

No. 00-123

IN THE

NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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KOSMO KRAMER,  
LCDR, U.S. NAVY

*Appellant,*

v.

UNITED STATES,

*Appellee.*

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ON WRIT OF CERTIORARI TO THE  
NAVY-MARINE CORPS TRIAL JUDICIARY SOUTHERN JUDICIAL  
CIRCUIT GENERAL COURT - MARTIAL

**BRIEF FOR THE APPELLANT**

*Counsel for the Appellant*

Team #2

## QUESTIONS PRESENTED

- I. DID THE MILITARY JUDGE ERR IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF LCDR KRAMER'S HOME, WHEN NCIS SPECIAL AGENTS DELIBERATELY MANIPULATED THE "THRESHOLD COLLOQUY" TO PREVENT LCDR KRAMER FROM BEING PRESENT TO REFUSE CONSENT TO SEARCH, AND THEN RELIED UPON THE INVOLUNTARY CONSENT OF HIS WIFE TO SEARCH A CLOSET AND BRIEFCASE UNDER HIS EXCLUSIVE CONTROL?
  
- II. DID THE MILITARY JUDGE ERR IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF LCDR KRAMER'S CAR, WHEN NCIS SPECIAL AGENT GEBBS SEARCHED THROUGH A CELL PHONE AND GYM BAG WITHIN THE PASSENGER COMPARTMENT, EVEN THOUGH LCDR KRAMER HAD ALREADY BEEN SECURED AND TAKEN AWAY FROM THE VICINITY OF THE CAR, AND NEITHER OBJECT WAS INCRIMINATING IN NATURE?
  
- III. DID THE MILITARY JUDGE ERR IN DENYING THE MOTION TO SUPPRESS STATEMENTS LCDR KRAMER MADE TO CDR NORRIS AND SPECIAL AGENT COLOMBO, WHEN CDR NORRIS INTERROGATED LCDR KRAMER WITHOUT ADVISING HIM OF HIS 31(B) RIGHTS, AND SPECIAL AGENT COLOMBO FAILED TO ADEQUATELY ORIENT HIM TO ALL OF THE CHARGES HE WAS SUSPECTED OF PRIOR TO QUESTIONING?

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## STATEMENT OF THE CASE<sup>1</sup>

On April 23, 2009, NCIS received a tip from Intelligence Specialist Second Class (IS2) Squeeky Clean that he believed that his coworker, LCDR Kosmo Kramer, was selling classified information. R. at 58-59. IS2 Squeeky Clean failed to appear for a follow-up interview with NCIS the following morning, causing NCIS to initiate an investigation into LCDR Kramer. Id.

As part of this investigation, NCIS Special Agent (SA) Magnum T.I. examined the Facebook page of LCDR Kramer, and found posts about gambling and a drug known as "Provigil." R. at 14. Based on the tip from IS2 Clean and these Facebook posts, NCIS sought and received command authorization to search LCDR Kramer's office on board Naval Air Station Jacksonville (NAS JAX). R. at 29. The command authorization was given by CDR Jack Spurrow, who was not the base Commanding Officer. Id.

That evening, three NCIS Agents went to LCDR's residence. R. at 11. The first, SA Colombo, convinced LCDR Kramer to come to NCIS for an interview about IS2 Clean's absence. R. at 80. During that interview, Kramer refused to grant NCIS consent to search his residence. Id. The other two Special Agents, T.I. and Closeau, were meanwhile waiting in their vehicle down the

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<sup>1</sup> References to facts throughout this brief are cited to the official record, including motion hearing testimony and the military judge's findings of fact, and are denoted "R. at [page]."

street. R. at 14. After receiving a phone call from SA Colombo that LCDR Kramer had refused to grant consent to search, they then approached the house and asked LCDR Kramer's wife, Parish Holten, for consent to search within for evidence of gambling. R. at 15-16. Mrs. Holten was holding a martini glass and demonstrated visible signs of intoxication, including stumbling and slurring her speech. Id. She repeatedly refused to grant consent, acquiescing to signing the Permissive Authorization to Search and Seizure (PASS) only after the Agents told her that they already had command authorization to search LCDR Kramer's office, and that everyone would be kept up all night if they had to get authorization to search the house as well. R. at 17, 81.

Inside the home, the Agents searched a den after being informed by Mrs. Holten that it was her "husband's game room" which she "did not go in." R. at 19. The den contained a closet, which Mrs. Holten told the Agents was only used by her husband. It did not apparently contain items other than Navy uniforms and gear. R. at 17, 19. Within the closet, the Agents found a closed Navy-regulation briefcase engraved with the initials "KK." R. at 82. Upon opening the briefcase, SA T.I. found U.S. currency, a cellular telephone and a pill bottle. R. at 83. SA T.I. then turned on the cell phone and searched through the messages and photos within. Id.

Meanwhile, SAs Gumshoe and Gebbs were searching LCDR Kramer's office. They did not discover anything suspicious, but were informed by a cell phone call from SA Colombo that evidence was found at the residence to support the arrest of LCDR Kramer. R. at 7. During the call, LCDR Kramer walked into his office, causing SA Gebbs to reach for his weapon and shout for LCDR to freeze. Id. LCDR Kramer then ran out of the office, with SAs Gebbs and Gumshoe in pursuit. R. at 87. As LCDR Kramer neared his open-top convertible in the parking lot, he was tackled by CDR Huck Norris, who had overheard the commotion. R. at 20. After knocking LCDR Kramer to the ground five feet away from the convertible and tying his hands with his own belt, Norris demanded to know "what in the hell is going on here?" R. at 21. LCDR Kramer verbally responded with a potentially incriminating statement. R. at 93.

Shortly thereafter, SAs Gumshoe and Gebbs arrived on scene and formally apprehended LCDR Kramer. Id. SA Gumshoe and CDR Norris escorted LCDR Kramer to a base security vehicle. R. at 21. Meanwhile, SA Gebbs searched and seized evidence from the passenger compartment of LCDR Kramer's vehicle, including a gym bag in the passenger compartment of the vehicle, a pill bottle under the exterior flap of that gym bag, and a cell phone in the driver's side door. R. at 24, 88. The next morning, SA Gebbs

conducted an inventory search of the vehicle, and then had it towed to NCIS headquarters on board NAS JAX. R. at 23.

After apprehending LCDR Kramer, the NCIS Agents took him to an NCIS interview room, where SA T.I. silently entered and placed the briefcase previously seized from LCDR Kramer's residence on the table. R. at 9. SA Colombo then entered and informed LCDR Kramer that he was suspected of "homicide; espionage; [gambling]; and flight from apprehension. Id. He then commenced the interrogation, during which LCDR Kramer made various potentially incriminating statements. R. at 9-10.

On April 28, 2009, three charges were preferred against LCDR Kramer: (1) flight from apprehension (Art. 95, UCMJ, 10 U.S.C. § 895); (2) attempted espionage (Art. 106(a), UCMJ, 10 U.S.C. § 906(a)); and (3) wrongful possession of controlled substances (Art. 112(a), UCMJ, 10 U.S.C. § 912(a)). Two days later, these charges were referred to a general court-martial. LCDR Kramer moved to suppress evidence seized from his residence and car, as well as his statements made to CDR Norris and the NCIS SAs. After hearings on each motion, the military judge denied them all. R. at 79-95. LCDR Kramer was convicted of each charge, and was sentenced to a dishonorable discharge, fifty-three years of confinement, and total forfeitures. R. at 25.

LCDR Kramer now asks this Court to reverse the denial of his motions to suppress (1) physical evidence seized during the

warrantless search of his residence; (2) physical evidence seized during the warrantless search of his car; and (3) the statements he made to CDR Norris and the NCIS SAs.

### Summary of the Argument

In seeking to obtain consent to search LCDR Kramer's residence, NCIS Special Agents deliberately manipulated the threshold colloquy by removing LCDR Kramer from his home without an independent reason for doing so. After learning that he refused to consent, the agents initiated a second inquiry with his wife, Parish Holten. Because of this deliberate manipulation to deprive LCDR of his Fourth Amendment protections, the Special Agents could not rely upon any consent given by Mrs. Holten. At any rate, Mrs. Holten's signature on the Permissive Authorization to Search and Seize (PASS) was involuntary, since it was obtained through the Agents' coercion of the intoxicated woman. As such, she did not consent to the search. Even if this Court chooses to find that Mrs. Holten could and did consent to the search of her shared residence, that consent could not justify a lawful search of LCDR's briefcase, because it was both within and itself a zone under the exclusive control of LCDR Kramer.

The search of LCDR Kramer's vehicle was likewise illegal because it stemmed from the unlawful search of his residence. The agents had no independent reason to search LCDR Kramer's car. Neither the officer safety nor evidence preservation rationales demanded a search, as LCDR Kramer had been restrained and was being led to a security vehicle when the search

occurred. The items seized from his car were not incriminating in nature, and therefore the plain view doctrine did not justify seizing them. Nor were the agents lawfully entitled to enter evidence seized during the search on the basis of an inevitable inventory search, because there was no need for the police to exercise their caretaking function over it. Even if this Court finds that the Agents were justified in seizing the gym bag and cell phone found within the vehicle during an inventory search, that justification would certainly not extend to the items found within the gym bag and phone, because these containers could be secured without need to rummage through their contents. Failure to suppress this evidence as the fruit of an unlawful search will encourage future agents to commit Fourth Amendment violations by claiming ignorance of new law, so this Court should apply the suppression rule to reverse the conclusions of the Military Judge.

Statements that LCDR Kramer made to CDR Norris should also be suppressed, because CDR Norris failed to advise LCDR Kramer of his 31(b) rights before interrogating him. Likewise, statements that LCDR Kramer made to SA Colombo should be suppressed, because SA Colombo failed to adequately orient LCDR Kramer to the drug crime he was suspected of before questioning and obtaining incriminating statements from LCDR Kramer about drugs.

### STANDARD OF REVIEW

This Court reviews a military judge's denial of a motion to suppress evidence "for an abuse of discretion." United States v. Yammine, 67 M.J. 717, 723 (N-M. Ct. Crim. App. 2009). "Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. Conclusions of law are reviewed de novo." United States v. Flores, 63 M.J. 557, 560 (N-M. Ct. Crim. App. 2006).

## ARGUMENT

- I. THIS COURT SHOULD REVERSE THE MILITARY JUDGE'S DENIAL OF THE MOTION TO SUPPRESS EVIDENCE SEIZED DURING THE WARRANTLESS SEARCH OF THE HOME OF LCDR KRAMER AND PARISH HOLTEN, BECAUSE THE NCIS SPECIAL AGENTS DELIBERATELY MANIPULATED THE "THRESHOLD COLLOQUY" TO ENSURE THAT LCDR KRAMER WOULD BE UNAVAILABLE TO EXPRESS HIS OBJECTION TO CONSENT, AND THEN RELIED UPON THE INVOLUNTARY CONSENT OF MRS. HOLTEN TO SEARCH A CLOSET AND BRIEFCASE UNDER LCDR KRAMER'S EXCLUSIVE CONTROL.
  - A. The Special Agents could not possibly acquire legally sufficient consent to search from Parish Holten over the known objections of LCDR Kramer, because they deliberately manipulated the "threshold colloquy" to remove LCDR Kramer from his home before learning of his objections, and to ensure that he would not be present to express those objections when they later asked for consent from Mrs. Holten.

The Fourth Amendment generally prohibits entry into a person's home without a warrant, whether to make an arrest or to search for specific objects. Illinois v. Rodriguez, 497 U.S. 180, 181 (1990). This rule is subject to one "jealously and carefully drawn" exception for consent given by an individual possessing authority over the premises. Jones v. United States, 357 U.S. 493, 499 (1958). The scope of this authority is controlled by "widely shared social expectations" about when a party has relinquished his expectation of privacy in a space by voluntarily sharing that space with others, such that police officers are entitled to rely upon the consent of just one co-tenant. Georgia v. Randolph, 547 U.S. 103, 111 (2006). Sufficient authority for a legal search exists when police

officers obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with an absent co-occupant, although the absent co-occupant may later object to the use of evidence so obtained. Id. at 106. However, if a resident is present at the "threshold colloquy" with the government agents and objects to search, then the agents lack authority to search even if another resident is willing to admit them. Id. at 114-15.

The facts of Randolph did not require that Court to address the question of whether the Fourth Amendment will permit government agents to deliberately manipulate the threshold colloquy to ensure that a potentially objecting co-tenant is not present when another co-tenant is asked to consent. Id. at 121-22 (Kennedy, J., concurring). However, the concurring opinion written by Justice Kennedy indicates that such manipulation forms an unlawful basis for search. Instead, the rule is that government agents must take the threshold colloquy as they find it when they approach to initiate the request for consent; if there is "evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," that will render the authority of the tenant remaining at the threshold legally insufficient. Id.

This Court should confirm the rule that government agents may not deliberately manipulate the threshold colloquy to

silence the non-consenting resident, for two reasons in addition to the Supreme Court's guidance. First, it preserves the practical simplicity of the formal distinction set forth in Randolph while also honoring its balancing of competing "individual and governmental interests entailed by the bar to unreasonable searches." See id. at 114-15, 121-22. Under this distinction, the police are not required to take affirmative steps to locate a potentially objecting co-resident and solicit his consent or lack thereof once they have received consent from another resident, allowing them to take advantage of "legitimate opportunities in the field" without waste of time. Id. at 122. They may, for example, remove a tenant from his premises during a lawful arrest and then receive consent to search from a co-tenant, without making a separate effort to obtain consent from the tenant under arrest. United States v. Matlock, 415 U.S. 164, 166-71 (1974).

However, the balancing of government and private interests behind Randolph indicates that the police should not be able to undercut a resident's legitimate expectation of privacy by manipulating the initial threshold colloquy to separate the co-tenants and conduct separate consecutive inquiries, such that the objections to search of one tenant cannot be heard when the other co-tenant is later asked. When the police have already spent resources to locate a potentially objecting resident and

remove him from the home under conditions other than lawful arrest, and only then requested consent to search, the government interest in the efficient use of police resources and ability to take advantage of "legitimate opportunities in the field" no longer applies. See Randolph, 547 U.S. at 122. A contrary decision will diminish the Randolph rule against searches over the objections of a present co-resident, since the police will be encouraged to devise reasons to separate tenants before requesting consent to search, effectively doubling their chances at the expense of "an objecting individual's claim to security against the government's intrusion into his dwelling place." Id. at 115.

The second reason why this Court should hold that the Fourth Amendment does not allow consent searches following government manipulation of the threshold colloquy in this fashion is that it will be laying guidance consistent with that set forth by numerous federal circuit courts, which have acknowledged this exception to the Randolph formalism in cases where the facts were insufficient to justify the exception's application. The Court of Appeals for the Seventh Circuit has indicated that if police officers remove an appellant from his home to avoid objections to consent, rather than in the course of a lawful arrest based on probable cause, then a spouse's consent to search is not legally sufficient. United States v.

DiModica, 468 F.3d 495, 500 (7th Cir. 2006). Similarly, both the Court of Appeals for the Armed Forces and Court of Appeals for the Second Circuit have found that the sufficiency of consent obtained from one tenant is subject to the limitation that "the police must not have removed the occupant for the purpose of avoiding a possible objection." United States v. Weston, 67 M.J. 390, 304 (C.A.A.F. 2009); United States v. Lopez, 547 F.3d 397, 400 (2nd Cir. 2008).

Here, the Special Agents deliberately manipulated the threshold colloquy to remove LCDR Kramer from his home before learning of his objections to search, and to keep him from expressing those objections when they initiated a second consent inquiry with his wife, Parish Holten. SA Closeau removed LCDR Kramer from his home by insisting that he come to NAS JAX to answer questions about the disappearance of IS2 Squeeky Clean. R. at 11. SA Closeau did not ask LCDR Kramer for consent to search during this initial threshold colloquy. Id. Agents T.I. and Colombo did not participate in this interaction, instead waiting out of sight in their vehicle. R. at 14. They then approached the door to request consent from Mrs. Holten, after receiving word from SA Closeau that LCDR Kramer, in an interrogation room at NAS JAX, had refused consent to search. R. at 14-15. During his threshold conversation with Mrs. Holten, SA T.I. encouraged her to call her husband on his cell phone to

consult about signing the PASS, even though he was aware that LCDR Kramer would not have sufficient signal within the NCIS building to receive the call. R. at 15-16. The inference to be drawn from these facts is that the Agents planned the two threshold interactions to separate LCDR Kramer and Mrs. Holten before requesting consent from either, while creating the appearance of normalcy so that she would feel comfortable in acquiescing to their requests. In doing so, they effectively eliminated the ability of either party to keep their Fourth Amendment right to security in the home.

This case is different from Rodriguez and Matlock, in which the Supreme Court upheld the denial of motions to suppress evidence discovered through consent searches, because in those cases the government agents did not expend any resources to affirmatively seek out the potential nonconsenting party before requesting consent from a co-tenant at the doorway. Here, the Agents deliberately located LCDR Kramer, removed him from his home, and sought and were refused his consent, before initiating the threshold colloquy with Parish Holten, so the efficiency rationale at work in Randolph does not weigh in their favor. See Randolph, 547 U.S. at 122.

Furthermore, unlike in Weston, the Agents did not have a reason aside from evidence gathering to independently compel the removal of LCDR Kramer from his home. In that case, the

defendant was already under arrest when the government agent requested consent, giving him a wholly independent justification for removing the defendant from the home. 67 M.J. at 390. Under similar circumstances, the Court of Appeals for the Eighth Circuit noted, the defendant "was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought" within the home. United States v. Hudspeth, 518 F.3d 954, 959 (8th Cir. 2008). The Agents here, in contrast, did not have any independent ground based on evidence already obtained to compel LCDR Kramer's removal from the home, and there was no practical reason why they needed to do so before requesting consent to search; on the contrary, they removed LCDR Kramer at least in part with evident intention to ask him for consent in a separate location. As a result of this manipulation of the threshold inquiry, Mrs. Holten could not possibly give legally sufficient consent to search.

- B. Mrs. Holten's signature on the PASS was involuntary, because the Special Agents acquired it through the use of coercive tactics with knowledge that Mrs. Holten was intoxicated.

When the Government seeks the benefit of the consent exception to the Fourth Amendment, it has the burden of proving that consent was, in fact, freely and voluntarily given.

Mil.R.Evid. 314(e)(4). Bumper v. North Carolina, 391 U.S. 543,

548 (1968). Mrs. Holten's signature on the PASS was involuntary. As such, even if this Court finds that Parish Holten could have given legally sufficient consent to search over the known objections of LCDR Kramer, she did not in fact do so.

To show that consent was freely and voluntarily given, the government must show that the party from whom consent was sought did more than merely acquiesce to an assertion of lawful authority, such as claimed possession of a search warrant. Id. at 549. Mention of intent to seek command authorization "must be done in an appropriate manner so as to make the resulting consent truly voluntary." United States v. McClain, 31 M.J. 130, 133 (C.A.A.F. 1990). The question of whether consent is "voluntary" is to be considered in light of all the circumstances. Mil.R.Evid. 314(e)(4). Two of these circumstances are (1) a person's knowledge of the right to refuse, id.; and (2) intoxication of the person from whom consent is sought, so long as the government agents were aware of the intoxication. United States v. Jones, 34 M.J. 899, 906-07 (N-M.C.M.R. 1992).

Here, the NCIS Agents manipulated Mrs. Holten such that her decision to sign the PASS was not free and voluntary. SA T.I. was aware that Mrs. Holten was intoxicated before he requested consent to enter, because she informed him as such. R. at 15. Additionally, she was slurring her speech and stumbling, to the extent that she spilled her nearly-empty martini glass on him.

Id. When asking for consent, he did not make any effort to ensure that she knew she could refuse. R. at 12. SA T.I. testified that he knew that Mrs. Holten was aware of her ability to refuse consent because she initially did so. Id. However, the fact that she twice refused consent before acquiescing better supports her testimony that she did "not feel like [she] had a choice. R. at 18.

Furthermore, SA T.I. manipulated her intoxicated state by asserting that he already had command authorization to search her husband's office, and that if he had to go back and get another authorization for the house, "everybody would be up all night." R. at 17-18. This is unlike Hudspeth, where consent was found sufficient, because in that case the government agent merely said that if consent was denied, he would have to apply for a search warrant, and that in the meantime the house would have to be under surveillance to prevent the destruction of evidence. 518 F.3d at 956. Here, SA T.I. added a factually unjustified element of coercion, namely that Mrs. Holten would be kept up all night in a known intoxicated state unless she consented to search. This coercion, coupled with Mrs. Holten's drunken perception that she was merely acquiescing to the authority of the SAs, indicates that her signature on the PASS was involuntary, and therefore insufficient justification for a warrantless search under the Fourth Amendment.

C. Even if this Court finds that Mrs. Holten could and did provide legally sufficient consent in response to the manipulative tactics of the Special Agents, that consent could not and did not extend to the den, closet or briefcase within LCDR Kramer's zone of exclusive control.

Even when a co-tenant generally has common authority to consent to a search of shared premises, that authority excludes spaces within the exclusive domain of another party. Weston, 67 M.J. at 392, citing United States v. Gallagher, 66 M.J. 250, 253-54 (C.A.A.F. 2008). "The scope of the apparent authority depends on whether it was objectively unreasonable under the circumstances for law enforcement to believe that the consent extended to a particular container on the premises." Florida v. Jimeno, 500 U.S. 248, 251 (1991). The consenter cannot authorize the search of areas over which she does not have common authority. Gallagher, 66 M.J. at 253.

Here, the NCIS Agents were put on notice that the den, closet and briefcase were within the exclusive control of LCDR Kramer, making a search of those spaces based on the consent of Mrs. Holten unlawful. Mrs. Holten explicitly informed the Agents that the den was her husband's room, and that she did not go in there. R. at 19. Furthermore, SA T.I. observed that all the contents of the closet were of a military nature. R. at 17. Mrs. Holten is not in the military, and never has been. R. at 81. As such, the Agents had reason to know that the closet and its

contents were within the exclusive control of her husband. This is particularly true of LCDR Kramer's briefcase, which was (1) in compliance with Navy regulations for use while in uniform, and (2) clearly marked with LCDR Kramer's initials. R. at 17. These facts are plainly different from Gallagher, where the CAAF affirmed the denial of suppression for evidence seized from appellant's briefcase on the basis of consent given by appellant's wife, because that briefcase was kept in a common area, and was generic and unmarked, such that it could have reasonably belonged to the spouse. 66 M.J. at 251.

Since it was apparent that Mrs. Holten did not possess authority over LCDR Kramer's briefcase, the Special Agents were not justified in searching its contents. As such, even if this Court finds that she could and did consent to a general search of the home, despite the Special Agents' manipulation of the threshold colloquy and the involuntariness of her signature on the PASS, the evidence found within the briefcase must be suppressed.

II. THIS COURT SHOULD REVERSE THE MILITARY JUDGE'S DENIAL OF THE MOTION TO SUPPRESS EVIDENCE SEIZED FROM LCDR KRAMER'S VEHICLE, BECAUSE THE ARREST OF LCDR KRAMER AND CONSEQUENT SEARCH OF THE GYM BAG AND CELL PHONE FOUND WITHIN THE VEHICLE WERE BASED ON EVIDENCE ACQUIRED IN A PRIOR UNLAWFUL SEARCH, BECAUSE THE PASSENGER COMPARTMENT OF THE VEHICLE WAS NOT WITHIN LCDR KRAMER'S ZONE OF CONTROL AT THE TIME OF THE SEARCH, AND BECAUSE THE INVENTORY EXCEPTION DOES NOT EXTEND TO THE SEARCH OF APPARENTLY INNOCUOUS REMOVABLE CONTAINERS.

- A. The NCIS Agents arrested LCDR Kramer in response to evidence acquired from the prior illegal search of his residence without independent origins for probable cause, thus rendering their search and seizure of evidence during the consequential search of LCDR Kramer's convertible unlawful.

In general, knowledge that government agents acquire through an illegal search or seizure cannot be used derivatively against the accused. Nardone v. United States, 308 U.S. 338, 342 (1939). "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id. at 340-41, quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). For the government to admit derivative evidence, it must convince the trial court that its evidence had an independent origin other than the illegal search or seizure, or that the causal connection between its lawless conduct and the challenged evidence was "so attenuated as to dissipate the taint" of that search and seizure. Nardone, 308 U.S. at 341.

Here, the Special Agents initiated their pursuit of LCDR Kramer in response to evidence acquired through the illegal search of his residence. Absent those items, their only grounds for the arrest of LCDR Kramer would have been the uncorroborated statements about espionage made by IS2 Squeaky Clean and the mention on LCDR Kramer's password-protected Facebook site of

gambling and a drug known as Provigil. R at 13. Neither of these things provides a reasonable ground to believe that LCDR Kramer had actually committed any offense. Hence, the officers did not have any independent lawful origins for the information supporting the arrest of LCDR Kramer, making that arrest itself unlawful.

B. The Special Agents searched LCDR Kramer's vehicle after securing him and removing him from the area, such that neither officer safety nor protection of evidence justified the warrantless intrusion.

Under certain circumstances, the Fourth Amendment will tolerate a warrantless search when conducted by government agents "incident to a lawful arrest." Chimel v. California, 395 U.S. 752, 762-63 (1969). Search incident to lawful arrest is justified by the agent's need to protect himself and prevent the destruction of evidence. Id. In the vehicle context, this justification exists only when (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or (2) it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).

Even if this Court finds that the arrest of LCDR Kramer was lawful, it still does not justify a search of his vehicle, because he was in custody and well away from the vehicle before SA Gebbs initiated his search. The NCIS Agents reached LCDR

Kramer after he had been tackled, laid prone and bound at the wrists with his belt by Navy SEAL CDR Norris. R. at 20-21. SA Gebbs then commenced his search of LCDR Kramer's convertible, including the gym bag and cell phone located within, as SA Gumshoe and CDR Norris were escorting LCDR Kramer to the base security vehicle, located approximately twenty feet from the convertible. R. at 22-23. Because the convertible's interior was never within LCDR Kramer's reach after he was tackled, and because he was in the custody of both SA Gumshoe and CDR Norris while being escorted back to the security vehicle, there was no danger of him reaching inside the vehicle to either access a weapon or destroy evidence at the time that SA Gebbs initiated his search. At any rate, it is clear that the Agents were not concerned about LCDR Kramer presenting a threat to their safety or evidence within the vehicle, because they chose to unbind his wrists before walking him back to the security vehicle.

Furthermore, SA Gebbs did not have reason to believe that any evidence related to the reasons for LCDR Kramer's arrest were located inside the vehicle. The arrest was initiated without any prior reference to the convertible, and it was mere coincidence that CDR Norris happened to tackle LCDR Kramer adjacent to it rather than elsewhere in his the path of his flight. These facts are different than in New York v. Belton where the Supreme Court affirmed the denial of a motion to

suppress evidence discovered during a vehicle search. 453 U.S. 454, 462-63 (1981). In that case, the defendant was driving his vehicle when police first noted the erratic behavior that led to the drug-related arrest, making it reasonable to believe that his vehicles would contain relevant evidence. See Gant, 129 S. Ct. at 1719. Here, on the other hand, LCDR Kramer was not in his convertible prior to the arrest, and there was no reason to believe that he was running towards it for any reason except to expedite his flight from the Special Agents. As such, SA Gebbs had no justification for searching the vehicle or the containers located within as an incident to the arrest.

- C. LCDR Kramer had a reasonable expectation of privacy in the bag and cell phone located in the passenger compartment of his convertible, and these containers were not incriminating in nature such as justify a search under the plain view doctrine.

Generally, the Fourth Amendment protects objects and spaces from search and seizure unless they have been "knowingly expose[d] to the public." Katz v. United States, 389 U.S. 347, 352 (1967). The police are entitled to see what may be seen "from a public vantage point where [they have] a right to be." California v. Ciraolo, 476 U.S. 207, 213 (1986). However, when an individual arranges his possessions such as to manifest a subjective expectation of privacy, those possessions are shaded by the Fourth Amendment so long as society accepts that

subjective expectation of privacy as reasonable. California v. Greenwood, 486 U.S. 35, 39 (1988).

Within this rule, the plain view doctrine establishes that government agents are permitted to search and seize objects when (1) they were lawfully in place to initially perceive the object, and (2) it was "immediately apparent" that the object was of "incriminating" character, such that there was probable cause to associate the property with criminal activity. See Texas v. Brown, 460 U.S. 730, 737-41 (1983).

Here, LCDR Kramer had a legitimate expectation of privacy in the bag and cell phone found in the passenger compartment of his vehicle. This is unlike the curbside trash bags at issue in Greenwood, where the Supreme Court concluded that the appellant did not have any reasonable expectation of privacy, because trash bags on a public street are commonly understood to be subject to public inspection. 486 U.S. at 40-41. Although LCDR Kramer parked with the top of his convertible down, he still possessed an objectively reasonable expectation that the containers within would not be rummaged through by passers-by. The NCIS Agents were justified in visually expecting those areas of the vehicle that could be viewed "from outside the vehicle, by either inquisitive passerby or diligent police officers." Brown, 460 U.S. at 740. However, visual contact with the gym bag

and cell phone did not justify a further search of their contents, because neither item was incriminating in nature.

Any suspicions possessed by SA Gebbs about the potentially incriminating contents of the gym bag or cell phone inside LCDR Kramer's vehicle at the time of his search were based on the prior illegal search of LCDR Kramer's residence. Absent knowledge of the cell phone previously seized from LCDR Kramer's residence, SA Gebbs would not have had reason to perceive the cell phone inside the vehicle as anything but innocuous. R. at 69. Similarly, even if this Court finds that SA Gebbs was justified in patting the exterior flap of the gym bag despite its non-incriminating nature, his seizure of the pill bottle was based on knowledge obtained from the prior illegal search of LCDR Kramer's briefcase. R. at 70. As previously noted, the government is not justified in using the fruits of a prior illegal search against the accused. Consequentially, the evidence seized through the Agent's search of the cell phone and gym bag should be suppressed.

- D. The Special Agents could not have lawfully searched inside the gym bag and cell phone found within the passenger compartment of LCDR Kramer's vehicle during an inventory search, so the initial vehicle search was not justified by the inevitable discovery doctrine.

The inevitable discovery doctrine is an exception to the general doctrine of suppression for illegally obtained evidence, for circumstances in which that evidence would have been

inevitably discovered even absent the illegal search. Nix v. Williams, 467 U.S. 431, 446 (1984). An inventory search is one mechanism by which evidence within a vehicle may be "inevitably discovered," provided that the inventory search is itself justified. The Supreme Court has found an inventory search to be justified when conducted as part of a standard procedure of securing and inventorying the contents, or for purposes of safeguarding the owner's property, guaranteeing the safety of the custodians, or protecting the general public. Cady v. Dombrowski, 413 U.S. 433, 447 (1973). However, there is no justification when the standard procedure is a "pretext concealing an investigatory police motive." South Dakota v. Opperman, 428 U.S. 364, 376 (1976). Furthermore, this justification to access the inside of the vehicle does not extend to containers within the vehicle, unless otherwise permitted by the plain view doctrine. Cady, 413 U.S. at 447.

Here, there was no justification for an inventory search extending to the contents of the cell phone and gym bag, so the inevitable discovery doctrine does not excuse these pieces of evidence from suppression. To begin, there was no legitimate need for the Special Agents to conduct an inventory search of the vehicle, which was legally parked on a secured Navy facility. Unlike in Cady, the vehicle was not disabled such as to justify police caretaking intervention, or suspected of

containing anything dangerous to either the Special Agents or the public. See id. at 442-43. Furthermore, the Special Agents could have easily contacted Parish Holten about removing the vehicle, thereby completely eliminating their interest in securing its contents.

Even if this Court chooses to find that an inventory search justified SA Gebbs' initial intrusion into LCDR Kramer's convertible, it does not justify his search within the gym bag or cell phone, because ensuring the security of those items in no way required rummaging through their contents. This is unlike the glove compartment inventory search at issue in Opperman, because although a glove compartment is also a separate container within the vehicle, its contents cannot be secured without first opening that compartment. See 428 U.S. at 382-83, n.10. The gym bag and cell phone, in contrast, could have been easily secured for both their safekeeping and public safety without rummaging through them, suggesting that the rummage was in fact conducted with an unlawful investigatory motive.

- E. Failure to suppress the evidence unlawfully acquired from LCDR Kramer's vehicle will encourage special agents to circumvent applicable law by claiming that they were unaware of it.

The question of whether to suppress evidence obtained in violation of the Fourth Amendment "turns on the culpability of the police and the potential of exclusion to deter wrongful

police conduct." Herring v. United States, 129 S. Ct. 695, 698 (2009). Evidence is suppressed because doing so appreciably deters future violations by law enforcement officers. United States v. Leon, 468 U.S. 897, 909 (1984). In Leon, the Supreme Court held that reliance on a search warrant later determined to be invalid should not result in the suppression of the evidence seized, because doing so would not create any deterrent effect. Id. at 922. Likewise, in Herring, evidence seized during the defendant's arrest was not suppressed, because the officers were unaware that the sheriff's office had negligently failed to update its computer to show that defendant's warrant had been rescinded. Id. at 698.

Here, however, failure to suppress the evidence seized from LCDR Kramer's vehicle will encourage future NCIS Agents to violate applicable law by claiming that they were not aware of it. See Leon, 468 U.S. at 909. In Leon and Herring, the Court reasoned that there is no appreciable deterrence in punishing police for relying on the very method of probable cause determination that courts prefer, namely a warrant. In contrast, the Special Agents here were not relying on a faulty warrant, but were simply not up-to-date on the current state of the law. It is not sensible to allow the police to operate on an incorrect basis simply because a Supreme Court decision is new. To do otherwise would open a Pandora's Box of problems; without

a bright line making Court decisions applicable immediately, police could avoid applying current law for an indefinite amount of time.

Because the NCIS Agents exploited their prior illegal search of LCDR Kramer's home when searching his vehicle, and because the gym bag and cell phone discovered within were both apparently innocuous in nature and could have been readily secured without investigation into their contents, neither the plain view doctrine nor a future inventory search can justify their search. Furthermore, the lack of any reasonable evidentiary or close spatial relationship between the arrest of LCDR Kramer and his vehicle indicates that the search was not properly incident to lawful arrest. Under these circumstances, failure to suppress will signal to government agents that they can lag in keeping their procedures in conformity with the requirements of the Fourth Amendment. As such, the items of evidence seized from within LCDR Kramer's convertible should be suppressed.

III. THIS COURT SHOULD REVERSE THE MILITARY JUDGE'S DENIAL OF THE MOTION TO SUPPRESS STATEMENTS LCDR KRAMER MADE TO CDR NORRIS AND SA COLOMBO, BECAUSE CDR NORRIS INTERROGATED LCDR KRAMER WITHOUT ADVISING HIM OF HIS 31(B) RIGHTS, AND BECAUSE SA COLOMBO FAILED TO ADEQUATELY ORIENT HIM TO THE DRUG CHARGE HE WAS SUSPECTED OF BEFORE INTERROGATING HIM AND OBTAINING STATEMENTS ABOUT THAT CHARGE.

- A. CDR Norris should have advised LCDR Kramer of his 31(b) rights because Norris reasonably should have known Kramer was suspected of a crime when he interrogated him, and because Norris could reasonably have been considered to have been working in a law-enforcement capacity.

Prior to any interrogation, defined as any "formal or informal questioning in which an incriminating response is . . . a reasonable consequence of the questioning," Mil.R.Evid. 305(b), a suspect must be informed of "the nature of the accusation" and advised that he need not make any statements about the offense, Article 31(b), UCMJ, 10 U.S.C. § 831(b). "A statement obtained in violation of this rule is involuntary," Mil.R.Evid. 305(a), and suppressible under Mil.R.Evid. 304.

The test for determining whether 31(b) warnings are required is two-part. Warnings are required if: (1) "the person being interrogated is a suspect at the time of the questioning," and (2) the questioner "is participating in an official law enforcement or disciplinary investigation or inquiry." United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000).

A person is a suspect if "the military questioner believed or reasonably should have believed that the servicemember [sic] committed an offense" at the time of the interview. Swift, 53 M.J. at 446. Whether the questioner is part of an official inquiry depends on the totality of the circumstances. Id.

Here, CDR Norris reasonably should have believed that LCDR Kramer had committed an offense at the time he tackled him and demanded to know what was going on. Norris, who was on active duty at the time, "observed the NCIS agents in pursuit of LCDR Kramer in the parking lot of building 1." R. at 92. Norris also "heard sirens in the background" and a woman who, while chasing LCDR Kramer, yelled, "freeze, NCIS, you are under arrest." R. at 19-20. An experienced member of the military like CDR Norris would know that NCIS cannot arrest individuals without probable cause to believe that they committed a crime. At that point in time, then, CDR Norris should have reasonably believed that LCDR Kramer had committed an offense. Swift, 53 M.J. at 446.

It is reasonable to consider that CDR Norris was working in a law-enforcement capacity at the time that he subdued LCDR Kramer. While Norris was admittedly "not affiliated with law enforcement," R. at 92, according to his own testimony, Norris subdued LCDR Kramer to help the pursuing agents catch up and sort out the situation. R. at 20. Norris was also one of two people, along with SA Gumshoe, to escort LCDR Kramer to the base security vehicle after the agents caught up. R. at 21.

This was an interrogation under Mil.R.Evid. 305(b) because (1) Norris questioned Kramer and (2) an incriminating response was reasonably expected. Norris should reasonably have believed that Kramer had committed a crime, so he also should have known

that any questioning at that time could likely receive an incriminating response, particularly when the question, "what the hell [is] going on," specifically goes to the nature of the apparently criminal nature of the pursuit at hand.

- B. SA Colombo failed to adequately orient LCDR Kramer to the charges against him, because he did not inform LCDR Kramer that he was suspected of drug offenses before interrogating him, in part, about drugs.

Prior to interrogation, a suspect being questioned must be advised, among other things, "of the nature of the accusation." Mil.R.Evid. 304, 305(c). A suspect need not be informed of "each and every possible charge under investigation" or "the most serious or any lesser-included charges being investigated." United States v. Simpson, 54 M.J. 281, 284 (C.A.A.F. 2000). However, the suspect "must be informed of the general nature of the allegation." Id. Whether this has been adequately accomplished depends on the totality of the circumstances. See id. If not, then any statements the suspect makes are involuntary and suppressible. Mil.R.Evid. 304(a).

Here, LCDR Kramer was not advised that he was suspected of a drug crime before SA Colombo began asking him questions about drugs. See R. at 10. SA Colombo did inform LCDR Kramer that he was suspected of homicide, espionage, gambling and flight from apprehension but he never mentioned drugs. R. at 9. This case is unlike Simpson, in which the suspect was advised "that he was

being questioned about indecent acts or liberties" with a minor victim. 54 M.J. at 284. In that case, the Court held that "those warnings sufficiently oriented appellant" to the charges of sodomy and dereliction of duty because the "offenses of indecent acts and sodomy are sufficiently related" to make the warning adequate to orient the suspect to those accusations. Id. See also Nitschke, 12 U.S.C.M.A. 489, 492 (C.M.A. 1961)(suspect oriented to manslaughter charges when he was informed of a "traffic accident" he was suspected of causing, when the death had resulted from that accident).

None of the criminal offenses set forth by SA Colombo is related to drugs like sodomy is related to indecent liberties with a child or accident-based manslaughter is related to the accident itself. In those instances, the unwarned crime was a direct extension of the crime the suspect was advised of. Here, on the other hand, there was no indication that the drug offense was related to the other offenses of which LCDR Kramer was advised. Unlike vehicular manslaughter and a traffic accident, LCDR Kramer's possession of Provigil was not known in any way to be the result or companion of the other charges against him. Likewise, merely placing what was allegedly LCDR Kramer's briefcase on the table during the interrogation did not sufficiently orient him to the drug possession charge. R. at 9.

Because the advisory warning that SA Colombo gave to LCDR Kramer did not sufficiently orient him to suspicion of drug-related offenses, his statements were involuntary and should have been suppressed. Likewise, because Mil.R.Evid. 305(b) applies and both prongs of the Swift test were fulfilled, CDR Norris's failure to inform LCDR Kramer of his 31(b) rights before demanding to know what was going on means that LCDR Kramer's statements in response should have been suppressed.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the military judge's denial of the three motions to suppress.

Respectfully submitted,

Team #2

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