UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
F.D. MITCHELL, L.T. BOOKER, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WALTER S. STEVENSON
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200301272
GENERAL COURT-MARTIAL

Sentence Adjudged: 31 October 2001.
Military Judge: CDR Nels Kelstrom, JAGC, USN.
Convening Authority: Commander, Navy Personnel Command, Millington, TN.
Staff Judge Advocate's Recommendation: CDR W.C. Horrigan, JAGC, USN.
For Appellant: LCDR M. Eric Eversole, JAGC, USN; LT Heather Cassidy, JAGC, USN.
For Appellee: LT Timothy Delgado, JAGC, USN.

10 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for 36 months and a dishonorable discharge. The convening authority approved the sentence as adjudged.

This case is before us for a third time. A detailed procedural history of the case is provided in Part I of this

opinion. In its current posture, the case is on remand from the Court of Appeals of the Armed Forces (CAAF) for our consideration of two related questions: "first, to determine whether the warrant was derivative from a source of information independent from the seizure and search of Appellant's blood at the [Veteran's Administration] hospital; and second, to consider whether the warrant was valid in light of Appellant's argument that statements and omissions to the magistrate were not made in good faith." *United States v. Stevenson*, 66 M.J. 15, 20 (C.A.A.F. 2008)(*Stevenson IV*).

After considering the questions in inverse order, we hold that omissions from the search warrant affidavit were made with reckless disregard for the truth and that if the omitted information had been included the affidavit would not have established probable cause. Furthermore, we hold that the search warrant was not derivative from a source of information independent from the prior illegal search and seizure. Accordingly, in our decretal paragraph we set aside both the findings and the sentence, with a rehearing authorized. Arts. 59(a) and 66(c), UCMJ.

I. Factual and Procedural Background

A. The rape

In the early morning hours of 23 November 1992, K, the 25-year-old wife of a deployed Navy Sailor, awoke in her dark Navy housing unit to a male intruder holding a knife against her back. Appellate Exhibit LXVIII, Exhibit C, Naval Criminal Investigative Service[1] (NCIS) Results of Interview (ROI) of 23 Nov 1992 at 1. The man told K that he had a knife, instructed her to be quiet and, after asking her a few questions, lifted her nightshirt over her head, obstructing her vision. *Id*; AE LXIX, NCIS ROI of 2 Dec 1992 at 2. The intruder then began licking her back, removed her underwear, and rubbed his genitalia over her back and buttocks. AE LXVIII, Ex. C, at 1-2.

Eventually the assailant turned K over onto her back and ordered her not to look at him. *Id.* at 2. At this point, in addition to her nightshirt, her head was covered by blankets and a pillow. AE LXIX, NCIS ROI of 2 Dec 1992 at 2. He then began licking the front of her body and performed oral sex on her. AE LXVIII, Ex. C, at 1-2. After several unsuccessful attempts to achieve an erection, the assailant finally penetrated K's vagina with his penis and began raping her. *Id.* at 2. When the intruder finished raping K, he bound her feet and hands together and left the house. *Id.* The attack lasted approximately 20 minutes. *Id.* After the assailant left, K was able to untie herself and went to a neighbor's residence for help. *Id.* She

[1] During the initial investigation of this crime the current Naval Criminal Investigative Service was known as the Naval Investigative Service. The organization will be referred to by its current name throughout this opinion.

then sought medical treatment at Tripler Army Medical Center and reported the sexual assault to authorities. *Id.* at 1.

B. The initial investigation

That same day, Special Agent (SA) R. Jewel Seawood from the Hawaii office of NCIS interviewed K at the hospital. *Id.* Asked by SA Seawood to describe her attacker, K explained that she was unable to obtain a good look at her assailant because her face was covered. *Id.* at 2. Based upon the intruder's voice characteristics, however, K deduced that he was a black male. *Id.* at 3. She also estimated that her assailant was around six feet tall and weighed approximately 230 pounds based upon the way he felt on top of her. *Id.*

During a series of interviews over the next two months, law enforcement officials asked K to provide them with more details about her attacker so as to identify him. Many of these questions focused on the intruder's clothing.

K's answers to the questions about her assailant's clothing reflect the extreme limitations placed on her ability to perceive her surroundings, most notably her attacker, amidst the darkness, confusion, and violence that accompanied this sexual assault. During her initial interview with SA Seawood, K stated that her assailant wore dark suede gloves. AE LXVIII, Ex. C at 2. She also stated that she heard her attacker fumbling around with something that sounded like scuba head cover during the attack, but at that time provided no other details about his clothing. *Id.*

On 2 December 1992, NCIS SA Keith Thomas conducted a second interview of K. AE LXIX, NCIS ROI of 2 Dec 92 at 1. During this second interview, SA Thomas asked K whether she recalled feeling any type of material on the assailant's legs during the attack. She responded that she felt "bare skin from [the] assailant's legs and thought he may have been wearing shorts." *Id.* at 2.

The Federal Bureau of Investigation (FBI), acting in response to an NCIS request for assistance in profiling K's attacker, interviewed K on 8 January 1993. AE LXIX, FBI ROI of 8 Jan 93[2] at 1. K provided previously undisclosed details to FBI SA Mary J. Counts about her assailant's state of dress during the attack. K told SA Counts that she did not hear the assailant disrobe during the attack and heard "no zippers, buttons, rustling, the sound of clothes dropping to the floor, elastic from men's underwear . . [sic] nothing." *Id.* at 4. K also stated that she heard her attacker's bare feet hitting the floor when he left her home. *Id.* at 6.

K also told SA Counts that she was able to "catch a glance" of her attacker when he rolled her over prior to penetrating her.

[2] The document erroneously lists the date of interview as 1/8/92.

Id. at 5. At that time, she saw that her attacker "wore very dark clothes." *Id.* K also described smelling and hearing a "wet suit material" similar to Gore-Tex during the attack. *Id.* at 6. K also told SA Counts that "[b]y his voice, [she] guessed [her assailant] was a black male, in his thirties." *Id.* at 4.

When NCIS agents conducted their crime scene investigation at K's residence, they discovered that the assailant had gained entry to the residence by cutting his way through the screen of an open window. AE LXXVI, Ex. A, "Search Warrant Affidavit" at 3. Agents also seized physical evidence from K's residence and sent these materials, along with K's rape kit, to the United States Army Criminal Investigations Laboratory (USACIL) for DNA testing. AE CIV, Essential Findings of Fact on Motion to Suppress at 1. Forensic analysts tested the crime scene evidence and K's rape kit and discovered DNA remnants from three individuals: K, her husband, and an unidentified third person. AE LXXVI, Ex. A at 3. Investigators concluded that the unidentified source was likely the assailant. *Id.*

NCIS interviewed K's neighbors to determine if they had any relevant information about the assault. One neighbor, J.P., told investigators that while jogging three days prior to the rape, at approximately 2200, he saw a bald, heavy set, naked black male, approximately six feet tall and in his late thirties or early forties, running along a path behind several Navy housing units. AE LXXVI, Ex. A at 3-4. The man startled J.P., who halted in his tracks. *Id.* at 4. When the naked male saw J.P., he stopped, stood still, and attempted to cover his genitals. *Id.* NCIS identified the spot where J.P. saw the naked male and determined that it was 50 feet from the southwest corner of K's residence. *Id.*

NCIS continued to investigate the case for nearly two years, but was unable to identify K's attacker. AE CIV at 1. In 1994, NCIS closed the case in accordance with local NCIS office policy. *Id.* As part of their close-out, NCIS Hawaii evidence custodians destroyed most of the physical evidence gathered during the investigation, including K's rape kit and all accompanying chain of custody documents. AE CIII, Essential Findings of Fact on Defense Motion to Dismiss Due to Pre-Preferral Delay, at 2. However, USACIL still had DNA samples from the rape kit and other physical evidence. *Id.*

At the time NCIS closed the case, the appellant was one of a number of persons of interest, but was never ruled in or out as a suspect. *Id.* at 2. The appellant was placed on the Temporary Disability Retired List (TDRL) in July 1994 and returned to the continental United States. *Id.* at 2; AE CIV at 1.

C. The cold case investigation

In 1997, NCIS cold case agent Bruce Warshawsky reopened the case and began reviewing the circumstances surrounding K's sexual

assault. AE CIV at 1. SA Warshawsky focused his attention on a Department of the Navy incident report from June 1992 which identified the appellant as a suspect in a "Peeping Tom" incident in the same Navy housing area as K's residence. *Id.*

The report related the events of 8 June 1992, five months prior to the attack. AE LXVIII, Ex. A. On that day, at around 0515, A.B. observed her neighbor, later identified as the appellant, completely naked, staring at her through her house window. *Id.* When the individual realized that he had been seen by A.B., he ran away. *Id.* Police arrested the appellant for indecent exposure, but later released him to his command; the record does not contain any evidence that the appellant received a criminal conviction or administrative action as a result of this incident. AE LXVIII at 1. The appellant denied that he had committed this act. AE LXIX at 3.

SA Warshawsky noted similarities between the "Peeping Tom" incident, K's sexual assault, and J.P.'s story, and began targeting the appellant as a possible suspect in the rape. AE CIV at 1. As the first step in his investigation, SA Warshawsky searched the Defense Enrollment Eligibility Reporting System and ascertained that the appellant's blood type matched that of the unidentified DNA source from the rape kit and crime scene. Record at 588.

With this knowledge, SA Warshawsky set out to locate the appellant and obtain a sample of his blood for DNA comparison purposes. AE CIV at 1. SA Warshawsky discovered that the appellant was no longer on active duty, having been transferred to the TDRL, and was residing in the vicinity of Memphis, Tennessee. *Id.* He also discovered that the appellant was receiving routine medical care from the Veteran's Administration (VA) Hospital in Memphis. *Id.* SA Warshawksy set out to "prove or disprove" the appellant's involvement in the crime. Record at 589.

SA Warshawsky, based in Hawaii, next sent a lead to the NCIS office in Memphis, to interrogate the appellant and obtain a sample of the appellant's blood. AE XV, Ruling on the Motion to Suppress Evidence, at 1. SA John McNutt of the Memphis office received SA Warshawky's request and became the lead Memphis agent working the case. *Id.* SA McNutt discovered that the VA hospital was treating the appellant for both physical and mental health related issues. *Id.* Concerned about the appellant's mental state, SA McNutt consulted with an NCIS psychologist and determined that approaching the appellant and either interviewing him or asking for consent to draw his blood would not be the safest option for both the agents and the appellant. Record at 74-76.

D. The first blood draw

At the suggestion of his superior, SA McNutt contacted VA regional counsel Ron Dooley and explained his predicament. AE XV at 2. After learning that the VA routinely conducted blood draws on the appellant, SA McNutt asked Mr. Dooley to arrange for the draw of a sample of the appellant's blood during one of these visits for analysis as part of the NCIS investigation. *Id.* Mr. Dooley offered the VA's assistance, stating that the VA routinely provided blood samples to civilian police agencies. *Id.* at 2. On 3 June 1998, during a routine blood draw, a VA health provider filled a second vial of the appellant's blood and provided this vial to NCIS. *Id.* at 2-3. USACIL analysis of this sample confirmed that the appellant was the source of the unidentified DNA found at the crime scene and in K's rape kit. AE CV at 2.

E. The suppression of the VA blood test

Armed with this new evidence, the Government preferred charges against the appellant on 16 December 1998 and, after conducting an Article 32, UCMJ, investigation, referred charges against him to a general court-martial on 5 February 1999. The defense moved to suppress the results of the VA blood test on the grounds that the blood was obtained in violation of the Fourth Amendment's prohibition against unreasonable search and seizure and the Due Process Clause of the Fifth Amendment. AE VII. The Government argued that the evidence was admissible under MILITARY RULE OF EVIDENCE 312(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), which permits the admission of evidence obtained during a bodily intrusion if the intrusion was conducted for valid medical purposes. AE VIII. The military judge disagreed with the Government, found violations of both the Fourth and Fifth Amendments, and, on 27 April 1999, suppressed the results of the VA blood draw. AE XV at 7. The focus of the ruling was on the appellant's status as a member of the TDRL when the blood was drawn and seized. *Id.* The Government subsequently appealed the military judge's ruling to this court pursuant to Article 62, UCMJ.

F. The search warrant

Subsequent to the military judge's ruling, NCIS SA Gail Beasley and Navy trial counsel began discussing other options for acquiring a sample of the appellant's DNA. AE LIX, Ex. B, "Stipulation of Expected Testimony of [Trial Counsel]" at 1. At first, the two contemplated looking for DNA remnants at the brig, where the appellant had been in pretrial confinement (PTC), or at the transient personnel unit where he resided after his release from PTC.[3] *Id.* Trial counsel decided against this course of action, however, believing that this seizure would likely be

[3] The military judge released the appellant from pretrial confinement approximately four months after suppressing the VA blood draw results.

suppressed as "fruit of the poisonous tree" from the VA blood draw. *Id.*

In the face of this roadblock, trial counsel and SA Beasley decided that obtaining a search warrant was their most feasible course of action. *Id.* at 1-2. The record is devoid of any prior consideration having been given to securing a warrant to facilitate collection of the appellant's bodily fluids. SA Beasley drafted her search warrant affidavit and asked trial counsel and a Memphis-area Special Assistant United States Attorney to review it. Record at 351-60. On 15 September 1999, SA Beasley presented her affidavit to a United States Magistrate Judge of the Western District of Tennessee, who issued the search warrant. AE LXXVI, Ex. A. NCIS executed this search warrant and received a vial of the appellant's blood on 22 September 1999. Prosecution Exhibit 7.

The magistrate relied upon a number of factual assertions made in the affidavit which form the basis for the appellant's current allegations that NCIS acted in bad faith during the search warrant process. As outlined above, while the Government was pursuing its search warrant, it also was simultaneously appealing the military judge's suppression of the initial VA blood draw to this court. On 10 October 1999, this court affirmed the military judge's suppression of the original VA blood draw based upon a violation of the Fourth Amendment. *United States* v. *Stevenson I*, 52 M.J. 504, 510 (N.M.Ct.Crim.App. 1999). CAAF reversed our ruling on 2 August 2000 and remanded the case with guidance to the trial judge as to the proper standard to apply to determine if the VA blood draw violated the Fourth Amendment. *United States v. Stevenson*, 53 M.J. 257, 260-61 (C.A.A.F. 2000)(*Stevenson II*). When the trial resumed, a successor military judge admitted, over objection, evidence of both the VA blood draw and blood drawn pursuant to the warrant. AE CIV; AE CV. The appellant was convicted on 31 October 2001.

This court affirmed the appellant's conviction on 24 July 2006.[4] *United States v. Stevenson III*, 65 M.J. 639, 650 (N.M.Ct.Crim.App. 2006). CAAF subsequently mandated two issues for our review. *Stevenson IV*, 66 M.J. at 19-20. We will first consider whether the warrant obtained after the initial trial judge's suppression of the VA blood draw was valid in light of the appellant's allegations of bad faith statements and omissions made during the search warrant application process. We will then examine whether the warrant was derivative from a source of information independent from the search and seizure of appellant's blood at the VA hospital.

[4] Citing excessive post-trial delay, this court granted sentencing relief and affirmed only that portion of the appellant's sentence as extended to 36 months confinement and a bad-conduct discharge.

II. Discussion

Our analysis of the two mandated issues before us is guided by the principles articulated in two separate but related doctrines. The first doctrine prohibits the admission of evidence obtained through deliberate or reckless misrepresentations in a search warrant affidavit unless there is probable cause in the affidavit independent of the deliberate or recklessly included information. *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). The second permits the admission of evidence from a lawful seizure if the same evidence was previously seized through illegal means only if the lawful seizure was derived from a source of information independent of the previous invalid one. *Murray v. United States*, 487 U.S. 533, 536-57 (1988).

We review a military judge's decision to suppress or admit evidence for an abuse of discretion. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

A. Validity of search authorization in light of alleged bad faith and omissions in search warrant process.

"Nonconsensual extraction of blood from an individual may be made pursuant to a valid search authorization, supported by probable cause." *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001)(citing MILITARY RULE OF EVIDENCE 312(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)). Probable cause 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(f)(2). An appropriate official, such as a magistrate, may make a probable cause determination based upon affidavits signed by law enforcement. MIL. R. EVID. 315(f)(2)(A).

While deference should normally be given to a magistrate's probable cause determination, this does "'not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based.'" *Carter*, 54 M.J. at 419 (quoting *United States v. Leon,* 468 U.S. 897, 914-15 (1984))(internal citation omitted). If an affiant deliberately or recklessly misrepresents facts in a search warrant affidavit, the evidence seized pursuant to that warrant is inadmissible if, after excising and setting aside the misrepresented facts, there is insufficient information remaining in the affidavit to support a probable cause determination. MIL. R. EVID. 311(g)(2); *see also Franks*, 438 U.S. at 171-72. This remedy is unavailable to a defendant if the police's misrepresentations were merely negligent. *Franks*, 438 U.S. at 171.

Omissions of information from a search warrant affidavit are analyzed similarly. *United States v. Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992). If an affiant deliberately or recklessly omits information from a search warrant affidavit that may have borne upon a magistrate's finding of probable cause, a reviewing court must determine whether the hypothetical inclusion of the omitted information would have extinguished probable cause. *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004). The Government bears the burden of proving by preponderance of the evidence that probable cause would remain if the intentionally or recklessly omitted facts were included in the affidavit. *Cf.* MIL. R. EVID. 311(g)(2). If the Government fails to meet this burden, the evidence must be excluded unless the search was otherwise lawful under the Military Rules of Evidence. *Id.*

Here, the appellant alleges that SA Beasley deliberately or recklessly omitted facts from her affidavit that did not comport with her claim that the appellant was most likely naked when he entered K's residence. The appellant also asserts that SA Beasley improperly omitted information from the affidavit which weakened her argument that the appellant targeted K while doing part-time work for Nurse Finders, a temporary health care worker placement agency. Finally, the appellant argues that SA Beasley deliberately misled the federal magistrate by not disclosing the military judge's recent suppression of the VA blood draw or even the existence of court-martial proceedings against the appellant.

Omissions or misstatements regarding the assailant's nudity

SA Beasley's affidavit makes repeated conclusory allegations that the assailant who raped K entered her residence naked. AE LXXVI, Ex. A. The affidavit alleges that K "heard nothing to indicate the perpetrator disrobed before the rape or redressed after the rape" and that K "could tell [the assailant] was barefooted" when he left her house after the assault. *Id.* at 2. The affidavit further concludes that the "assailant that raped [K] most likely entered the residence naked." *Id.* at 5.

Foremost among the evidence cited in support of SA Beasley's conclusion is K's statement to the FBI that "she never heard the perpetrator remove any clothing, i.e. zippers, buttons, rustling sounds, elastic from underwear, or the sound of clothes dropping to the floor." *Id.* at 2. The affidavit quotes this language almost verbatim from the FBI's summary of its 8 January 1993 interview with K. *See* AE LXIX, FBI ROI of 8 Jan 93, at 4.

Glaringly missing from the affidavit, however, are several of K's statements that speak directly to her assailant's state of dress at the time of the assault. Paramount among these is K's statement, located in the FBI summary a mere three paragraphs after the passage SA Beasley's quoted nearly verbatim, that immediately before the assailant penetrated K she caught a glance at him and observed that "he wore very dark clothes." *Id.* at 5. Similarly missing is K's statement from her FBI interview that

"she smelled and heard 'wet suit material' like Goretex" during the attack. *Id.* at 6. Once more, this statement is located in K's statement three paragraphs below the verbatim quote. Likewise absent is the victim's statement to NCIS during her first interview that she heard the intruder fumbling around during the attack with something resembling a scuba head cover. AE LXVIII, Ex. C, at 2. Finally, SA Beasley's affidavit omits any reference to NCIS's 2 December 1992 interview with K, during which she stated that "she did feel bare skin from her assailant's legs, and thought he may have been wearing shorts." AE LXIX, "NCIS ROI of 2 Dec 92," at 2.

The affidavit juxtaposes its conclusions about the assailant's "likely" nudity with A.B.'s identification of the appellant as a "Peeping Tom" five months prior to the rape and J.P.'s identification of a naked black male standing in front of K's residence three nights before the rape. AE LXXVI, Ex. A at 3-4. As written, the affidavit leads the reader to the inevitable conclusion that the intruder and appellant were one in the same.

We are convinced that the probable cause landscape would have been substantially altered if SA Beasley had not made these material omissions. Had she included all of relevant facts known about the assailant's state of clothing, a reader of the affidavit would likely have focused on the only concrete statements K made about her attacker's clothing: that he wore very dark clothes and possibly wore shorts or Gore-Tex material of some sort. We are also certain that the omission of this information was at the very least reckless, and thus places on the Government the burden of proving by preponderance of the evidence that probable cause would remain if the omitted facts were included in the affidavit.[5]

Omissions about Nurse Finders

As further support for its nexus between the assailant and the appellant, the affidavit states that K's purse was stolen on the night of the rape and abandoned near K's place of employment, the Straub Medical Clinic. AE LXXVI, Ex. A at 4. It also notes that, at the time of the rape, the appellant was employed part-time by Nurse Finders, a health care worker employment agency which provided personnel assistance to the Straub Medical Clinic.

[5] We are cognizant that the military judge did not deal squarely with this issue at the trial level. We contemplated returning this case pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), for a hearing to address this evidentiary gap. However, given the serious allegations of what in best light can be described as recklessly selective exaggeration of the state of the evidence and particularized excision of adverse facts for consideration by a United States magistrate-judge in a key warrant application outlined within the record, the age of this case, and the interests of judicial economy, we have exercised our inherent powers under Article 66, UCMJ, to find the facts and make the conclusions of law necessary to effectuate a final resolution of this case.

Id. According to the affidavit, because Nurse Finders "serviced the Straub Medical Clinic and [K] worked at the Straub Medical Clinic, it is possible that [the appellant] had seen [K] prior to 23Nov92 [sic] and was knowledgeable of the fact that [K] worked there." *Id.*

Absent from the affidavit, however, is uncontroverted evidence that on the date of the rape the appellant worked at a clinic not in the vicinity of K's place of work. AE CV at 4-5. Similarly absent is information, in NCIS's possession at the time, that there were at least ten Straub Clinics throughout the Honolulu area and that there was no evidence that the appellant had ever worked at any of these clinics. *Id.* at 5.

We conclude that these omissions were made with reckless disregard for the truth and believe the military judge's legal conclusion that these omissions were instances of mere professional negligence constituted an abuse of discretion. The affidavit's assertions about Nurse Finders contributed substantially to the nexus between the appellant and the assailant who entered K's home. We are convinced that the omission of this information by experienced criminal investigators employed by the United States was reckless.

Failure to disclose the military judge's suppression of the VA blood draw

The appellant also asserts that SA Beasley deliberately misled the federal magistrate by not disclosing the existence of court-martial proceedings against the appellant during which a military judge had just suppressed an illegal draw of the appellant's blood. Based upon our review of the record, we conclude that the military judge properly exercised his discretion in holding that the purpose of the omission was "not to mislead the magistrate and thereby enhance the likelihood that a search warrant would be issued, but to avoid possibly tainting the magistrate." AE CV at 4.

Remedy for improper omissions from affidavit

We turn now to the next step of our analysis and ask whether probable cause would have been extinguished had SA Beasley included in the affidavit the improperly omitted facts about the assailant's clothing and deleted all references to Nurse Finders. *See Franks*, 438 U.S. at 171; *Mason*, 59 M.J. at 422. We conclude that probable cause would have been extinguished if SA Beasley had made these corrections.

If this information were corrected, the affidavit would have described K's assailant as a black male with O positive blood approximately 6 feet tall and 230 pounds, wearing dark clothes and possibly a Gore-Tex scuba hood and shorts. With this more accurate description of K's attacker, the appellant's nexus with the rape would have been considerably more tenuous. He would

have been described as a black male with the same blood type living in the same area who was identified by his next door neighbor five months earlier as a naked Peeping Tom. While J.P. spotted a naked black man in the vicinity of K's home two nights prior to the attack, there is no indication in the record that J.P. ever identified the appellant as the man he observed that evening. Had the affidavit accurately reflected the facts, the nexus between the assailant and the appellant would have been much too speculative to justify the issuance of a search warrant. We cannot overstate the importance the rather selective choice of factual submission had on a neutral and detached magistrate. The very limited facts, gilded with a connection between the appellant and reports of a naked stalker in the neighborhood outlined nothing less than a *prima facie* case of culpability against the appellant. As set forth, the magistrate judge had little choice but to grant the warrant application.

As corrected, we do not find these facts sufficient to establish probable cause. We conclude that the military judge abused his discretion by admitting evidence seized pursuant to this search warrant.

B. The Independent Source Doctrine

We also hold that the blood seized pursuant to the search warrant was not obtained from a source independent of the illegal blood draw. The exclusionary rule prohibits the introduction into evidence of items seized during an illegal search, testimony about knowledge gained during an illegal search, and derivative evidence acquired directly or indirectly from an illegal search. *Murray*, 487 U.S. 536-37 (citing *Weeks v. United States*, 232 U.S. 383 (1914); *Silverman v. United States*, 365 U.S. 505 (1961); and *Nardone v. United States*, 308 U.S. 338, 341 (1939)). When a search pursuant to a warrant follows a prior illegal search of a person or property, the question is "whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue." *Murray*, 487 U.S. at 542. The independent source doctrine balances two competing interests: "the interests of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime." *Id.* at 537 (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). The overriding principle of the doctrine is to "put[] the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred." *Id.*

Courts analyzing whether a search pursuant to a warrant conducted after an illegal search was genuinely derived from an "independent source" must conduct a two-pronged inquiry. *Murray*, 487 U.S. at 542. The first question is whether the police officer's decision to seek the warrant was prompted by information he gathered during the prior illegal search. Second, a court must determine if information obtained during the illegal search was presented to the magistrate that affected his decision

to issue the warrant. If the Government fails either of these tests, the evidence is inadmissible.

The appellant has focused his argument on the first prong of the *Murray* test, arguing that NCIS would not have sought a search warrant but for the illegal draw and its resulting identification of the appellant as K's attacker.

Neither this court nor CAAF has yet applied this prong of the *Murray* test, although it has been adopted and applied by nearly all of the circuits in some manner. *See e.g. United States v. Hearn*, 563 F.3d 95, 102 (5th Cir. 2009)("did the illegal search affect or motivate the officers' decision to procure the search warrant"), *cert. denied, Hammond v. United States*, 130 S. Ct. 227 (2009); *United States v. Mowatt*, 513 F.3d 395, 404 (4th Cir. 2008)("evidence recovered in the later search is not admissible unless the government establishes that 'no information gained from the illegal [search] affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it.'" (quoting *Murray*, 487 U.S. at 540)); *United States v. Dessesaure*, 429 F.3d 359, 367 (1st Cir. 2005)(stating that the relevant inquiry is "whether '[the police's] decision to seek the warrant was prompted by what they had seen during their initial entry'")(quoting *Murray*, 487 U.S. at 542); *United States v. Herrold*, 962 F.2d 1131, 1140 (3rd Cir. 1992)("we must determine if, without regard to information obtained during the original entry, the police would have applied for the search warrant").

We hold that there is insufficient evidence in the record to conclude that NCIS would have sought a search warrant had the prior VA illegal blood draw never occurred. In fact, the substantial weight of the evidence in the record weighs in favor of the opposite conclusion.

During several pretrial motions hearings, multiple NCIS agents admitted that NCIS never even considered the possibility of obtaining a search warrant prior to the illegal blood draw. For example, defense counsel questioned SA McNutt at length as to whether he contemplated applying for a search warrant prior to the VA blood draw:

> Q: Let me ask you again. At any time during your review did you review that investigation to determine whether or not you had probable cause to believe you could obtain a search warrant for Mr. Stevenson's blood?
> A: No.
>
> . . . .

Q: At any time in this case did you request a search authorization for Mr. Stevenson's blood?
A: No.

Q: What impact, if any, did Mr. Dooley's advice to you regarding the Veteran's Administrations [sic] ability to assist you have on your decision not to seek a search authorization?
A: Based on – on Mr. Dooley's statement that it could be done, plus after Mr. Dooley told us the procedure, I also contacted again Agent Sasaki at our headquarters. And she apparently ran this by our gen – the NCIS general counsel, who, in turn, told her there was no problem with that. So, based on that, I-I thought we had a-a procedure to obtain that blood that was workable.

Record at 79-80.

Q: Now, do you know why at this time you didn't try to get a warrant?
A: It just wasn't a-a consideration at that time.

Q: Was there some sort of emergency that required you to get Stevenson's blood immediately?
A: No.

Q: Was there – so you didn't think Stevenson's going out of the country or that somehow any evidence would be taken if you wanted to get a warrant, right?
A: No, no.

Q: So, you could have waited and gotten a warrant if you had wanted to?
A: Yes.

. . . .

Q: But at least we can agree that you could have taken the time to attempt to get a warrant?
A: Yes.

Id. at 83-84.

During a separate pretrial hearing, SA Beasley testified that she did not begin working on her search warrant affidavit until after the military judge suppressed the initial VA blood draw.

[W]hen we [trial counsel LCDR Miller and I] first discussed the affidavit, it was after the suppression hearing. And at that point, she asked me to hold off, not to go forward with the affidavit. After the confinement hearing, we have another conversation about

> the search warrant . . . {a}nd at that point she said to go ahead and apply for the search warrant.

Record at 368.

SA Beasley's testimony is supported by trial counsel's Stipulation of Expected Testimony. AE LIX, Ex. B. The stipulation helps illuminate the Government's thought process following the military judge's suppression of the VA blood draw:

> LCDR Miller and Beasley decided that because they could not use the VA blood, they would try the probable cause route because they now had new information since the time the original investigation was closed. The new information was about the victim's purse and where it was found, and how that information tied into information on where Mr. Stevenson worked with Nurse Finders.

Id. at 1-2. The stipulation of expected testimony illuminates two important facts which clarify the Government's thought processes at the time of the illegal VA blood draw and the subsequent search warrant application. First, the Navy trial counsel providing legal guidance to NCIS with the search warrant application believed that the Government did not have probable cause to seize the appellant's blood at the time of the VA blood draw. Second, and more importantly, the Government only became motivated to obtain a search warrant after it learned the appellant worked for Nurse Finders and that the company provided temporary workers to the Straub Clinic, K's place of employment.

This is problematic, since NCIS first learned of the appellant's part-time employment at Nurse Finders in March 1999 from the appellant's detailed defense counsel.[6] Record at 623-24. Defense counsel disclosed the appellant's employment at Nurse Finders because the Government had denied his request for investigative assistance and he was seeking NCIS's help in obtaining the appellant's Nurse Finders employment records. *Id.* It was only after appellant's defense attorney disclosed the appellant's employment at Nurse Finders that NCIS contacted the company and determined that it placed temporary workers in positions at the Straub Clinic. *Id.*

Detailed defense counsel would never have been detailed to defend the appellant had the Government not illegally drawn the appellant's blood and subsequently preferred charges against him. The illegal blood draw left defense counsel in the tenuous position of defending the appellant in the face of overwhelming, scientific-based evidence of guilt. In his attempt to defend his client against the Government's evidence, the defense counsel disclosed the appellant's part-time employment during routine

[6] The Government stipulated to this fact. Record at 623. SA Beasley also testified to it. *Id.* at 638.

discovery practice. This information is thus derivative of the illegal blood draw and both motivated the Government to obtain the search warrant and affected the magistrate's decision to issue the warrant. *See Murray*, 487 U.S. at 542.

The Government asks us to conclude that had the VA hospital rejected NCIS's request to seize the appellant's blood, the agency would have applied for a search warrant and seized the blood legally. As support for this claim, the Government points to a statement by SA McNutt at a pretrial Article 39(a), UCMJ, session:

> Q: If Mr. Dooley, the general counsel, had indicated that he would not be able to provide you a sample of the blood, at that time would you have looked more closely at the possibility of obtaining a search authorization based upon probable cause?
> A: That-that would have been one option. I would have probably have gone to our experts at headquarters and asked if other possible avenues that could be taken.

Record at 88.

We do not find SA McNutt's equivocal statement to be dispositive about the strength of NCIS's resolve to pursue a search warrant in this case. Nor do we find SA Warshawsky's interest in "prov[ing] or disprov[ing]" the appellant's involvement in the crime to be determinative of NCIS's motivations to obtain a search warrant. We therefore reject as speculative the Government's conclusions that NCIS would inevitably have obtained a warrant to draw a sample of the appellant's blood. Based upon a thorough examination of the record, we hold that there is insufficient evidence that the Government would have obtained a search warrant if the illegal blood draw at the VA had not taken place. As such, we hold that the Government has failed to meet this prong of the *Murray* test.

Our conclusion squares with results reached by the circuits. In the recent case of *United States v. Siciliano*, 578 F.3d 61, 71 (1st Cir. 2009), the First Circuit upheld a district court's suppression of evidence where a police officer did not testify convincingly that a prior illegal search had not impacted his decision to seek a later search warrant. We find *Siciliano* to be analogous to the case before us.

We find this case to be dissimilar from circuit precedent where this *Murray* prong has been satisfied. Had the record contained any evidence that NCIS had begun applying for a search warrant when they conducted their illegal blood draw, our conclusion may be different. *See, e.g., Segura v. United* States, 468 U.S. 796, 800 (1984); *Hearn*, 563 F.3d at 102 ("because the officers had begun preparing the search warrant application well before their purported illegal entry . . . it is clear that

information obtained during the purported illegal entry did not motivate the officers to seek the warrant").

We similarly lack any testimony or evidence that NCIS had already decided to seek a warrant prior to the illegal search. *United States v. Salas*, 879 F.2d 530, 538 (9th Cir. 1989)(finding "uncontradicted" evidence that officer had decided to obtain warrant prior to illegal entry); *Dessesaure*, 429 F.3d at 369 (finding police entered apartment to freeze scene in anticipation of obtaining search warrant).

Similarly absent are any unequivocal assurances from law enforcement that it would have applied for a warrant had it not conducted the illegal search. *United States v. Runyan*, 290 F.3d 223, 236-37 (5th Cir. 2002)(finding agent testified that customs regulations required him to apply for a warrant under the circumstances); *United States v. Grosenheider*, 200 F.3d 321, 328 (5th Cir. 2000)(finding officer's testimony that he would have applied for a warrant had illegal search never happened credible). Certainly, courts are not bound by after-the-fact assurances by law enforcement that they would have sought a warrant absent the illegal search. *Dessesaure*, 429 F.3d at 369 (citing *Murray*, 487 U.S. at 540 n.2). Notwithstanding their inherent reliability or unreliability, however, unequivocal assurances of this sort are completely missing from our record.

Nor do we have here substantial evidence of probable cause from which we could conclude that NCIS would inevitably have sought a warrant had they not engaged in their illegal search. *United States v. Price*, 558 F.3d 270, 282 (3rd Cir. 2009)(finding that given the weight of the evidence, "it seems impossible that the police would not have applied for a warrant") *cert. denied,* 130 S. Ct. 375 (2009); *United States v. Silva*, 554 F.3d 13, 19 (1st Cir. 2009)(holding that after excising improperly included evidence from affidavit, "ample evidence remained" of probable cause); *United States v. Swope*, 542 F.3d 609, 616 (8th Cir. 2008) *cert. denied,* 129 S. Ct. 1018 (2009); *Herrold*, 962 F.2d at 1140-41 (finding it "inconceivable" that police would not have taken steps toward obtaining warrant); *United States v. Johnson*, 994 F.2d 980, 987 (2nd Cir. 1993).

Conclusion

Having found constitutional error, we test this error for harmlessness beyond a reasonable doubt. *United States v. Thompson*, 67 M.J. 106, 107-08 (C.A.A.F. 2009). As the overwhelming majority of the evidence proving the appellant's guilt was derived from DNA analysis of the blood seized during the appellant's two blood draws, this error was not harmless beyond a reasonable doubt. The findings of guilty and the sentence are set aside. The record is

returned to the Judge Advocate General for remand to an appropriate convening authority with a rehearing authorized.

Senior Judge MITCHELL and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court