, Appellant had a series of disagreements with the hotel staff, culminating with Appellant threatening to remove the hotel from consideration for use by government employees. On November 16, 2012, in response to Appellant's threat, the hotel manager contacted AFOSI and the office of the Chief of Staff of the Air Force. The Air Force opened an investigation based on the hotel staff's complaint.

During the week of November 19, 2012, AFOSI Special Agent (SA) Armstrong traveled to the hotel to interview the hotel employees. SA Armstrong learned of the tax exemption request for the cost of the wedding, collected false tax forms from the hotel, and obtained copies of emails Appellant exchanged with hotel staff.

AFOSI agents interviewed the supposed wedding "security team" members. These witnesses provided the AFOSI agents with the forged documents authorizing their detail and told the agents Appellant had mentioned filing insurance claims for a burglary of his previous residence.

On November 29, 2012, one of Appellant's coworkers went through the desk he shared with Appellant in search of a work-related memorandum and came across a folder labeled "wedding shower." This folder contained fraudulent travel documents authorizing the travel of a number of Appellant's family members to Dallas, Texas, for a "[Chief of Staff of the Air Force] Special Interest Itinerary for 10–11 September." Realizing the itinerary was false, Appellant's coworker scanned and emailed it to his AFOSI supervisors.

Apparently, no such Special Interest event scheduled in September ever occurred.

On December 6, 2012, AFOSI conducted a formal search of Appellant's shared desk at the Pentagon, seizing a work computer and a receipt for a camera. From December 7 to December 10, 2012, agents searched Appellant's work email accounts.

In the final stages of his initial investigation, SA Armstrong reviewed a letter of counseling Appellant received in 2008 for falsifying travel documents.

On December 7, 2012, SA Armstrong swore an affidavit requesting a search warrant before a District of Columbia Superior Court judge. SA Armstrong sought to search Appellant's home and, inter alia, Appellant's "computer hardware, computer software and digital media (e.g., computer equipment, digital storage devices, cameras, photographs, etc.)" for evidence of frauds against the government.

The Superior Court judge found probable cause to believe a search of Appellant's home would reveal evidence of a crime. He issued the warrant on December 7, 2012, and AFOSI conducted the search pursuant to the warrant on the same date. This search yielded a significant quantity of evidence including blank prescription forms already signed by a military provider, receipts and documents from two bags in Appellant's living room, as well as USB drives, hard drives, and a laptop from elsewhere in Appellant's home.

On December 8, 2012, agents interviewed Appellant, searched his person, and, with his consent, searched two of his personal bags. The bags contained travel orders on official letterhead, prescription forms, a laptop, a Blackberry, SIM cards, an iPad, and medications. Agents subsequently received verbal search authorization to search the electronic devices recovered during this search.

In mid-December, AFOSI obtained Appellant's Defense Travel System claims, manually submitted travel vouchers, and Government Travel Card records, and conducted a review of Appellant's financial, insurance, and medical records. Of sixty travel vouchers Appellant submitted

between January 2009 and December 2012, fifty-one contained false information and five were completely fraudulent. The review of Appellant's insurance records showed evidence of insurance fraud and reviews of his medical records showed "no indication that [Appellant] was prescribed the medications" for which prescriptions and prescription packaging were found in his home.

At some point during the investigation Appellant was moved from his regular work station at the Pentagon to a small office in Chapel 1 at Joint Base Andrews. On February 5, 2013, SA Cooper submitted a signed and sworn affidavit requesting authorization to search Appellant and his personal bags at the Chapel 1 office, as well as his personal vehicle. A military magistrate granted the authorization, but did not expressly authorize a search of Appellant's bags.

Pursuant to the authorization, SA Cooper and his colleagues searched Appellant's person, vehicle, and office on February 5, 2013. Agents recovered a jewelry invoice, pharmacy receipts, and documents evidencing false claims against the United States in Appellant's vehicle. They found leave authorizations, bank statements, a permanent duty travel voucher, blank Chief of Staff of the Air Force documents, and various other documents in Appellant's office. Agents recovered a watch they believed to be evidence of insurance fraud during the search of Appellant's person. After searching Appellant's person, agents searched Appellant's immediate vicinity and two of his bags. With respect to the bags, the military judge found that, upon discovering evidence of travel fraud "in plain view ... SA Cooper stopped the search and consulted the 11 WG Deputy Staff Judge Advocate (DSJA). The DSJA advised the agents to continue the search in accordance with the authorization, but to also collect other documents they know to be evidence of other crimes." A Report of Investigative Activity submitted for this search indicates the bags in question contained the following items of relevant evidentiary value:

> one Marriot [sic] room rate discount authorization form with the date covered, an 18-page merchandise inventory sheet, A 10-page United Services Automobile Association (USAA) valuable personal property (VPP) insurance document, 11

> airline tickets and travel related documents, three blank USAA checks, 12 pages of USAA VPP documents, three blank [CSAF] letter documents, one Cole Haan receipt, one Citi direct statement, One ATM card with "Africa Russia" written on it, and one Foundry Lofts envelope with four documents inside.

That same day, SA Cooper and his colleagues again searched Appellant's home pursuant to a judicial warrant, and recovered various documents relating to the sale and appraisal of jewelry and watches, as well as insurance documents related to Appellant's vehicle, airline tickets, receipts, and cameras.

Defense counsel filed a motion to suppress much of the evidence offered against Appellant, including evidence gathered in the December 7, 2012, and February 5, 2013, searches.

The military judge denied the motion to suppress, holding both searches were supported by probable cause, and as to the February 5 search, the agents were authorized to search Appellant's person and reasonably searched the area immediately around him, including the bags.

II. Discussion

We review a military judge's denial of a motion to suppress for an abuse of discretion. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017); *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010); *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007). We "reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Owens*, 51 M.J. 204, 204 (C.A.A.F. 1999) (internal quotation marks omitted) (citation omitted). "[I]n reviewing a ruling on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party." *United States v. Macomber*, 67 M.J. 214, 219 (C.A.A.F. 2009) (internal quotation marks omitted) (citations omitted).

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. A search conducted pursuant to a warrant or search authorization is presumptively reasonable. *See United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). When evidence is unlawfully obtained, however, an accused may timely move to suppress it and, pursuant to the exclusionary rule, a military judge may exclude it. *See* Military Rule of Evidence (M.R.E.) 311(a); *see also Murray v. United States*, 487 U.S. 533, 536–37 (1988) (explaining the exclusionary rule prohibits the admission of unlawfully obtained primary and derivative evidence).

A. The December 7, 2012, search of Appellant's residence[4]

We find the December 7, 2012, search of Appellant's residence was supported by probable cause and was therefore valid.

Appellant contends the warrant issued by the District of Columbia Superior Court judge to search Appellant's residence on December 7, 2012, was not supported by probable cause because there was an insufficient nexus between Appellant's computer recovered during the search and the crime Appellant was suspected of committing.

In resolving search and seizure issues, we rely on a number of principles emerging from our own precedent, United States Supreme Court precedent, and the *Manual for Courts-Martial, United States*.

"Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." M.R.E. 315(f)(2). "Probable cause deals with probabilities." *Leedy*, 65 M.J. at 213 (internal quotation marks omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). "[T]here 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." *Id.* "[P]robable cause is a flexible, commonsense standard."

[4] To facilitate the analysis, we address the searches in chronological order.

United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (internal quotation marks omitted) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)). "It is not a technical standard, but rather is based on the factual and practical considerations of everyday life on which reasonable [persons], not legal technicians, act." *Leedy*, 65 M.J. at 213 (internal quotation marks omitted) (citation omitted). Probable cause determinations made by a neutral and detached search authority are entitled to substantial deference. *Nieto*, 76 M.J. at 105; *Clayton*, 68 M.J. at 423; *Macomber*, 67 M.J. at 218. Resolution of doubtful or marginal cases should be largely determined by the preference for warrants, and close calls will be resolved in favor of sustaining the search authority's decision. *Nieto*, 76 M.J. at 105, *Clayton*, 68 M.J. at 423; *Macomber*, 67 M.J. at 218; *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000). Courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense manner. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *Clayton*, 68 M.J. at 423; *Macomber*, 67 M.J. at 218; *United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001). "A grudging or negative attitude by reviewing courts towards warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant ...." *Gates*, 462 U.S. at 236 (internal quotation marks omitted) (citation omitted).

The search authority must have "a substantial basis for concluding probable cause exist[s]." *Nieto*, 76 M.J. at 105 (internal quotation marks omitted) (quoting *United States v. Rogers*, 67 M.J. 162, 164–65 (C.A.A.F. 2009)). "A substantial basis exists 'when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location.' " *Id.* (quoting *Gates*, 462 U.S. at 238). To establish probable cause, a sufficient nexus must be shown to exist between the alleged criminal activity, the things to be seized, and the place to be searched. 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(d), at 518 (5th ed. 2012). Such 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." *Nieto*, 76 M.J. at 106 (internal quotation marks omitted) (citations omitted). Reviewing courts may read the affidavit and warrant to include inferences the issuing magistrate reasonably could have made. *See United States v. Williams*, 544 F.3d 683, 686–87 (6th Cir. 2008) (reasoning "[the courts are] entitled to draw reasonable inferences" and holding an issuing judge *could* have inferred a nexus (alteration in original) (internal quotation marks omitted) (citation omitted)); *United States v. Hodge*, 246 F.3d 301, 305–06 (3d Cir. 2001) (reasoning "[a] court is entitled to draw reasonable inferences about where evidence is likely to be kept" and holding a magistrate *might* have inferred a nexus under the circumstances (internal quotation marks omitted) (citation omitted)); *see also State v. Mell*, 182 P.3d 1, 14 (Kan. Ct. App. 2008) (explaining trial judges do not always "cover the issues raised on appeal to the extent [appellate courts] would like"). In establishing probable cause a magistrate may rely, in part, on the affiant law enforcement agent's professional experience, knowledge, and expertise. *See Leedy*, 65 M.J. at 215–16.

In evaluating the issuing search authority's probable cause finding, we examine: 1) the facts known to the authority when he issued the warrant and 2) the manner in which he came to know these facts. *Id.* at 214. Where the search authority has "a substantial basis to find probable cause," a military judge does not abuse his discretion in denying a motion to suppress. *Nieto*, 76 M.J. at 105 (internal quotation marks omitted) (citation omitted).

We conclude the Superior Court judge had "a substantial basis for concluding probable cause existed" because he was presented with sufficient facts to reasonably infer evidence of Appellant's crimes, namely fraud against the government and other offenses, would probably be recovered on a computer in Appellant's home. *Id.* (internal quotation marks omitted) (citation omitted); *Leedy*, 65 M.J. at 214.

SA Armstrong's affidavit in support of the warrant stated there was probable cause to believe Appellant committed several crimes, including frauds against the United States. The affidavit stated there was probable cause to search Appellant's residence and to seize any computers

and a variety of other items because: 1) Appellant had submitted false documents to the hotel personnel representing his wedding was an official event; 2) Appellant had provided signed state tax exemption forms falsely certifying that several of the wedding attendees were on official business; 3) Appellant made false claims about his tax status to hotel staff via email; 4) it had been discovered that Appellant had produced fraudulent invitational travel orders for members of his and his fiancée's family to travel to Dallas, Texas, purportedly to attend an earlier official Air Force event that never occurred; and 5) there was an indication Appellant had previously engaged in similar misconduct involving fraud. Finally, the affidavit informed the issuing judge Appellant was a law enforcement official.

The fact that the affidavit stated Appellant had used email to communicate with the hotel personnel raised a reasonable inference Appellant probably used a computer or other digital device or media as an instrumentality to pursue the suspected fraudulent scheme. The affidavit also supports the further reasonable inference that evidence of this type of criminal conduct, namely travel orders, letters, notes, financial records, and receipts, probably resided on such devices. Finally, unlike the average servicemember or government employee, Appellant, as a law enforcement official, had specialized knowledge and training about criminal investigative techniques and where individuals engaged in criminal conduct might secret the fruits and instrumentalities of their crimes. Together, these facts establish that the issuing judge could reasonably have inferred that given the nature of the criminal activity under investigation, Appellant probably had evidence of this criminal activity and the instrumentalities used to carry it out at his residence.[5] This inference is all the more reasonable given that there was no indication Appellant

[5] We certainly do not intend to suggest that, as a general matter, servicemembers are likely to store criminal evidence on their home computers. The knowledge at issue here is specific to Appellant. Without some other incriminating facts, a search authority cannot reasonably infer that the average servicemember is more likely to store evidence of criminality on his home computer than on his work computer.

lived elsewhere, and Appellant shared both his workspace and his computer with his AFOSI coworkers.

Given the state of the investigation on December 7, 2012, the information contained in the affidavit, and SA Armstrong's experience as a law enforcement official, the Superior Court judge had a substantial basis for finding probable cause regarding the search of the residence and the military judge did not abuse his discretion in ruling the warrant issued for the search of Appellant's residence was supported by probable cause.

B. The February 5, 2013, search of Appellant's bags

We first conclude that the search of Appellant's bags in his Chapel 1 office was beyond the scope of the search authorization.

The Fourth Amendment requires all warrants "particularly describ[e] the place to be searched, and the person or things to be seized." U.S. Const. amend. IV. "Th[is] requirement ... is conventionally explained as being intended to protect against general, exploratory rummaging in a person's belongings. But it also serves to prevent circumvention of the requirement of probable cause by *limiting the discretion of officers executing a warrant to determine the permissible scope of their search.*" *United States v. Sims*, 553 F. 3d 580, 582 (7th Cir. 2009) (emphasis added) (internal quotation marks omitted) (citations omitted).

Here, the affidavit in support of the search authorization expressly and specifically stated it was being submitted "in support of a request for separate search authority for (1) EPPES' person, (2) EPPES' personal bags and (3) EPPES' personally owned vehicle." The authorization returned to SA Cooper from the military magistrate authorized a search of "the person of TYLER G. EPPES, Capt, USAF" and his vehicle.

It is likely the omission of the bags from the search authorization was simply a scrivener's error because the agent who swore the affidavit also apparently authored the search authorization signed by the magistrate. It seems incongruous that the agent would include the bags in the

affidavit and then intentionally leave them out of the drafted search authorization.

Even if the discrepancy was not a scrivener's error, we conclude the military judge did not abuse his discretion in admitting the contents of the bags because agents inevitably would have searched the bags and discovered their contents. The military judge's conclusions of law touch generally on the independent source doctrine and the inevitable discovery doctrine as they pertain to the various searches in this case.[6]

The two doctrines, while similar, are separate exceptions to the exclusionary rule. The inevitable discovery rule is said to be a variation on the independent source rule. 6 LaFave, *supra* § 11.4(a), at 339. Thus, under the inevitable discovery rule, the question is not whether the police did in fact acquire certain evidence by reliance upon an untainted (or independent) source, but rather whether evidence found because of a Fourth Amendment violation *would inevitably have been discovered lawfully*. *Id.* We conclude that this analysis is more appropriately applied to the question of the admissibility of the contents of Appellant's personal bags searched on February 5, 2013.

The doctrine of inevitable discovery allows for the admission of illegally obtained evidence when the government "demonstrate[s] by a preponderance of the evidence that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner." *Wicks*, 73 M.J. at 103 (internal quotation marks omitted) (citation omitted); *see also Nix v. Williams*, 467 U.S. 431 (1984). The inevitable discovery of the evidence must occur through "routine procedures of a law enforcement agency" and "mere speculation and conjecture" as to inevitable discovery is not sufficient. *Wicks*, 73 M.J. at 103 (internal quotation marks omitted) (citations omitted). M.R.E. 311(c)(2) codifies the inevitable discovery doctrine into military law as follows,

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[6] It is not clear whether his conclusions extended specifically to the search at issue here. We will thus analyze whether either is applicable in the instant case.

"Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made."

> While the inevitable discovery exception does not apply in situations where the government's only argument is that it had probable cause for the search, the doctrine may apply where, in addition to the existence of probable cause, the police had taken steps in an attempt to obtain a search warrant.

United States v. Souza, 223 F.3d 1197, 1203 (10th Cir. 2000). The doctrine may apply where it is reasonable to conclude officers would have obtained a valid authorization had they known their actions were unlawful.[7] *See United States v. Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008) (holding the doctrine applicable where consent to a search was invalid, reasoning the officers would have obtained a valid warrant to retrieve the evidence at issue if the accused had not consented). We find the inevitable discovery doctrine applies in this case for the following reasons.

First, we believe the agents would have applied for and received authorization to search had they recognized the discrepancy omitting the bags. The agents conducted a search beyond the scope of the authorization, but within the confines of the affidavit. Since the military judge made no finding of bad faith, we assume the agents were unaware of the discrepancy between the warrant and the affidavit. Had

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[7] In most of our inevitable discovery precedent, the imminent and inevitable lawful discovery of the evidence has been so closely tied to the ongoing investigation its occurrence has been practically certain. *See, e.g., United States v. Kozak*, 12 M.J. 389, 393 (C.M.A. 1982) (holding the unlawful search of a locker yielded the same evidence agents would have lawfully recovered moments later conducting a search incident to arrest); *Owens*, 51 M.J. at 204 (holding an officer's proper automobile search meant he would have inevitably discovered evidence within the car, despite other unconstitutional behavior). These cases differ from the one at present, where we believe the officers could have and would have obtained a lawful, valid warrant had they known they were prohibited from searching Appellant's bags.

the agents arrived at Appellant's office and noticed the personal bags, read the authorization, noticed the discrepancy, and decided not to search the bags, they could have, and likely would have lawfully seized the bags, with probable cause to do so, and either called a military magistrate and asked for an oral search authorization or left and obtained a written authorization to search the bags. *See California v. Acevedo*, 500 U.S. 565, 575 (1991) ("Law enforcement officers may seize a container and hold it until they obtain a search warrant. Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases." (internal quotation marks omitted) (citations omitted)). Furthermore, it is reasonable to conclude the agents would have applied for authorization to search the bags where, as here, they had earlier requested, in the affidavit, to search any bags found.[8] The probable cause that existed to search Appellant and his vehicle would still have supported any later request to search the bags had the illegality not occurred.[9]

Second, the agents were actively pursuing leads that would have led them to the same evidence. On December 7 and 8, agents searched other bags belonging to Appellant and recovered blank prescription forms, receipts, travel orders on official letterhead, a laptop, a Blackberry, SIM cards, an iPad, medications, and documents. In mid-December, agents obtained Appellant's travel records and vouchers and reviewed his financial, insurance, and medical

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[8] *Cf. Wicks*, 73 M.J. at 103 (holding "the inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents *no* evidence that the police would have obtained a warrant" (internal quotation marks omitted) (citation omitted)).

[9] We do not condone the officers' failure to read and/or understand the scope of the search authorization. We caution law enforcement to carefully read search authorizations to ensure they are aware of and understand any limitations the issuing magistrate may have imposed. As we write elsewhere in this opinion, we decide this case on its unique and narrow circumstances.

records. This yielded evidence Appellant had committed both travel and medical prescription fraud and spurred an investigation into whether Appellant committed insurance fraud. On February 5, 2013, aside from the evidence contained in the personal bags at Appellant's office, agents recovered jewelry invoices, pharmacy receipts, leave authorizations, bank statements, a permanent duty travel voucher, and documents evidencing fraud against the United States during searches of Appellant's vehicle, his office, and his residence. Under the preponderance of the evidence standard, the Government has demonstrated agents were actively pursuing leads that support the conclusion that the bags at the Chapel 1 office would inevitably have been lawfully seized and searched and their contents discovered.

Next, we also see no valid policy reason for applying the exclusionary rule in this case. "[A]dmittedly drastic and socially costly," the exclusionary rule should only be applied where "needed to deter police from violations of constitutional and statutory protections." *Nix*, 467 U.S. at 442–43. The exclusionary "rule's sole purpose ... is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37 (2011). As such, its use is limited "to situations in which this purpose is thought most efficaciously served." *Id.* at 237 (internal quotation marks omitted) (citation omitted). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh [the rule's] heavy costs." *Id.*

Finally, the inevitable discovery exception to the exclusionary rule unavoidably requires acceptance of certain reasonable assumptions. Reasonable minds might very well differ as to whether, in a particular case, these assumptions have exceeded the bounds of reasonableness. Nonetheless, the aim is to apply the doctrine in such a way as to not subvert the deterrence objective of the exclusionary rule. Here, where the Fourth Amendment violation was likely not the result of deliberate misconduct in need of deterrence, any marginal deterrent benefit to be gained is far outweighed by the heavy costs exclusion would have—namely placing the Government in a worse position than it would have been had the illegality not occurred. *See, e.g.,*

Sims, 553 F.3d at 581, 583–84 (noting likely scrivener's error of omission on warrant of evidence listed in affidavit and that there was zero social benefit in excluding the evidence because "[t]he search would have been authorized, would have taken place, and would have been identical in scope, both as to places searched and things seized, to the search that the police did conduct").

We therefore conclude the inevitable discovery doctrine applies to the narrow circumstances before us in this case.

III. Conclusion

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge RYAN, concurring in part and concurring in the result.

I join fully in the majority decision that there was probable cause to issue the December 7, 2012, warrant to search Appellant's home. With respect to the Court's resolution of the search of Appellant's bags on February 5, 2013, I respectfully concur in the result. To my mind, the better way to resolve that issue[1] is to ask whether, viewing the evidence in the light most favorable to the party who prevailed below, *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015), the military judge abused his discretion in denying the motion to suppress the evidence from that search. *Id.* That decision, in turn, depends on whether he was wrong to determine that law enforcement's commonsense, non-hypertechnical interpretation of the warrant's scope was reasonable. That is a factual thumb on the scale in the Government's favor, on top of two layers of deferential review. Under the facts of this case, I therefore conclude that the military judge did not abuse his discretion in denying the motion to suppress evidence found inside bags in Appellant's immediate vicinity, as the military magistrate's search authorization could reasonably be read to include a search of Appellant's bags.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. It is axiomatic that a warrantless search and seizure is "presumptively unreasonable," *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)); *United States v. Gurczynski*, 76 M.J. 381, 386 (C.A.A.F. 2017), and that a search conducted pursuant to a valid warrant is presumptively reasonable. *Gurczynski*, 76 M.J. at 386; *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014). The Fourth Amendment, in turn, requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

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[1] It simply cannot be the case, as the majority suggests, that inevitable discovery pertains wherever law enforcement would have obtained a different warrant to search if they knew the search they were conducting was not covered by the warrant in hand. *United States v. Eppes*, __ M.J. __, __ (12–15) (C.A.A.F. 2018).

particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

In this case there is a warrant and, with respect to the February 5 search, no one argues either that probable cause was lacking to search Appellant's bags or that the things seized as a result of that search were outside the scope of the warrant. Appellant argues instead that law enforcement exceeded the scope of the warrant to search his person by searching the bags in his immediate vicinity at the time of the search. Brief for Appellant at 10–11, *United States v. Eppes*, No. 17-0364 (C.A.A.F. Jul. 12, 2017) (citations omitted). The military judge simply did not abuse his discretion in coming to the contrary conclusion as his decision was not outside the "range of choices reasonably arising from the applicable facts and the law." *United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013) (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)).[2]

The affidavit accompanying the warrant requested search authorization "for a search of EPPES' person, his personal belongings that may be located within a reasonable vicinity of EPPES' person or as may be found at his work location located in Chapel 1, and his vehicle." The warrant itself authorized a search of the "person of . . . EPPES," "premises known as" his vehicle, and the seizure of "[d]ocuments and/or items of evidence as may be used in the commission of fraud against the United States Government or against federally insured financial institutions; watches and jewelry matching the description of items claimed lost or stolen in insurance claims against USAA and commercial airline companies."

In his ruling on the defense motion to suppress the evidence found in the "closet-sized office" in Eppes's immediate

[2] The validity of the warrant is precisely why the good-faith exception to the exclusionary rule, *United States v. Leon*, 468 U.S. 897, 920–21 (1984), does not apply to this case. There is nothing to suggest that the warrant itself was constitutionally invalid or defective, and the good-faith exception will not "save an improperly executed warrant." *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006) (quoting *United States v. Rowland*, 145 F.3d 1194, 1208 n. 10 (10th Cir. 1998)).

vicinity, the military judge concluded, inter alia, that "the agents were authorized to search the person of Capt Eppes and reasonably searched the area immediately around him." Utilizing a commonsense rather than a hypertechnical review of the warrant, *United States v. Srivastava*, 540 F.3d 277, 289–90 (4th Cir. 2008); *United States v. Stiver*, 9 F.3d 298, 302–03 (3d Cir. 1993), *cert. denied*, 510 U.S. 1136 (1994); *United States v. Marques*, 600 F.2d 742, 751–52 (9th Cir. 1979); *United States v. Salameh*, 54 F. Supp. 2d 236, 277–78 (S.D.N.Y. 1999), law enforcement could reasonably conclude that the "person" mentioned in the warrant included bags in close proximity to the "person." There is nothing constitutionally unreasonable about that conclusion. *Gurczynski*, 76 M.J. at 386 ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " (quoting *Kentucky v. King*, 563 U.S. 452, 459 (2011))); *cf. Groh*, 540 U.S. at 572–80 (Thomas, J., dissenting).

First, there is no evidence that the warrant failed to include the apparently talismanic words "his personal belongings that may be located within a reasonable vicinity of EPPES' person" because the magistrate believed there was no probable cause to believe the evidence he authorized to be seized would be found in his personal bags. Indeed, such evidence as there is suggests that the same person who provided the affidavit in support of the warrant also filled out the warrant's form, supporting the opposite conclusion: that both the affiant and the magistrate believed the "person" of EPPES included within in its scope the subordinate clause "his personal belongings that may be located within a reasonable vicinity of EPPES' person." This interpretation of the facts is all the more reasonable given that the list of items to be seized included documents and numerous watches, which are unlikely to be found in someone's pockets. *United States v. Graham*, 638 F.2d 1111, 1112–14 (7th Cir. 1981).

Second, it is folly to forget that in executing a warrant law enforcement is required to exercise judgment, making commonsense, rather than hypertechnical, determinations about the scope of their authority, while precluded from "general rummaging about." *Gurczynski*, 76 M.J. at 386; *Stanford v. Texas*, 379 U.S. 476, 485 (1965)); *United States v.*

Fogg, 52 M.J. 144, 148 (C.A.A.F. 1999). Of course, this ability to exercise discretion does not give law enforcement a "blank check," *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992), and "[f]lagrant disregard for the terms of the warrant" is forbidden. *Id.* But law enforcement's reasonable interpretation of a warrant's terms should be respected. *See, e.g., id.* (Law enforcement is "not obliged to interpret [warrants] narrowly, and would . . . be mistaken to do so . . . ."); *Srivastava*, 540 F.3d at 289–90 (holding that personal tax documents were included in a commonsense understanding of a warrant authorizing the seizure of documents of a pass-through tax entity); *Stiver*, 9 F.3d at 302–03 (holding that officers had a reasonable basis to answer accused's telephone when executing a warrant for "drug paraphernalia," because the telephone could be considered "paraphernalia"); *Marques*, 600 F.2d at 751–52 (holding that a science textbook including a methamphetamine recipe was reasonably within the scope of a warrant authorizing the seizure of narcotics and narcotic paraphernalia when the affidavit in the warrant application makes clear that the police expected to find evidence of methamphetamine production); *Salameh*, 54 F. Supp. 2d at 277–78 (emphasizing that law enforcement interpretation of search warrants should be "commonsensical" not "hyper-technical" (quoting *Johnson v. Massey*, No. 3:92 CV 178 (JAC), 1993 U.S. Dist. LEXIS 13100, at *13, 1993 WL 372263, at *4 (D. Conn. Sept. 17, 1993))).

There was no rummaging about here, and it was constitutionally reasonable for the law enforcement officers to conclude that a search of the Appellant's person referred to more than the literal person of the Appellant and reasonably included bags in his immediate vicinity. Humans are not kangaroos, and the human body thus does not have natural "pockets" or "pouches" in which to store either watch and jewelry collections or documents related to insurance and travel fraud. *Graham*, 638 F.2d at 1112–14. "To hold differently would be to narrow the scope of a search of one's person to a point at which it would have little meaning." *Id.* at 1114.

Senior Judge EFFRON, concurring in part and dissenting in part.

I agree with the conclusion in the majority opinion that the military judge properly denied the defense motion to suppress the evidence seized in the December 7, 2012, search of Appellant's residence. I also agree with the majority opinion's determination that the military judge erred in rejecting the defense contention that the February 5, 2013, search of Appellant's bags exceeded the scope of the search authorization.

I respectfully disagree with the majority opinion's conclusion that all of the evidence seized in the February 5 search was nonetheless admissible under the inevitable discovery doctrine. Although the record identifies the information contained in some of the items obtained on February 5 and provides a basis for concluding that those items inevitably would have been discovered, the Government failed to establish in the record a basis for relying on the inevitable discovery doctrine with respect to other items at issue. The Government did not identify the contents of those other items, nor did the Government set forth in the record a path that inevitably would have led to the discovery of the unidentified contents of those other items.

The Scrivener

As an initial matter, the majority opinion suggests a "scrivener's error" is to blame for the omission of authorization to search Appellant's bags. The Government had the opportunity at trial to present evidence in support of this theory, but did not do so. Special Agent WC, who prepared the affidavit and conducted the search, testified at the suppression hearing. The trial counsel's questions did not ask Special Agent WC about whether or why he thought he was authorized to search the bags despite their omission from the authorization. The issuing magistrate did not testify, and the Government did not present an affidavit from the magistrate to support the theory of a scrivener's error. Notwithstanding the opportunity to do so, the Government did not establish in the record the magistrate's intent to exclude or include the bags.

If the Government believed the content of the search authorization was affected by a scrivener's error, that matter should have been litigated at trial, where the factual basis could have been tested by testimony, addressed through argument of the parties, and ruled upon by the military judge. At this point in the appellate proceedings, it is no longer appropriate to rely on speculation about a scrivener's error — a consideration that was not raised or preserved at trial.

Inevitable discovery — the Government's Burden and an Incomplete Record

Where evidence is obtained in an illegal search, such as the February 5 search that exceeded the scope of the authorization, the government bears the burden of demonstrating by a preponderance of the evidence that, at the time of the illegal search, agents were pursuing leads that would have led inevitably to the discovery by lawful means of the unlawfully obtained evidence. *Nix v. Williams*, 467 U.S. 431 (1984); *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014). " 'Mere speculation and conjecture' as to the inevitable discovery of the evidence is not sufficient when applying this exception." *Wicks*, 73 M.J. at 103 (quoting *United States v. Maxwell*, 45 M.J. 406, 422 (C.A.A.F. 1996)).

At trial, Appellant moved to suppress the evidence found in searches and seizures conducted on at least eight different dates, including the evidence found in Appellant's bags on February 5. The Government opposed the motion, arguing the searches and seizures were lawful, and even if they were not, "law enforcement obtained an overwhelming amount of evidence of the Accused's criminal activity through his own actions of submitting travel vouchers and insurance claims and compared his proffered substantiating documents against official records obtained from individual organizations through *subpoenas duces tecum*."

The Government did not introduce into evidence the items found in Appellant's bags, nor did the Government attempt to show that any piece of that evidence inevitably would have been discovered by other means. Instead, the Government at trial simply argued that, as a general matter, "the evidence seized during this search made no

substantial impact on the investigation" in light of the "broader criminal investigation," which yielded evidence of travel and insurance fraud.

The military judge found that all the searches were lawful, and even if not lawful, "a preponderance of the evidence demonstrates that AFOSI possessed and were actively pursuing evidence and leads independent of the searches and seizures at issue in this motion." Reviewing the evidence discovered in all of the searches at issue, the military judge found that AFOSI inevitably would have found a first group of items — fraudulent travel vouchers, government travel card records, an investigation file into theft, unfunded purchase requests, financial database information, Appellant's USAA claim, a fraudulent vehicle claim, and Appellant's bank records.

The military judge made no findings with respect to a second group of items found in Appellant's bags, including the merchandise inventory sheet, the Cole Haan receipt, the ATM card, or the Foundry Loft envelope or the four documents inside it. The Government made no offer of proof or argument as to the manner in which the Government's investigatory efforts would have led the investigators to the second group of items, the contents of which were never described in the record by the Government or in the findings of the military judge.

We review the military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017). The military judge's findings of fact are entitled to deference and will be reversed only if clearly erroneous.

With respect to the first group of items, the record contains evidence as to the content and the investigatory steps then underway regarding those items. I agree with the majority opinion that evidence from the first group of items was admissible under the inevitable discovery doctrine.

With respect to the second group of items, the Government introduced no evidence as to the content; and the military judge made no specific findings that the items in the second group inevitably would have been discovered.

In that context the military judge's conclusion as to inevitable discovery is entitled to no deference.

Viewing the evidence in the light most favorable to the Government, we can do no more than speculate as to what, precisely, was found in Appellant's bags, as the Government did not produce the evidence or describe it with particularity. Without more information as to what was found in the bags — e.g., what was on the merchandise inventory list?; what documents were contained in the Foundry Lofts envelope?; did the Cole Haan receipt record a financial transaction that would have been discovered in Appellant's bank or credit card records? — we cannot conclude that the evidence inevitably would have been discovered by other means.

Harmlessness

With respect to harmlessness, Appellant entered a conditional guilty plea, preserving his right to challenge the military judge's ruling on the motion to suppress. The Government could have, but did not, present information via the plea agreement stipulation or otherwise on the record about the contents of the evidence in the second group of items contained in the bags or other information that could have been reviewed during appellate consideration of the issue.

In this context, where the Government relied on the plea to meet its burden of proof, we cannot evaluate how the evidence of the second group of items found in Appellant's bags affected his decision to plead guilty. *See United States v. Shelton*, 64 M.J. 32, 39 (C.A.A.F. 2006) (although this Court ordinarily reviews an erroneous evidentiary ruling for harmlessness, "that avenue of analysis is not presently open because of the context of this error in the trial proceedings"). Indeed, the military judge acknowledged that he could not conclusively determine how suppression of the evidence would have affected the case, but opined that "it would have impacted the ability of the government to present its case and to meet its burden beyond a reasonable doubt" for at least some of the charges and specifications.

In this case, the Government did not to meet its burden on the issue of inevitable discovery. The Government did not offer into evidence the specific items found in the bags, did not otherwise identify the contents of the second group of items found in the bags, and did not identify leads that law enforcement possessed or was actively pursuing that would have led to the discovery of the second group of items. Without more information as to what was found in the bags, the record does not establish that (1) the evidence inevitably would have been discovered by other means, or (2) the illegal search was harmless beyond a reasonable doubt.

In the context of a conditional guilty plea, the Government has not demonstrated that the erroneous denial of the motion to suppress was harmless beyond a reasonable doubt. Under these circumstances, the decision of the United States Army Court of Criminal Appeals should be reversed, and a rehearing should be authorized.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS DECISION

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 38881

UNITED STATES
Appellee

v.

Tyler G. EPPES
Captain, U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 21 February 2017

Military Judge: Shaun S. Speranza (sitting alone).

Approved sentence: Dismissal, confinement for 10 years, forfeiture of all pay and allowances, and a fine of $64,000, with an additional 3 years of confinement if the fine in not paid. Sentence adjudged 24 April 2015 by GCM convened at Joint Base Andrews, Maryland.

For Appellant: Captain Annie W. Morgan, USAF; and William E. Cassara, Esquire.

For Appellee: Major Jeremy D. Gehman, USAF; and Gerald R. Bruce, Esquire.

Before DUBRISKE, HARDING, and C. BROWN, *Appellate Military Judges*

Senior Judge DUBRISKE delivered the opinion of the Court, in which Judges HARDING and C. BROWN joined.

DUBRISKE, Senior Judge:

Consistent with his pleas pursuant to a pretrial agreement, Appellant was convicted by a military judge sitting alone of conspiracy, false official statement, larceny of both military and non-military property, fraud against the United States Government, and conduct unbecoming an officer, in violation of Articles 81, 107, 121, 132, and 133, UCMJ, 10 U.S.C. §§ 881, 907, 921, 932, 933. Additional specifications for false official statement were dismissed by the Government upon acceptance of Appellant's guilty plea. The Government also agreed as part of the pretrial agreement that it would not attempt to prove up allegations that Appellant was responsible for the theft of approximately $65,000.00 in legal currency from a deployed location.

Appellant was sentenced to a dismissal, confinement for ten years, forfeiture of all pay and allowances, and a fine of $64,000.00, with an additional three years of confinement if the fine is not paid. The convening authority approved the sentence as adjudged.

Appellant raises seven issues on appeal: (1) the military judge erred in failing to suppress evidence obtained during various searches of Appellant's person, personal bags, vehicle, and off-base residence, as well as evidence seized from Appellant's government computers, communication devices, and work spaces; (2) his plea to conspiring to violate a lawful general regulation was improvident; (3) his plea to one specification of conduct unbecoming an officer was improvident; (4) a conduct unbecoming an officer specification alleging Appellant improperly transferred monies into the United States fails to state an offense; (5) the convening authority erred in summarily denying Appellant's request for deferral of forfeitures; (6) his sentence is inappropriately severe; and (7) various charges are either multiplicious or the charging amounted to an unreasonable multiplication of charges.

As we find no error substantially prejudices a substantial right of this Appellant, we now affirm.

I. BACKGROUND

Appellant, a special agent with the Air Force Office of Special Investigations (AFOSI), engaged in frequent foreign travel while providing counter-intelligence support to Air Force Special Operations Command forces. The nature of his duties allowed Appellant to travel with very little oversight by his chain of command. After completion of this assignment, Appellant was competitively selected to provide personal security protection to senior Air Force leaders, which again required significant travel at government expense.

The majority of the charged offenses surrounded Appellant's submission of fraudulent travel vouchers over the course of almost four years. With regard

to some of the vouchers, Appellant travelled as claimed on the voucher, but manipulated his travel dates, expenses, or modes of transportation to obtain additional reimbursement from the United States Government to which he was not entitled. Some travel vouchers, however, were entirely fraudulent as Appellant did not engage in government travel as claimed. In total, Appellant submitted at least 41 fraudulent claims resulting in over $80,000.00 in loss to the United States.

In addition to his fraudulent travel, Appellant filed false claims against the United States Government for a permanent change of station move and vehicle damage. Appellant also stole two government cameras, valued at approximately $4,969.00 each, selling one of them to a college friend for $1,150.00.

While committing fraud against the United States Government, Appellant also submitted fraudulent claims in the amount of $91,000.00 to a commercial insurance company for personal property he alleged was stolen from his residence. To facilitate at least $47,000.00 of this fraud, Appellant created false documents to support the loss of the property or inflate its value.

Appellant's fraudulent activity came to light when a manager at a hotel in Dallas, Texas, contacted Appellant's office at the Pentagon. Appellant was scheduled to have his wedding at the hotel, but promoted the event as an official Air Force function given his position within the Pentagon. In addition to demanding additional security measures for his event, Appellant requested he and his guests receive tax-exempt status for all state taxes.

Appellant, unhappy with the service provided by the hotel, eventually informed the hotel manager that he would use his official position to "blacklist" and "classify" the hotel, thereby limiting the hotel's ability to accept government travelers. Concerned about the potential loss of government business, the hotel manager contacted one of Appellant's co-workers, another AFOSI special agent, who eventually relayed the complaint to Appellant's commander. When the commander contacted Appellant about the complaint, Appellant informed her the complaint was a misunderstanding and would be resolved.

Notwithstanding Appellant's assurances, a decision was made to further investigate the allegations Appellant had abused his position or authority. Prior to speaking with Appellant, the assigned AFOSI investigator interviewed hotel employees and secured documents showing Appellant fraudulently obtained tax-exempt status for his wedding. The investigating agent also discovered during a background check that Appellant had previously been subjected to discipline for falsifying travel orders.

Additionally, when interviewing Appellant's co-workers, the investigator discovered Appellant had created false invitational travel orders for the co-

worker to attend Appellant's wedding as a member of Appellant's personal security team. Additional false documents were discovered in a file folder found in a desk at the Pentagon office Appellant shared with multiple co-workers. Based on all of this information, the AFOSI investigator obtained a search warrant for Appellant's off-base residence, which yielded additional evidence of fraudulent activity by Appellant.

Additional facts necessary to resolve the assignments of error are provided below.

II. DISCUSSION

A. Improper Searches and Seizures

As he did at trial, Appellant claims on appeal that the Government violated his Fourth Amendment[1] rights in executing a number of searches and seizures of evidence during their investigation of allegations against Appellant. We address each aspect of this assignment of error in turn below. While Appellant's suppression motion would have normally been waived by his guilty plea, his pretrial agreement conditionally preserved the right to raise this issue on appeal.[2]

We review a military judge's denial of a suppression motion under an abuse of discretion standard and "consider the evidence 'in the light most favorable' to the prevailing party." *United States v. Rodriguez*, 60 M.J. 239, 246–47 (C.A.A.F. 2004) (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). In performing our review, "we review fact-finding under the clearly-erroneous standard and conclusions of law under the de novo standard." *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). On mixed questions of law and fact, "a military judge abuses his discretion if his findings are clearly erroneous or his conclusions of law are incorrect." *Id.* "The abuse of discretion standard calls for more than a mere difference of opinion. The chal-

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[1] U.S. Const. amend. IV.

[2] We once again caution servicemembers facing court-martial, trial practitioners, staff judge advocates, and convening authorities about the pitfalls of accepting conditional offers to plead guilty when the resolution of the underlying issue is not case dispositive. *See generally, United States v. Phillips*, 32 M.J. 955 (A.F.C.M.R. 1991). Here, for example, the suppression of evidence as requested by Appellant would not have prevented the Government from going forward on various charges related to Appellant's travel fraud and misuse of position. The limited record of trial from Appellant's guilty plea, however, restricts our ability to assess how the challenged evidence identified during motion practice ultimately impacted the offenses charged in this case.

lenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations and internal quotation marks omitted).

After taking a significant amount of evidence on the Defense's motion to suppress evidence at trial, the military judge issued a 29-page written ruling containing comprehensive findings of fact and conclusions of law. We adopt the military judge's factual findings as they are not clearly erroneous. *See United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003).

Given our determination regarding the military judge's factual findings, we are left to examine whether the military judge properly applied the correct law to the factual matters developed from Appellant's case. Overall, we find the searches and seizures in this case comport with the constitutional requirement of reasonableness; thus, the military judge did not abuse his discretion.

1. Search of Appellant's Government Office on 29 November 2012

Shortly after AFOSI began investigating Appellant for his conduct with the Dallas hotel, Appellant's co-worker, SP, who was also an AFOSI special agent, found fraudulent travel documents in a file folder located in a drawer of a government desk Appellant shared with co-workers at the Pentagon. Special Agent SP discovered the documents when looking for a memorandum for record (MFR) Appellant had prepared to justify expenses for government travel taken by Appellant and some of his co-workers. Appellant had previously informed Special Agent SP that he believed he had left the MFR in the office before he departed for leave to attend his wedding. Special Agent SP needed the MFR to allow an enlisted co-worker to file a travel voucher for payment which had been previously rejected. While a label affixed to the file folder referenced a "wedding shower" in Dallas, Texas, Special Agent SP believed the MFR could have been included in the folder as the dates on the label corresponded to the dates for the travel covered by Appellant's MFR. The MFR was not found in this particular file folder, but was later located by Special Agent SP in the same desk drawer.

While Appellant acknowledges in his brief that his expectation of privacy in a shared desk within a non-private government office is likely limited, he claims he still retained a privacy interest in the personal items stored in this desk such as the "closed" file folder in this case. Appellant also questions the military judge's finding that Special Agent SP's opening of the folder was for work-related purposes. In particular, Appellant notes that even if the initial examination of the folder was non-investigatory and administrative in nature, Special Agent SP should have stopped his examination of the folder when he realized the fraudulent nature of the first document and immediately sought a search warrant.

Examining the specific facts of this case, we have significant doubt as to Appellant's claim of a reasonable expectation of privacy in a file folder contained in a shared government desk. *See O'Connor v. Ortega*, 480 U.S. 709, 717–18 (1987) (noting that a government employee's expectation of privacy in the workplace is limited and that a government office "is seldom a private enclave free from entry by supervisors [and] other employees . . . ."); *see also United States v. Battles*, 25 M.J. 58, 60 (C.M.A. 1987) (finding no reasonable expectation of privacy in berthing area on naval vessel or in an unsealed and open box located within the vessel's common spaces); *see also United States v. Neal*, 41 M.J. 855, 860 (A.F. Ct. Crim. App. 1994) (questioning whether a reasonable expectation of privacy exists in an open locker located in a common area). We also discount Appellant's challenge to the military judge's finding that Special Agent SP's examination of the folder was for non-investigatory, work-related purposes and therefore proper. *See generally City of Ontario v. Quon*, 560 U.S. 746, 761 (2010).

We need not address these issues in depth here, however, as the evidence from the file folder, which was not used in support of any of the charged offenses, did not taint subsequent searches, including the primary search of Appellant's residence as detailed below.[3] While the evidence obtained from Special Agent SP's examination of the folder was included in the probable cause affidavit used to secure the civilian search warrant of Appellant's residence, we find the Government already had sufficient information to secure the warrant prior to Special Agent's SP's review of material in Appellant's shared desk. In particular, we note the Government was already aware of Appellant's submission of fraudulent state tax exempt forms to the hotel in Dallas, and had been provided with copies of false travel orders by one of Appellant's co-workers who traveled to Appellant's wedding. Additionally, the Government had knowledge of Appellant's previous attempts to falsify travel orders. As we are confident probable cause would have still existed without the evidence uncovered by Special Agent SP, we decline to grant Appellant relief on this particular claim. *See United States v. Gallo*, 55 M.J. 418, 421 (C.A.A.F. 2001) (courts may

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[3] Appellant's office was later search by criminal investigators without a search warrant under the theory Appellant had no reasonable expectation of privacy in a shared government office. Appellant does not directly challenge on appeal any of the evidence derived from this investigative step. We note multiple government computers used by Appellant and his co-workers were seized during this search. To the extent Appellant suggests the Government improperly obtained evidence from the search of these computers, we reject this claim. *See United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008).

sever improperly obtained information from affidavits and examine the remainder to determine if probable cause still exists).

2. Search of Appellant's Residence on 7 December 2012

Appellant next argues the search of his off-base residence on 7 December 2012 was invalid as the warrant issued by a civilian judge was overbroad in that: (1) it lacked particularity with respect to things to be seized; and (2) it permitted the Government to search for and seize government property even though there was no probable cause to believe such property was evidence or fruits of a crime committed by Appellant.[4]

The Fourth Amendment's requirement that a warrant particularly describe the scope of a search prevents the government from engaging in "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The specific description of things to be seized and the place to be searched "eliminates the danger of unlimited discretion in the executing officer's determination of what is subject to seizure." *United States v. Greene*, 250 F.3d 471, 476–77 (6th Cir. 2001) (quoting *United States v. Blakeney*, 942 F.2d 1001, 1026 (6th Cir. 1991)). To meet this requirement, a "warrant must enable the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize." *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992). However, the degree of specificity required depends on the crime involved and the types of items sought. *Blakeney*, 942 F.2d at 1026. To be valid, the warrant description need only be "as specific as the circumstances and the nature of the activity under investigation permit." *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988) (internal citation omitted). Military Rule of Evidence (Mil. R. Evid.) 315(b)(1) echoes the Fourth Amendment's particularity requirement.

The warrant issued by a civilian judge for the search of Appellant's off-base residence authorized, based on the information in the accompanying affidavit from the AFOSI investigator, the search and seizure of "evidence of fraud to

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[4] The second page of the affidavit in support of the search of Appellant's residence on 7 December 2012 is missing from the Government's response to the suppression motion at Appellate Exhibit II. Although there were discussions on the record about correcting this oversight, the original record of trial filed with the court still contains the omission. As the missing page is found in the Defense's motion at Appellate Exhibit I, the omission did not inhibit our review of this assignment of error.

include travel orders, letters, notes, financial records, receipts, computer hardware, computer software and digital media (e.g., computer equipment, digital storage devices, cameras, photographs, etc.), and for evidence of fraud."

Appellant first argues the addition of the phrase "and for evidence of fraud" in the supporting affidavit resulted in the warrant becoming an improper general search.[5] Specifically, Appellant suggests the warrant was so "amorphously worded as to result in the indiscriminate seizure of relevant and non-relevant material alike." In so arguing, however, Appellant acknowledges the warrant and supporting affidavit do attempt to identify evidence of the fraud such as travel orders, financial records, and receipts among other items. We review de novo whether the search authorization was overly broad, resulting in a general search prohibited by the Fourth Amendment. *United States v. Maxwell*, 45 M.J. 406, 420 (C.A.A.F. 1996).

We do not find the language used here is overbroad given the nature of Appellant's offenses. In *United States v. Abboud*, 438 F.3d 554 (6th Cir. 2006), the Sixth Circuit examined a search warrant in connection with a fraud investigation. There, investigators sought business and financial records in connection with the defendant's bank fraud. Recognizing the difficulty facing law enforcement to specifically identify which records or files might contain evidence of a fraudulent scheme, the court held the authorization to search for general business records of a fraud scheme was not overbroad.

> In this case, the warrant was specific in terms of the items to be seized; for example, it listed "logs or ledgers that reflect the recording of banking activity," "all bank statements, deposit slips, withdrawal slips, official checks, money orders, cancelled checks, wire transfers and other documents for any and all bank accounts," and other specific forms of records. Moreover . . . the law enforcement agents in this case could not have known the precise documents and records Defendants utilized in the check kiting scheme. The items listed in the warrant were items "likely to provide information" about Defendants' check kiting scheme. A more specific alternative did not exist to the search warrant's list of items to be seized.

Id. at 575–76.

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[5] We question whether the addition of this language was a scrivener's error given the use of the same language at the beginning of the challenged phrase. In any event, for the reasons noted below, we do not find the addition of this language resulted in a general search warrant.

Likewise, we believe the language of this warrant was sufficiently narrowed to focus law enforcement on the items to be seized based on Appellant's fraudulent scheme. The fact that the warrant included more expansive language after describing specific items of evidence subject to this fraud investigation does not by itself establish the warrant was somehow overbroad. *See United States v. Modesto*, 39 M.J. 1055, 1059 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (C.A.A.F. 1995). Instead, we examine both the warrant and the supporting affidavit to determine whether the search identifies the crimes committed and the items which could be evidence of those crimes. *See United States v. Martinelli*, 454 F.3d 1300, 1308 (11th Cir. 2006). The warrant in this case did just that.

Absent the seizure of blank prescription drug forms and empty prescription medication boxes, Appellant provides no other examples of evidence seized by AFOSI that failed to comport with the terms of the search warrant. Instead, Appellant simply argues the military judge's determination that these specific items fell within the scope of the warrant reflects the expanded nature of the search. In arguing this point, however, Appellant ignores the fact that the military judge found that even if these items were not subject to the warrant, the items were properly seized under the plain view doctrine. This finding by the military judge was supported in both law and fact. *See United States v. McMahon*, 58 M.J. 362, 367 (C.A.A.F. 2003) (holding that law enforcement personnel conducting a lawful search may seize items in plain view if they are acting within the scope of their authority and have probable cause to believe the items are contraband or evidence of a crime). As Appellant cannot point this court to any evidence improperly seized based on his expansive reading of this warrant, we decline to grant relief.

Appellant also claims the warrant improperly allowed AFOSI to seize items of government property found in Appellant's off-base residence even though these items were not connected to any criminal offense being investigated by AFOSI. Similar to his argument above, Appellant fails to identify items of government property improperly seized that was evidence potentially to be used against him at trial.

Given Appellant's misuse of his position, we cannot say the civilian judge's probable cause determination was deficient, or that AFOSI agents executing the search did not have a good faith basis to seize government property in Appellant's possession. *See generally* Mil. R. Evid. 311(c)(3); *United States v. Lopez*, 35 M.J. 35, 42 (C.M.A. 1992). In attacking the probable cause determination, Appellant suggests the AFOSI agent submitted inaccurate information about Appellant's status as an AFOSI investigator. As found as fact by the military judge, however, Appellant had been informed by his commander that his ability to carry weapons as an AFOSI agent had been revoked. Appellant

was also given a no-contact order which effectively prevented him from performing his personal security duties for senior Air Force officers. As such, we cannot not agree with Appellant that the civilian judge in his case was provided with inaccurate or false information by AFOSI when authorizing the seizure of government property.

Moreover, we believe these items of government property would have been lawfully secured by the Government even if specific authorization had not been granted in this case. As recognized by Appellant, he had no expectation of privacy in the government property in his possession. Instead, Appellant argues the seizure was improper as he did maintain a reasonable expectation of privacy in the place searched—his off-base home. *See United States v. Salazar*, 44 M.J. 464, 467 (C.A.A.F. 1996). As noted above, however, AFOSI was legally authorized to search Appellant's residence for evidence surrounding his fraudulent scheme as described in the warrant. Given Appellant acknowledges he had no expectation of privacy in the government property actually seized within his home, any government property located in plain view during the search could be secured given AFOSI was properly in the location to be searched. *See Horton v. California*, 496 U.S. 128, 135–36 (1990); *McMahon*, 58 M.J. at 367.

3. Search of Appellant's Electronic Devices

Immediately upon his return from leave after his wedding ceremony and honeymoon, Appellant was interviewed by AFOSI investigators on 8 December 2012. At the conclusion of the interview, Appellant consented to the search of a backpack and small travel bag that he had carried with him from the airport. Appellant declined consent to search his personal electronics in these bags, including a cellular phone, tablet, and laptop computer.

Based on Appellant's declination of consent, AFOSI requested verbal search authority from a military magistrate to search for electronic devices found in Appellant's two personal bags. The military magistrate granted verbal authority to search Appellant's electronic devices, which was reduced to writing the following day.

On appeal, Appellant argues this search was defective for a variety of reasons. First, he argues the search was defective as there was no evidence the AFOSI agent's verbal probable cause briefing to the magistrate was made under oath or affirmation. Second, Appellant claims the authorization was invalid as the agent who received the verbal authorization from the military magistrate later changed the items sought to be seized when preparing the written affidavit the next day. Finally, Appellant argues the oral search authority granted in this case under Mil. R. Evid. 315(b) was constitutionally infirm as

there were no procedural safeguards in place to ensure the search was based on probable cause.

Regarding Appellant's first claim that the verbal probable cause affidavit was not made under oath or authorization, we find Appellant forfeited this particular issue by not raising it at trial and thus is not entitled to relief absent plain error.[6] *See United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013); *United States v. Brown*, 13 M.J. 810, 811 (A.F.C.M.R. 1982). To establish plain error, Appellant must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011).

We find Appellant is unable to establish plain error on this matter. While Appellant cites to the lack of evidence in the record establishing the agent's verbal probable cause justification was submitted under oath, this absence was the direct result of Appellant's failure to specify this issue at trial. Without evidence to the contrary, we presume the military magistrate, as a trained quasi-judicial officer, understood the procedural requirements surrounding his granting of probable cause in this case. *Cf. United States v. Cron*, 73 M.J. 718, 736 (A.F. Ct. Crim. App. 2014) (noting that judges are presumed to know the law and apply it correctly absent clear evidence otherwise).

Appellant next argues the Government invalidated the verbal search authorization for electronic devices when the AFOSI agent preparing the supporting affidavit after the fact listed the specific electronic devices discovered in Appellant's personal bags. Appellant does not allege the magistrate failed to have a substantial basis to grant probable cause for the search Appellant's electronic devices for evidence of fraud and prescription drug misuse. Instead, he appears to argue the addition of the specific devices in the affidavit supporting the written search authorization shows the initial request for verbal search authorization did not "particularly describe . . . . the things to be search." Thus, we will examine whether the request for verbal search authority was overbroad.

Given Appellant's consent to the search of his two personal bags, AFOSI agents were generally aware of the personal electronic devices in Appellant's possession. Notwithstanding this fact, the AFOSI agent who sought verbal authorization to search Appellant's electronic devices could not recall whether he contacted the military magistrate for authorization before AFOSI executed the

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[6] The Government argues throughout its brief that Appellant's "waive all waivable motions" provision in his pretrial agreement should cause this court to apply waiver to any Fourth Amendment suppression theory not specifically raised at trial. As the Government consented to Appellant's conditional plea, preserving his extremely broad suppression motion, we decline to apply waiver in this case.

consensual search of Appellant's bags. After considering the testimony of the agent, sworn statements, and a video of the consensual search of Appellant's bags, the military judge made the following factual findings:

> After the consent search, [Special Agent (SA) A] sought search authorization from [the] military magistrate . . . over the phone. During the phone call, SA A described the offenses he suspected [Captain (Capt)] Eppes committed, the probable cause he believed existed to search Capt Eppes' electronic devices, and the evidence he believed he would find. SA A requested authorization to search Capt Eppes' bags for the personal electronic devices and to search the personal electronic devices. . . . The military magistrate was satisfied there was probable cause to believe Capt Eppes' personal electronic devices contained evidence of the offenses identified by SA A. The military magistrate verbally granted SA A the authority to search Capt Eppes' personal electronic devices. At approximately 1902 hrs, SA A informed Capt Eppes that he obtained search authorization from the military magistrate and [that] he was authorized to search Capt Eppes' iPad, laptop, and iPhone. . . . Pursuant to the search authorization granted by the military magistrate, agents seized Capt Eppes' MacBook laptop and iPad. Capt Eppes' iPhone data was extracted and the phone was returned to Capt Eppes.

Given the military judge's findings, we examine whether the search for "electronic devices" in Appellant's two bags was constitutionally overbroad. As previously noted, a "warrant must enable the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize." *George*, 975 F.2d at 75. To be valid, the warrant description need only be "as specific as the circumstances and the nature of the activity under investigation permit." *Henson*, 848 F.2d at 1383 (internal citation omitted).

Considering the military judge's factual findings, we do not believe the request to search for electronic devices in Appellant's two personal bags was constitutionally deficient. An authorization to search media meets constitutional specificity requirements as long as the material described is "related to the information constituting probable cause." *United States v. Allen*, 53 M.J. 402, 408 (C.A.A.F. 2000). We find such a connection here.

Appellant's final argument claims Mil. R. Evid. 315(b) fails to include sufficient procedural safeguards to ensure an oral search authorization is based on probable cause. Although unclear from his brief, it appears Appellant is raising a facial challenge to the constitutionality of the Mil. R. Evid. 315(b), which authorizes the issuance of verbal search authority. Appellant argues the

lack of procedural safeguards, specifically the absence of documentation as to what verbal information was provided to the military magistrate in support of probable cause, violates Appellant's constitutional right to protection from unreasonable searches and seizures. In making such an argument, Appellant acknowledges verbal search authority has been previously countenanced by military courts.

There is a presumption that a rule of evidence is constitutional unless its lack of constitutionality is clearly and unmistakably shown. *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000); *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort.") (internal quotation marks and citations omitted); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Thus, in this case, Appellant must show the challenged rule of evidence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43-45 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201-202 (1977)) (examining historical practices on due process challenges).

Appellant has not "clearly and unmistakably shown" that the issuance of oral search authorization under Mil. R. Evid. 315(b) offends fundamental fairness in such a way to render the rule unconstitutional. The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. Probable cause exists when there is sufficient information to provide the authorizing official "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). As such,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). As we believe the probable cause standard is sufficient to afford Appellant his constitutional protections, we decline to grant relief.

4. Search of Appellant's Personal Computer

Appellant next argues the Government's search of his computer seized during the search of his off-base residence on 7 December 2012 was improper because: (1) the warrant issued by the civilian judge only authorized AFOSI agents to "seize" electronic devices; and (2) if the search was authorized, it occurred outside the time period noted in the warrant.[7] Because Appellant did not raise the first theory at trial, he must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Marsh*, 70 M.J. at 104.

As to the first complaint, we find Appellant has not established plain error. The warrant issued by the civilian judge specifically granted AFOSI the authority to search for and seize computer hardware connected to Appellant's fraudulent transactions. Therefore, the search was presumptively reasonable. *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014).

Moreover, based on the facts developed by the military judge, we are satisfied the intent of the warrant was to authorize the examination of computer hardware seized during the 7 December 2012 search. *See United States v. Richards*, No. ACM 38346, 2016 CCA LEXIS 285, at *44 (A.F. Ct. Crim. App. 2 May 2016) (unpub. op.). Appellant was being investigated for creating fraudulent tax documents and travel orders. Evidence of these types of crimes would only be found through an examination of the data contained on the seized hardware. While there were obviously restrictions on the scope of the search given the warrant and accompanying affidavit, the authorization in our opinion did cover the search of computer hardware seized from the residence. Moreover, even if the warrant limited AFOSI ability to examine the contents of the computer hardware, we believe the good faith exception to the exclusionary rule applies. *See United States v. Carter*, 54 M.J. 414, 419–20 (C.A.A.F. 2001).

Appellant next argues the search of the computer hardware took place outside the time window established by the search warrant, which stated in part: "YOU ARE HEREBY AUTHORIZED within 10 days of the date of issuance of this warrant to search in the daytime the designated [premise] for the property specified and if the property be found there. YOU ARE COMMANDED TO SEIZE IT." As the initial examination of Appellant's computer hardware took

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[7] Appellant also argues that all searches after 22 January 2013, the date the Government first analyzed computer hardware seized on 7 December 2012, should be viewed as "fruit of the poisonous tree" and suppressed by this court. Based on our finding below that the search of Appellant's computer hardware was legally authorized, we need not address Appellant's claim that subsequent searches were somehow tainted.

place on 22 January 2013, Appellant claims the 47 days that passed since the initial seizure on 7 December 2012 invalidated the warrant.

In analyzing Appellant's claim, we first note "[t]he Fourth Amendment does not specify that search warrants [must] contain expiration dates . . . [or] requirements about *when* the search or seizure is to occur or the *duration*." *United States v. Gerber*, 994 F.2d 1556, 1559 (11th Cir. 1993). Here, we disagree with Appellant that the language cited above set the duration as to when the Government could analyze the seized computer hardware. *See United States v. Cote*, 72 M.J. 41, 44 (C.A.A.F. 2013) (discussing that courts have considered seizure of electronic materials and later off-site analysis and review of them to be a constitutionally reasonable "necessity of the digital era"). We further find the length of time taken by the Government to examine the computer hardware seized on 7 December 2012 was reasonable. *Id.* at 44 n.6. As such, we decline to grant Appellant relief.[8]

5. Search of Appellant's Personal Property

Finally, Appellant argues the Government's search of a personal bag on 5 February 2013 exceeded the scope of the warrant. In so claiming, Appellant acknowledges the affidavit accompanying the search authorization requested authority to search Appellant's personal bags. However, the search authorization signed by the military magistrate only authorized the search of Appellant's person and personal vehicle.

The military judge found the search of Appellant's bag to be "reasonable" given the bag was in the immediate vicinity of Appellant's person, which was authorized on the search authorization. In so holding, the military judge also found Appellant did not have a reasonable expectation of privacy in the government office where the search of his person and personal bag took place.

Although we do not subscribe to the military judge's specific theory of admissibility, we find that the evidence derived from this search was admissible under the good faith exception given the facts of this case.[9]

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[8] Moreover, even if the duration of the warrant was 10 days, we decline to apply the exclusionary rule as the violation was de minimis or otherwise reasonable under the circumstances. *See United States v. Cote*, 72 M.J. 41, 45 (C.A.A.F. 2013).

[9] The military judge did mention in his findings that government agents conducted the search in "good faith reliance" on the search authorization. As the majority of his analysis focused on the location of the bag in relation to Appellant's person, it is unclear whether the good faith exception was a basis for denial of the suppression motion.

The good faith exception permits the admission of evidence, which although unlawfully obtained, was the result of the good-faith reliance of law enforcement agents on a search authorization. The good faith exception permits the use of evidence obtained from an unlawful search and seizure if:

> (A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
>
> (B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

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

> [T]he good-faith exception will not apply when part of the information given to the authorizing official is intentionally false or given with "reckless disregard for the truth." It will also not apply where "no reasonably well trained officer should rely on the warrant." . . . Finally, it will not apply when the authorization "may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Lopez, 35 M.J. at 41–42 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

Here, the only factor in dispute is whether, from an objective viewpoint, the AFOSI agents executing the authorization reasonably and with good faith believed the authorization permitted the search of Appellant's personal bag.

We find a reasonable agent would have believed the authorization allowed the search of Appellant's personal bag as requested in the affidavit accompanying the authorization. *See Carter*, 54 M.J. at 420. The language granting the search of Appellant's person could reasonably be interpreted as also authorizing the search of items of personal property in Appellant's possession when the search was executed. This is especially true in this case where the accompanying affidavit endorsed by the military magistrate specifically requested search authority to examine Appellant's personal bags. For this reason, we decline to grant Appellant relief.

B. Improvident Plea to Conspiracy to Violate a Lawful General Regulation

Appellant pleaded guilty to conspiring with another military member to violate a lawful general regulation by possessing an intoxicating substance with an intent to alter mood or function. The general order alleged in the specification was derived from AFI 44-120, *Drug Abuse Testing Program*, ¶ 1.1.6 (1 July 2000), which prohibited the following conduct:

> In order to ensure military readiness; safeguard the health and wellness of the force; and maintain good order and discipline in the service, the knowing use of any intoxicating substance, other than the lawful use of alcohol or tobacco products, that is inhaled, injected, consumed, or introduced into the body in any manner to alter mood or function is prohibited. These substances include, but are not limited to, controlled substance analogues (e.g., designer drugs such as "spice" that are not otherwise controlled substances); inhalants, propellants, solvents, household chemicals, and other substances used for "huffing"; prescription or over-the-counter medications when used in a manner contrary to their intended medical purpose or in excess of the prescribed dosage; and naturally occurring intoxicating substances (e.g., Salvia divinorum). The possession of any intoxicating substance described in this paragraph, if done with the intent to use in a manner that would alter mood or function, is also prohibited. Failure to comply with the prohibitions contained in this paragraph is a violation of Article 92, UCMJ.

Appellant admitted at trial that he entered into an agreement with another military member to have the military member procure Valium and Xanax for Appellant. The agreement called for the co-conspirator to use forged prescriptions created by Appellant to obtain prescription medications while traveling through Africa on special operations aviation missions. The drugs were then mailed to Appellant when the co-conspirator returned to the United States. Appellant advised he took the drugs in an effort to treat the anxiety he was feeling due to stress surrounding his upcoming wedding.

On appeal, Appellant claims his plea to this specification was improvident because any conspiracy to possess controlled substances had to be charged under Article 112a, UCMJ, 10 U.S.C. § 912a, because of either the preemption doctrine or the limitations of the specific language in underlying lawful general regulation. As to the latter claim, Appellant argues the text of the general regulation does not apply to controlled substances such as those sought by Appellant.

We do not agree that the preemption doctrine somehow limits the Government's ability to use an Article 92, UCMJ, 10 U.S.C. § 892, violation as the basis for the conspiracy charge in this case. The preemption doctrine is specifically enumerated in the *Manual for Courts-Martial* (MCM), United States (2016 ed.), Part IV, ¶ 60(c) (5)(a), and "prohibits application of Article 134 to conduct covered by Articles 80 through 132." The "rationale of preemption is that, if Congress has covered a particular kind of misconduct in specific punitive articles of the Uniform Code, it does not intend for such misconduct to be prosecuted under the general provisions of Article 133 or 134." *United States v. Reichenbach*, 29 M.J. 128, 136-37 (C.M.A. 1989); *see also United States v. McGuinness*, 35 M.J. 149, 151–52 (C.M.A. 1992). Thus, while the Government could have charged Appellant with conspiring to violate Article 112a, UCMJ, the preemption doctrine did not require them to do so.[10]

Even if we were to agree with Appellant's general preemption argument, we do not believe Congress intended Article 112a, UCMJ, to occupy the field for all prescription drug offenses. *See United States v. Erickson*, 61 M.J. 230, 233 (C.A.A.F. 2005) (noting there is nothing on the face of Article 112a, UCMJ, or in its legislative history to suggest Congress intended to preclude the armed forces from relying on other UCMJ provisions, including the general article, to punish drug-related offenses not covered by Article 112a, UCMJ); *see also* S. Rep. No. 98-53, at 29 (1983) (Article 112a "is intended to apply solely to offenses within its express terms. It does not preempt prosecution of drug paraphernalia offenses or other drug-related offenses under Article 92, 133, or 134 of the UCMJ."). Here, Appellant was charged with conspiracy to violate a lawful general regulation prohibiting the possession of any intoxicating substance other than alcohol with the intent to use the substance in a manner that would alter mood or function. The fact the substance sought by Appellant was a controlled substance does not remove the Government's ability to charge possession of a substance that Appellant could have lawfully obtained, but still used in an illicit manner.

With the preemption question resolved, we examine the providence of Appellant's plea to the charged offense. We review a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). In order to prevail on appeal, Appellant

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[10] Appellant cites dictum from a sister service case, *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990), as support for his preemption claim. The court in *Asfeld* cited our superior court's opinion in *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989), as authority for its pronouncement on preemption. As we believe the *Curry* holding turns on the doctrine of unreasonable multiplication of charges, *id.* at 424, we do not find our sister court's opinion to be persuasive.

has the burden to demonstrate "a substantial basis in law [or] fact for questioning the guilty plea." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)) (internal quotation marks omitted). The "mere possibility" of a conflict between the accused's plea and statements or other evidence in the record is not a sufficient basis to overturn the trial results. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting *Prater*, 32 M.J. at 436) (internal quotation marks omitted). A guilty plea will only be considered improvident if testimony or other evidence of record reasonably raises the question of a defense, or includes something patently inconsistent with the plea in some respect. *See United States v. Roane*, 43 M.J. 93, 98–99 (C.A.A.F. 1995).

Having examined the providence inquiry and the stipulation of fact, we find the military judge did not abuse his discretion in accepting Appellant's plea to this offense. Appellant admitted he entered into an agreement with another military member to transfer prescription medications to Appellant even though he did not have a lawful prescription. Appellant confirmed there were steps taken in furtherance of the conspiracy when his co-conspirator shipped the drugs to Appellant. Regarding the offense underlying the conspiracy, Appellant admitted the drugs sought were intoxicating substances as defined in the regulatory guidance, and acknowledged he used the substances to alter his mood or function.

Appellant seems to argue the controlled nature of the substance in this case causes it to fall outside the definition found in the regulatory guidance. We disagree given our plain reading of the term "intoxicating substance." As Appellant admitted he believed the prescription medications in his possession were subject to regulation by the instruction, we see no inconsistencies before the military judge that would have reasonably called into question Appellant's plea.

C. Improvident Plea to Conduct Unbecoming an Officer

Appellant pleaded guilty to a variety of offenses under Article 133, UCMJ, for his deceitful conduct towards employees of the Dallas hotel where his wedding took place. On appeal, Appellant challenges one of these specifications in which he threatened to prevent the hotel from competing for future government business by "blacklisting" or "classifying" the hotel. On appeal, Appellant claims his plea was improvident because he never admitted to using the term "blacklist" or "blacklisting" and the military judge failed to equate the term "classifying," which Appellant did use, to "blacklisting."

As noted above, we review a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *Inabinette*, 66 M.J. at 322.

To sustain Appellant's guilty plea to this offense, a sufficient factual predicate had to establish that: (1) Appellant wrongfully and dishonorably stated

to a hotel employee that "I'm going to blacklist you," or words to that effect; and (2) Appellant's conduct, under the circumstances, constituted conduct unbecoming an officer. *MCM,* Part IV, ¶ 59a. (2012 ed.).

Appellant's inability to remember the exact terminology he used to threaten the hotel employee in this case does not render his plea improvident. If an appellant is personally convinced of his guilt based upon an assessment of the government's evidence, his inability to recall the specific facts underlying his offense without assistance does not preclude his guilty plea from being provident. *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011); *United States v. Corralez*, 61 M.J. 737, 741 (A.F. Ct. Crim. App. 2005). In these circumstances, Appellant's reliance on information provided in the stipulation of fact or by his counsel does not raise a substantial basis in law or fact to question the plea. *Id.*

While it is true Appellant never informed the military judge he specifically used the terms "blacklist" or "blacklisting" when dealing with the hotel staff, the providence inquiry establishes Appellant was convinced of his own guilt. *See United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). As part of his pretrial agreement, Appellant agreed to a stipulation of fact surrounding his offenses. Appellant acknowledged that all of the facts contained in the stipulation were true and uncontradicted. With regard to Appellant's specific challenge on appeal, the stipulation noted Appellant "threatened to 'blacklist' the hotel from the Government Accountability Office (GAO) accommodations book, or words to that effect." The stipulation later documented that Appellant informed a hotel employee that the hotel "was now officially blacklisted, or words to that effect."

When asked about these statements in the stipulation of fact, Appellant informed the military judge, "I can't recall [using those exact words] . . . but it's very possible, like I told you before, under the circumstances it could have happened." Later during the providence inquiry, Appellant advised, "I'm not saying that I did not say those things[;] I just don't accurately recall but the atmosphere was such that I could have." Finally, when asked whether he had any reason to doubt the statements of the hotel employee as documented in the stipulation of fact, Appellant stated, "I have no reason to doubt that he's probably . . . more accurate than I am after, you know, enduring all of this."

Appellant also admitted to the military judge that he sent an e-mail to a hotel staff member, which was attached to the stipulation of fact, advising that he intended to place a "classification" on the hotel that would limit its ability to obtain government business. Appellant advised he sent the e-mail to show he had the "power, ability or knowledge to change a classification or blacklist" the hotel.

Given Appellant's statements above, as well as his pronouncements that he believed he was, in fact, guilty of the offense, Appellant has failed to demonstrate "a substantial basis in law [or] fact for questioning the guilty plea." *Prater*, 32 M.J. at 436.

D. Failure to State an Offense

In addition to his direct financial crimes, Appellant was charged with conduct unbecoming an officer for failing to properly report currency transactions as required by 31 U.S.C. § 5324(c). As Appellant noted during the providence inquiry, and as documented in the stipulation of fact, Appellant enlisted the assistance of a friend, who was an Air Force officer stationed in Belgium, to electronically transfer to Appellant approximately $50,000.00 in cash in increments under $10,000.00 to avoid federal reporting requirements. Appellant provided his friend with the currency as Appellant was returning to the United States from a deployment in Africa. Over the course of almost two years, the friend executed numerous non-reported wire transfers to return the cash to Appellant for his personal use. Appellant now claims the charged specification fails to state an offense.

Whether a charge and specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* R.C.M. 307(c)(3). Because Appellant did not request a bill of particulars or move to dismiss the specification for failing to state an offense at trial, we analyze this issue for plain error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 34 (2012) (mem.).

The elements of the offense alleged in the specification are: (1) that, on divers occasions, Appellant wrongfully and dishonorably engaged in acts of structuring monetary instruments, in violation of 31 U.S.C. § 5324(c), by knowingly failing to file and knowingly causing another to fail to file a report required by federal law; and (2) that, under the circumstances, this conduct was unbecoming an officer.

Appellant concedes all of the elements of the offense are stated either expressly or by necessary implication. Instead, Appellant focuses on the remaining requirements of notice and protection from double jeopardy. Specifically, as a violation of the underlying federal statute can occur by either structuring a financial transaction or failing to report a transaction, Appellant complains he was not on notice as to which theory the Government was proceeding under

at trial. Moreover, given these alternative theories, Appellant alleges the specification did not protect him against double jeopardy as the Government could later charge him with a violation of a different theory of liability under this statute.

We need not dwell too long on this question given our review is for plain error. It is clear from Appellant's admissions during the providence inquiry that he was fully aware of the Government's charging theory based on the individual elements of the charge against him. *See United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953) (notice requirements met when charge sufficiently apprised an accused of what he must be prepared to meet). As such, Appellant has failed to establish he was without fair notice of the offense charged against him.

Likewise, the specification alleges sufficient facts, and the record as a whole provides a sufficient factual basis, for Appellant to raise a claim of double jeopardy if he is later prosecuted for a violation of the same statute under a different theory of culpability. *See Dear*, 40 M.J. at 197 (holding an accused can point to the entire record of trial in raising double-jeopardy protection). For these reasons, we decline to find plain error.

E. Review of the Convening Authority's Denial of Appellant's Request to Defer Forfeitures

Shortly after the completion of his trial, Appellant, through his military defense counsel, requested the convening authority defer all forfeitures until action, and then waive forfeitures at action for the benefit of Appellant's spouse. Appellant justified his request by stating the loss of his pay and allowances "may" leave his wife without adequate support. The convening authority denied Appellant's request in writing a week later but provided no justification for his denial of Appellant's request.

On appeal, Appellant claims it was error for the convening authority to not provide reasons for his denial of the deferral request. He requests this court grant relief for this error by either disapproving or reducing his fine, or taking other action to reduce the sentence as appropriate.

In response, the Government suggests the convening authority's decision to defer and waive forfeitures is a matter of clemency and, therefore, not subject to judicial review. While we agree with the Government that Appellant's waiver request is not subject to our review, the denial of his deferment request is a matter squarely within this court's purview. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002). We review the convening authority's action on a deferral request for an abuse of discretion. R.C.M. 1101(c)(3).

In this case, the convening authority's denial of the request to defer forfeitures failed to identify any reason for the decision. This was error. *United States v. Sloan*, 35 M.J. 4, 6–7 (C.M.A. 1992); R.C.M. 1101(c)(3), Discussion.

However, the convening authority's error does not entitle Appellant to relief unless it materially prejudices his substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a). As previously noted by our sister service court, "[a]bsent credible evidence that a convening authority denied a request to defer punishment for an unlawful or improper reason, an erroneous omission of reasons in a convening authority's denial of a deferment request does not entitle an appellant to relief." *United States v. Zimmer*, 56 M.J. 869, 874 (Army Ct. Crim. App. 2002).

We have no evidence before us that the convening authority's denial was for unlawful or improper reasons. While Appellant attempted to show the negative financial impact of his sentence on his wife's well-being, this fact was obviously balanced against Appellant's significant financial crimes against the United States Government and a commercial insurance company. Without the necessary evidence of prejudice, we find the error in this case to be harmless.

F. Sentence Appropriateness

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant argues his sentence is inappropriately severe given the significant "legal and factual overlap" between the false statement, fraudulent claim, and larceny offenses. Appellant requests this court grant appropriate relief by significantly reducing his sentence to confinement.

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

After giving individualized consideration to this particular Appellant, his record of service, the nature and seriousness of the offenses, and all other matters contained in the record of trial, we find the approved sentence is not inappropriately severe. Appellant's deceitful and dishonorable misconduct was both recurring and expansive. As such, we find, based on the entire record, that the approved sentence for this commissioned officer is not unduly harsh or otherwise inappropriate.

G. Multiplicity and Unreasonable Multiplication of Charges

Appellant's final assignment of error requests this court declare assorted offenses either multiplicious or an unreasonable multiplication of charges. In requesting relief, Appellant acknowledges his claims have been waived by the "waive all waivable motions" provision in his pretrial agreement. *See United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009). Nonetheless, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant asks us to grant appropriate relief.

We hold Appellant has waived this issue on appeal. *Gladue*, 67 M.J. at 314. Moreover, after consideration of the entire record of trial, we decline to exercise our authority under Article 66(c), UCMJ, to grant Appellant relief for this claim of error. *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016).

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.[11] Articles 59(a) and 66(c), UCMJ. Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court

[11] Although not raised by Appellant, we note 126 days elapsed between the conclusion of trial and the convening authority's action, exceeding the 120-day standard established by *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). We find no evidence Appellant was prejudiced by the delay and, therefore, find that relief under *Moreno* is not warranted. We also decline to grant relief even in the absence of a showing of prejudice. *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

APPENDIX C

ORDER DENYING REHEARING

BY

COURT OF APPEALS FOR THE ARMED

FORCES

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Tyler G.
Eppes,
Appellant

USCA Dkt. No. 17-0364/AF
Crim.App. No. 38881

ORDER

On consideration of Appellant's petition for reconsideration of the Court's decision, United States v. Eppes, 77 M.J. __ (C.A.A.F. 2018), it is, by the Court, this 7th day of May, 2018,

ORDERED:

That the petition for reconsideration is hereby denied.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Cassara)
Appellate Government Counsel (Kubler)