No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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

vs.

UNITED STATES,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. SCRIVENER'S ERROR
   The lower court held that the search of petitioner's personal bags did not exceed the scope of the search authorization despite the fact that the military magistrate did not authorize this search. The lower court's holding turned on its determination that this omission was a scrivener's error, despite no evidence to support this conclusion. Was this an error?

2. INEVITABLE DISCOVERY
   The lower court applied the doctrine of inevitable discovery to resuscitate a defective warrant, where the government failed to show that any of evidence would have been inevitability discovered. In doing so, the court applied this doctrine more broadly that any other federal circuit court. Was this error?

LIST OF PARTIES

☑ All parties appear in the caption of the case on the cover page

❑ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

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PETITION FOR A WRIT OF CERTIORARI

Air Force Captain Tyler G. Eppes respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces is reported at *United States v. Eppes,* 77 M.J. 339 (C.A.A.F. 2018). It is reprinted in Appendix A to the petition. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is reprinted in Appendix B to the petition.

JURISDICTION

The Court of Appeals for the Armed Forces granted the Petitioner's petition for review on 12 June 2017, *United States v. Eppes*, 77 M.J. 339 (C.A.A.F. 2018). and issued a final decision on 10 April 2018. A timely petition for rehearing was denied by the Court of Appeals for the Armed Forces on 7 May 2018, and a copy of the order denying rehearing appears at Appendix C. This Court therefore has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution protects the rights of the individuals to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. U.S. Const. amend IV. Military Rule of Evidence, 315(f) provides, "a search authorization issued under this rule must be based upon probable cause," which "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." Mil. R. Evid. 315(h)(2) provides, "The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or any applicable Act of Congress." Mil. R. Evid. 315(h)(4). Evidence that was obtained improperly may be used "when the evidence would have been obtained even if such unlawful search or seizure had not been made." Mil. R. Evid. 311(c)(2) The military judge erred in denying Petitioner's motion to suppress evidence in this case that was gathered in violation of Petitioner's right to be free from unreasonable search and seizure.

STATEMENT OF THE CASE

Petitioner was tried between 9-10 and 24 March 2015 at Joint Base Andrews, Maryland by a general court-martial convened by Commander, Headquarters, Air Force District of Washington. The Petitioner accepted a pre-trial agreement and conditionally pled guilty to conspiracy, false official statement, larceny of military & non-military property, fraud against the United States and conduct unbecoming an officer and a gentleman, in violation of Articles 81, 107, 121, 132 and 133 of the Uniformed Code of Military Justice (UCMJ).

Petitioner accepted a trial by military judge alone and after the plea colloquy, the military judge found Petitioner guilty in accordance with his conditional guilty plea. The military judge sentenced Petitioner to forfeiture of all pay and allowances, to be confined for 10 years, to pay a fine in the amount of $64,000.00 (and if the fine is not paid, adjudged an additional three years of confinement); and to be dismissed from the service of the United States Air Force.

Petitioner, a special agent with the Air Force Office of Special Investigations (AFOSI), was a Special Operations counter-intelligence officer and traveled extensively to various worldwide locations in support of the Air Force Special Operations Command (AFSOC) and Special Operations Command (SOCOM) mission. After completion of this assignment, Petitioner was competitively selected to be the personal security advisor to the Chief of Staff of the United States Air Force which also required significant travel. The majority of the charged offenses surrounded Petitioner's submission of travel vouchers over the course of almost four years. With regards to the false official statements and travel vouchers, Petitioner traveled as claimed on the voucher but manipulated his travel dates, expenses or others modes of travel. Some travel vouchers were fraudulent as Petitioner did not engage in government travel as claimed when submitting his travel claims. Petitioner was charged with a litany of other violations of the UCMJ surrounding his travel, but the majority of the criminal activity derives from these

false travel claim submissions. In total, Petitioner submitted at least 41 travel vouchers with inconsistent or fraudulent claims with a cumulative value in excess of $80,000.

The investigation into Petitioner was far-reaching and complex, and involved numerous searches and seizures. The issues addressed on appeal concern the 5 February 2013 search of Petitioner's bags in his temporary place of work at the base Chapel. Agents of AFOSI requested authority to search Petitioner's person, his personal bags and his automobile. The military magistrate issued a search authorization authorizing search of Petitioner's person and automobile; the magistrate did not authorize the search of Petitioner's personal bags. Despite the language of the search authorization limiting the places to be searched, the agents searched Petitioner's personal bags and seized incriminating evidence in violation of the Fourth Amendment prohibition against unreasonable search and seizure. The military judge, after a pre-trial motions, denied the motion to suppress determining that searches were "reasonable" given the bags were in the vicinity of the Petitioner's person, which was authorized on the search authorization . The military judge also found Petitioner did not have a reasonable expectation of privacy in the government office where the search of his person and personal bags took place.

Petitioner on appeal to the Air Force Court of Criminal Appeals again postulated that the Government violated his Fourth Amendment rights in their execution of a number of searches and seizures of evidence during their thirty month investigation of allegations against Petitioner. Normally on appeal, the review of suppression motions are waived by a guilty plea, but the Petitioner specifically sought and preserved the right to raise these issues on appeal through the directed terms of his pre-trial agreement subsequent to his conditionally guilty plea. On 21 February 2017, the Air Force Court of Criminal Appeals found no error that prejudices the rights of the Petitioner and affirmed the case. The court did not agree with the military judge's specific theory of admissibility pertaining to the search of the personal bags outside of the scope of the authorization; they concluded the search was admissible citing the good faith exception to the exclusionary rule.

The ruling of the Air Force Court of Criminal Appeals was appealed to the Criminal Appeals Court of the Armed Forces (C.A.A.F.) who accepted the case on 12 June 2017. On 10 April 2018, the C.A.A.F. delivered their opinion in the case, concluding the search of the Petitioner's bags was beyond the scope of the search authorization. The court believed that the omission of the bags from the search authorization was likely due a scrivener's error. The C.A.A.F. found that it seems incongruous that the agent drafting the affidavit would not include the item on the authorization to search. Additionally, the court opined that if the discrepancy was not a scrivener's error, it is their opinion that the agents would of inevitably searched the bags and discovered their contents. The court found that it is reasonable to believe that had the agents read the authorization, and discovered the discrepancy, they could have and would have obtained a lawful, valid warrant. For these reasons, the court found that the inevitable discovery exception to the exclusionary rule applied, and the military judge did not error in his discretion. The Criminal Appeals Court of the Armed Forces affirmed the decision of the United States Air Force Court of Criminal Appeals.

REASONS FOR GRANTING THE PETITION

The Court of Appeals denied the Petitioner's appeal for relief based on an improper *post facto* determination of a scrivener's error and the factually and legally unsubstantiated application of the inevitable discovery exception to the exclusionary rule. The inevitable discovery doctrine, as established by *Nix v Williams*, (104 S. Ct. 2501 (1984)), permits the admissibility of improperly obtained evidence in instances where the government can prove, by a preponderance of the evidence, that inevitably the incriminating information would have been discovered through lawful means. Since its incorporation by the lower courts, the inevitable discovery exception has caused great consternation in the lack of clarity that plainly defines what is "inevitable." In the exploitation of the ambiguity of what it means to be inevitable, the Court of Criminal Appeals for the Armed Forces (C.A.A.F.) applied the inevitably discovery doctrine more broadly than any other Federal Circuit court and in doing so violated the Petitioner's right to be free from unreasonable searches and seizures as demanded by the Fourth Amendment to the Constitution.

On 4 February 2013, Special Agent Cooper, an Agent with the Air Force Office of Special Investigations, personally authored and submitted an affidavit to a military magistrate requesting authority to search "(1) EPPES' person, (2) EPPES' personal bags and (3) EPPES' personally owned vehicle." The military magistrate authorized SA Cooper "a search of the person of [Petitioner and] premises known as [Petitioner's vehicle]." The authorization does not grant permission to search "personal bags." SA Cooper, when executing the search authorization searched the Petitioner's personal bags and seized numerous items as evidence of believed criminal activity.

It is clear that SA Cooper sought authority to search Petitioner's personal bags. It is equally clear that the military magistrate did not grant that authority. The Court of Appeals for the Armed Forces

agreed with this constitutional overreach concluding "the search of Petitioner's bags in his Chapel 1 office was beyond the scope of the search authorization."

The Court of Appeals for the Armed Forces ultimately determined that evidence sized from the Petitioner's bags need not to be suppressed believing that the omission of the bags from the search authorization must have been a scrivener's error. And even if the discrepancy was not a scrivener's error, the court believes the agents executing the warrant could have and would have obtained a lawful, valid warrant, had they known they were prohibiting from searching the Petitioner's bag and thereby concluding the contents of the bags would have been inevitably discovered.

1. "Scrivener's Error"

The Court of Appeals for the Armed Forces determined in *United States v. Eppes* 77 M.J. 339 (C.A.A.F 2018) that,

> 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.

Respectfully, whether the agent left the bags out of the drafted search authorization intentionally or unintentionally is irrelevant to whether the search authorization in this case actually authorized the search of the Petitioner's bags. But even assuming it was unintentional, calling this a "scrivener's error" relieves the officer of any obligation to either read the search authorization or confine his search to the limits of the authorization. In fact, it effectively removes the magistrate from the process because it permits a law enforcement officer to presume that the magistrate intended the warrant to say something other than what it does say and permits law enforcement to consider the magistrate a "rubber stamp."

The United States Supreme Court held, in *Groh v. Ramirez*, 520 U.S. 551,563 (2004), that it is "incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and

lawfully conducted." And when the officer who executes the search authorization is the same officer who both drafted the affidavit and prepared the search authorization, he cannot claim that he reasonably relied on the authorization. *Groh*, 540 U.S. at 564. Although the issues in *Groh* was whether the good faith exception to the warrant requirement applied, Petitioner respectfully submits that the same some logic obtains with respect to inevitable discovery – the burden [to ensure the search is lawfully authorized and lawfully conducted] is even greater when the officer executing the warrant prepares the affidavit in support of the warrant, drafts the warrant and applies for the warrant." *United States v. Watson*, 493 F3d 429,433 (6th Cir. 2007; see also *United States v. Rarick*, 636 Fed. Appx. 911, 918 (6th Cir. 2016). Because Special Agent Cooper was the same agent who drafted the affidavit and the search authorization and executed the search, he had an "even greater" burden to ensure that the search was done lawfully and should not get a pass under the rubric of a "scrivener's error."

As a method to resuscitate the evidence improperly obtained, the Court of Appeals for the Armed Forces (C.A.A.F) concluded a "scrivener's error" is to blame for the omission of the personal bags in the search authorization. The Government had the opportunity at trial to present evidence in support of this theory, but chose not to do so. Special Agent Cooper, who prepared the affidavit and conducted the search, testified at the suppression hearing. The trial counsel's questions did not ask SA Cooper 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 any 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 or provide any manner of testimony to support the finding of a scrivener's error.

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. To rely on simple

speculation at this point in the appellate process and to make such a grandiose, *post facto*, conclusion is no longer appropriate.

2. Inevitable discovery

At the crux of the application of the inevitable discovery exception to the exclusionary rule, is a logical determination of what would have been properly and legally discovered absent the illegal actions. "All the cases that have endorsed the inevitable discovery exception have relied upon independent, untainted investigations that would have inevitably uncovered the same evidence" *United States v. Owens* 782 F.2d 146, (10th Cir. 1986). Stated differently, if the illegality had not occurred, the government has the burden to establish the lawful methods that would of produced the same evidence independent of the unconstitutional behavior.

Inevitable discovery is not a tool to be used by the government to avoid submitting supporting evidence by simply stating to could have been obtained later (*Hudson vs. Michigan,* 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)). Inevitable discovery cannot mean that we pretend that law enforcement might have done the right thing had it known it had done the wrong thing. If that was the case, then all evidence would be inevitability discovered in the absence of bad faith. It simply cannot be the case, as the C.A.A.F 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.

The various Circuit Courts of Appeals have interpreted and codified the inevitable discovery doctrine through the Supreme Court's ruling in *Nix v Williams* with a wide ranging and often ambiguous standards of interpretation. The Supreme Court has yet to provide a specific definition of "inevitable" and in that uncertainty, the application of this exception to the exclusionary rule is found to be inconsistent and

applied with a litany of various standards contingent mostly upon the specific Circuit Court offering review.

Even within the same Circuit Court, the parameters permitting the application of the inevitable discovery exception is often found to be inconsistent and applied with an ever shifting standard. In *United States v. Brookins,* 614 F.2d. 1048 (5th Cir. 1990), the 5th Circuit Court of Appeals (Fifth Circuit) defined inevitable discovery as a "reasonable" probability that [the] witness would have...been discovered and that normal police practices would have uncovered the information. In *United States v. Amuny,* 775 F.2d. 301 (5th Cir. 1985), the court implied that at a minimum, the government would have to offer a theory as to the manner in which agents would have made their discovery, concluding that the emphasis is on "would' not "might" or "could." Finally, the Fifth Circuit in *United States v. Namer,* 835 F.2d. 1084,1088 (5th Cir 1988), adjusted their holding of inevitable discovery to provide "in certain circumstances, such as when the hypothetical independent source comes into being only after the misconduct, the absence of a strong deterrent interest may warrant the application of the inevitable discovery execution without a showing of active pursuit by the government in order to ensure that the government is not unjustifiably disadvantaged by the police misconduct. Within the scope of the Fifth Circuit, the application of inevitable discovery exception can be understood as a "moving target," enforced with constantly moving standard which is enabled by the lack of legal clarification as to what is specifically "inevitable."

The codification of what is "inevitable" and the application of the inevitable discovery exception between the individual Circuit Courts identifies even greater variability that allows each Circuit Court to interpret differently the standards as outlined in *Nix v. Williams,* and therefor establish standards that often position one Circuit Court's holdings in tension with the rulings of a fellow Circuit Court. The Court of Appeals for the Eleventh Circuit (Eleventh Circuit) has recognized the need for legal and proper investigative methods to be made clear to allow a determination of inevitable discovery. The court has

held that where evidence was obtained by illegal conduct, the "illegality can be cured only if the police possessed and were pursing lawful means of discovery at the time the illegality occurred." The government cannot later initiate a lawful avenue of obtaining the evidence then claim it should be admitted because its discovery was inevitable (*United States v. Satterfield* 743 F.2 d 827,843-845 (11th Cir. 1984)). The Third Circuit Court of Appeals in *United States v Reyes* 149 F.3d. 192, (3rd Cir. 1998) positions that "proof of inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment" adding "the exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred. "

The requirement for a concurrent search independent of the taint of the unconstitutional action as outlined by the Eleventh and Third Circuit is in apparent conflict with the Court of Appeals for the Seventh Circuit (Seventh Circuit) in their determination of inevitable discovery. The Seventh Circuit has held that the application of the inevitable discovery is an evaluation of the harm caused by an illegal search versus the values protected by the Fourth Amendment to the Constitution. The Seventh Circuit utilizes a calculation in weighing suppression that balances the value of excluding evidence in relation to the social benefit of the search in the pursuit of justice. Established in the Seventh Circuit court's ruling in *United States v. Sims,* 553 F.3d 580 (7th Cir. 2009), the evaluation of inevitable discovery was weighed with the understanding that "had the police complied with the Fourth Amendment, the consequences for the defendant would be been exactly as they were." In other words, the Seventh Circuit requires no concurrent or parallel investigative activity to demonstrate the freedom from the illegal actions but rather determines inevitable discovery based on a cost versus benefit calculation.

The frustration created in the ambiguous and fluid interpretation of "inevitable" in the various Circuit Courts is further complicated by the determination and application of this exception to the exclusionary rule made by the C.A.A.F. In the Petitioner's case, *United States v. Eppes*, (77 MJ CAAF 2018), the

C.A.A.F. concluded that the military judge "did not abuse his discretion in admitting the contents of the bags because the agents inevitably would have searched the bags and discovered their contents." The court noted that the military judge's "conclusions of law touch generally on the independent source doctrine and the inevitable discovery doctrine," and states in a footnote that it is "not clear whether his conclusions extend specifically to the search at issue here." Respectfully, if it is not clear that the military judge's conclusions with respect to inevitable discovery extend specifically to the search at issue, how can it be said that the government met its burden or prove that the evidence would have been inevitably discovered by a preponderance of the evidence?

The invocation of the inevitable discovery doctrine demands that the reviewing court to decide whether the government ultimately and legitimately would have discovered the evidence had Petitioner's bags not have been searched in violation of his Fourth Amendment rights. With respect, it cannot be said, nor concluded that the evidence would have been inevitable discovered. The government produced no evidence and failed to identify any investigative method that would have allowed the production of the improperly seized evidence absent the illegal search. Stated differently, without the constitutional violation, the evidence that was discovered would never have been found. The C.A.A.F., recognized in note 7 of its decision, this was not a case involving evidence that would have been recovered during a search incident to arrest, or evidence that would have been discovered during a search pursuant to the "automobile exception" to the warrant requirement. Nor did this case involve any "inventory" conducted pursuant to some administrative process. The C.A.A.F. simply concludes that if the agents had known they had done the wrong thing, they would have done the right thing and therefor the inevitable discovery doctrine applies.

In *United States v. Satterfield*, the Court of Appeals for the Eleventh Circuit recognized that in the application of inevitable discovery there is a timing requirement that demands investigative processes must be independent and concurrent to the unconstitutional event. The court concluded that the

commencement of whatever lawful process that would have produced the evidence has to precede the unlawful conduct. The court found that the Government could not rehabilitate a constitutional violation buy later pursuing "a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable" (*United States v. Satterfield*). If the Eleventh Circuit has established that an actual, later obtained, warrant cannot save an illegal search under inevitable discovery doctrine, then a hypothetical never-obtained warrant certainly cannot as concluded by the C.A.A.F.

The Court of Appeals for the Armed Forces also concluded that the agents in *United States v. Eppes* "were actively pursuing leads that would have led them to the same evidence." While the court describes some of the evidence obtained in other searches, and outlines the nature of the investigation, there is simply no evidentiary support for the conclusion that "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 their contents discovered." The government has the burden of proving, by a preponderance of the evidence, that its agents would in fact have sought a warrant even without the knowledge they gleaned from the warrantless intrusion. *See Nix,* 467 U.S. at 444, 104 S. Ct. at 2509. The government made no attempt at such a showing. The government did not pursue the theory of inevitable discovery until after the case was docketed for Appellate review. Consequently, the theory was not explored at all during the evidentiary hearings. The C.A.A.F developed and decided *sub silento* the findings of inevitable discovery relying on after the fact speculation and assumption. Even if the government had probable cause for a later search independent of the illegal action, there is absolutely no evidence in the record to substantiate how or where the items that were unlawfully seized would have been discovered through lawful means. For the application of inevitable discovery doctrine, the Government, at a bare minimum, has to prove how the illegally obtained items were lawfully discovered but this is something that the government simply failed to address.

The C.A.A.F., in *Eppes*, stated that the "inevitable discovery exception to the exclusionary rules unavoidably requires acceptance of certain reasonable assumptions." The court's conclusions require engaging in precisely the type of speculation and assumptions that the Supreme Court proscribed in *Nix*. The C.A.A.F. findings places their conclusion in direct tension with the Third Circuit Court of Appeals demands that "the [inevitable discovery] analysis should focus upon the historical facts capable of ready verification, and not speculation" (*US v Vasquez* citing NIX, 467 at 444). The Third Circuit in *Vasquesz* further clarifies the inevitable discovery rule by concluding "Proof of inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at a suppression hearing. This exception requires the court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." The ambiguity of the interpretation of "inevitable" permits the C.A.A.F. to apply inevitable discovery rule through nothing more than speculation and assumption. This interpretation directly and specifically contradicts the Third Circuit's codification of "inevitable" which demands determinations made with no speculation. The same parameters of inevitable discovery, as outlined by *Nix v. Williams* are executed in two very different and contradicting standards, their outcomes contingent upon nothing more than which Circuit Court is offering review.

The "assumptions," which are leaned on so heavily by the C.A.A.F in their ruling in *Eppes*, cannot stand as a substitute for the government's obligation to prove by a preponderance of the evidence that the illegally obtained items would have been inevitably discovered despite the unlawful search. The Fifth Circuit of Appeals, in *United States v Namer,* (835, F2d 1084, 1088 (5th Cir. 1988), provides that "At a minimum, the government would have to offer a theory as to the manner in which agents would have made their discovery." The Third Circuit Court of Appeals parallels with the Fifth Circuit Court of Appeals finding "the emphasis on 'would' not 'might' or 'could'." The irony is not lost on Petitioner that

the very word which is precluded from having value in an inevitable discovery determination by so many other Circuit Courts, "could," is the exact word that the CAAF uses to justify and substantiate their findings of inevitable discovery.

As identified previously, the burden to prove what agents "would' of accomplished to support evidence being inevitably discovered is the responsibility of the government to prove and they simply failed to do so, choosing to remain silent on the subject. The *post facto* reliance on assumptions and speculation by the C.A.A.F, relieves the government of its burden of proof and affectively eliminates the protections of the Fourth Amendment and the demands of the exclusionary rule. As expressed in *United States v. Jones,* 72 F.3d. 1324, 1995 (7th Cir. 1995), it is all too easy to imagine in retrospect lawful avenues through which the government might have obtained evidence that in reality it came upon in contravention of the Fourth Amendment. Speculation and assumption do not satisfy the dictates of *Nix.*" The court further found that "inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of proof." The Petitioner humbly submits that the interpretation of inevitable discovery as levied by the C.A.A.F. fails to hold the government to their burden of proof and relies on an unacceptable degree of retrospective supposition, assumption and speculation.

Simply put, if "inevitable discovery" means anything, it must mean that law enforcement would have found the evidence anyway, despite the illegal search. It cannot means that we simply pretend that law enforcement might have done the right thing had it know it had done the wrong thing. If that were the case, then through *post facto* resuscitation, any evidence, regardless of the manner of its discovery would be potentially admissible through this backward looking rational of inevitable discovery. Inevitable discovery defined by these terms would serve to encourage law enforcement to deviate from their requirements to read and be familiar with the very warrants and authorizations they are executing. If investigators were able to apply for a broad, general search warrant and then execute that search warrant

regardless of the restrictions and limitations outlined by the authorizing judge knowing that whatever evidence obtained by constitutional overreach would be admitted under the inevitable discovery doctrine, it would reduce the warrant requirement to the Fourth Amendment to simply a "rubber stamp" and encourages the savvy investigator to engage in unconstitutional behavior. Law enforcement's awareness of the limitations of the warrant and what they would of done had they known of the discrepancy was something that the government was required to prove at trial. The investigator never testified that he would have requested a new search authorization. He never testified that he would have exercised control over the bag until a search authorization could be obtained. The magistrate never testified that he would have issued a search authorization different from the search he originally permitted and the Petitioner is not as sanguine as the C.A.A.F. in concluding that the magistrate would have authorized a second search. It is equally probable that the magistrate simply originally told the investigating officer that he was not comfortable authorizing a search of personal bags inside community religious facilities at Chapel 1 and purposely declined to authorize that aspect of the search authorization. To conclude that because the items requested by the investigating agent do not match the items approved by the magistrate and that the reason for those differences is due to a scrivener's error, completely discredits the magistrate's voice in warrant requirements of the Fourth Amendment. By their holding, the C.A.A.F. seems to create an unreasonable demand that requires the magistrate to somehow further identify the items *prohibited* from being searched, otherwise their absence on the search authorization could later be attributed to a scrivener's error. How does a magistrate deny a particular area of a search authorization if not by choosing to *NOT* include it in their signed authorization? (*Emphasis Added*)

The Court of Appeals for the Armed Forces opined in *Eppes* that it sees "no valid policy reason for applying the exclusionary rules in this case." The court noted, the public policy underlying the exclusionary rule is to "deter police from violations of constitutional and statutory protections." *United States v. Eppes* quoting *Nix v. Williams* 467 U.S. 431, 442-43 (1984). With respect, the petitioner submits

that the C.A.A.F. ruling undermines the public policy underlying the exclusionary rule. Other than the admonishment located in note 9 of the C.A.A.F.'s decision, the ruling appears to establish precedent that law enforcement officers in the military will be excused of any failure to actually read the contents of a search authorization and will be excused of any failure to limit their searches to the places described in the search authorization. The inevitable discovery doctrine as clarified by the C.A.A.F. would always forgive constitutional violations committed by law enforcement officers and allow them to simply claim that they would have obtained a warrant if they had known they needed one.

Exacerbating the exploited determination of "inevitable" by C.A.A.F in *Eppes*, we can do no more than speculate as to what precisely, was found in the Petitioner's bags, as the Government did not produce the evidence or describe it with any particularity. Even when evaluated in the light most favorable to the government, without more information as to what was found in the bags, it is fundamentally impossible to conclude that the evidence inevitably would have been discovered by other means. In this case, the Government did not meet its burden prove the items would have been inevitably discovered by a preponderance of the evidence. The Government did not offer into evidence the specific items found in the bags, it did not otherwise identify the contents of the items found in the bags and it did not identify leads that law enforcement possessed or was actively pursuing that would have led to the discovery of items that were found in the bags. Without more testimony to determine what was found the bags, the record simply does not establish that the evidence inevitably would have been discovered by other legal means or prove to any degree the illegal search was harmless beyond a reasonable doubt. To speculate and assume when the record is completely *sub silentio,* is legally improper and fundamentally in error. Absent this specific information, it is particularly disturbing the precedent that is established permitting evidence to be inevitably discovered when the court cannot even identify what evidence was seized. How can a court determine beyond a preponderance of evidence the legal manner in which an item was obtained if they lack the particularity to identify what they actually possess?

In conclusion, the United States Supreme Court properly established in *Nix v. Williams*, the inevitable discovery exceptions to the exclusionary rule. Although the inevitable discovery exception is a valid and useful tool to ensure the best interest of justice is achieved, it cannot be exercised at the constitutional detriment of the very citizens it was intended to protect. The lack of legal determination as to what is "inevitable" has created an environment that permits wildly different applications and ever changing expectations governing a finding of inevitable discovery and reduces the predictability of a court's findings not to the merits of the case but rather to trends specific to the individual Circuit Court offering review. The precedent established in *Eppes* by the C.A.A.F. creates a slippery slope in the loose and ambiguous definition of "inevitable," which could be logically extrapolated to conclude that since "no human can live forever and all citizens must "inevitability" succumb to death, taking another person's life must be permissible because the end result, their death, is after all 'inevitable.'" Such an offensive and reductive conclusion cannot be what the founders of our great nation envisioned when they left us with the eternal charge to form a more perfect union. This case comes before the Supreme Court requesting for an intervention asking that the wound created by the indistinctly defined and variously interpreted term "inevitably," be legally clarified. An explicitly defined legal concept of "inevitable" would resolve the difficulties the lower courts have in standardizing the application of inevitable discovery and would normalize the constitutional protections afforded to each citizen by eliminating the contradictory standards of inevitable discovery currently held by each of the Circuit Courts of Appeals. The ambiguity of the critical concept of "inevitable" in the application of inevitable discovery doctrine necessitates the intercession of the Supreme Court in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner

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