DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY

UNITED STATES	)	GOVERNMENT RESPONSE
	)	TO DEFENSE MOTION
v.	)	TO SUPPRESS EVIDENCE
	)	
1ST LT TRAVIS C. BAKER	)	
Delta 4 Detachment 2 (SpOC)	)	
Buckley SFB, Colorado	)	30 May 2023

RESPONSE TO MOTION

The Unites States, by and through counsel, hereby responds to the Defense Motion to Suppress Evidence.

SUMMARY

The Accused is charged with two specifications of violating UCMJ Article 113, Drunken Operation of a Vehicle, two specifications of violating UCMJ Article 107, False Official Statement, and two specifications of violating UCMJ Article 133, Conduct Unbecoming an Officer and a Gentleman. All charged misconduct took place on 14 and 18 October 2022.[1]

Defense Counsel requests the Court suppress the blood sample (and evidence derived therefrom) seized from the accused on 18 October 2022 based on a theory that the accused's commander did not have the lawful authority to authorize the search.[2] However, the accused's commander had the authority to search his blood as the commander of a tenant unit on Buckley Space Force Base. The facts here also meet the good faith exception and the blood alcohol results should not be suppressed. The Government respectfully requests denial.

BURDEN

1. As the moving party, the Defense bears the burden for this motion. RCM 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to resolve this motion is a preponderance of the evidence. RCM 905(c)(1).

FACTS

2. For the purposes of this motion, the Government agrees with the facts in paragraphs 1-9.

3. Space Base Delta 2 is the host unit of Buckley Space Force Base, Colorado.[3]

[1] *See* Attachment 1.
[2] *See* Attachment 2.
[3] *See* Attachment 3.

4. Space Delta 4 is a tenant unit of Buckley Space Force Base, Colorado.[4]

5. In authorizing the search and seizure of the accused's blood, [redacted] sought and obtained legal advice as well as advice from law enforcement.

LAW

6. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. Fourth Amendment, U.S. Constitution, 1787.

7. The ultimate touchstone of any Fourth Amendment inquiry is always reasonableness. *United States v. Cote*, 72 M.J. 41, 45 (2013); (*quoting Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

8. MRE 315(d) provides that a search authorization is valid if issued by a "commander…who has control over the place where the property or person to be searched is situated or found…" or "if that place is not under military control, [when the commander has] control over persons subject to military law…."

9. DAFI 51-201, paragraph 6.2.6, "Tenant Units," states that

> "A tenant unit commander may exercise search authority for matters involving DAF personnel to the extent the commander has control over the place where the property or person to be searched is situated or found, or over the person to be apprehended. Depending on the place to be searched, other commanders on the installation may be the more appropriate choice to exercise search authority."

10. "Pursuant to well-established military custom, commanding officers have long been empowered to permit the search of persons…under their command." United States v. Kalscheuer, 11 M.J. 373, 374 (1981). "A commander's authority to permit a search is consistent with [the Fourth] Amendment for the very reason that [they] are commander over the persons or property to be searched." Id. at 376. "A military commander plays a number of roles in our military justice system. One of his roles is as a quasi-judicial officer who can order a search if he remains neutral and detached." United States v. Freeman, 42 M.J. 239, 243 (1995). "The power to authorize searches is indeed a 'judicial function.' However, within the military it…is an incident of command." United States v. Drew, 15 U.S.C.M.A 449, 454 (1965).

11. MRE 311(a) provides that evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

a. the accused makes a timely motion to suppress or an objection to the evidence under this rule;

b. the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or

[4] *Id*.

seizure under the Constitution of the United States as applied to members of the Armed Forces; and

c. exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system

12. MRE 311(c) provides exceptions to MRE 311(a), two of which are:

> (2) Inevitable Discovery. Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.
>
> (3). *Good Faith Execution of a Warrant or Search Authorization*. Evidence that was obtained as a result of an unlawful search or seizure may be used if:
>
> (A). the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
>
> (B). the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C). the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

13. In United States v. Mix, the Court of Appeals for the Armed Forces upheld a search where a commander authorized the search of a member of his command's personal vehicle despite the fact that other battalion commanders had control over the place where the vehicle was located. M.J. 283, 288 (1992). The Court also upheld the search authorization under the good-faith exception because the commander acted as a rational, reasonable commander having probable cause to believe that he could authorize a search of appellant's car. Id.

ARGUMENT

14. As a member of Delta 4, a tenant unit on Buckley SFB, the accused was under the command of [redacted] on 18 October 2022. Defense claims that only the installation commander, [redacted], had authority to search the accused's blood on-base on 18 October 2022. This is an unreasonably narrow interpretation of MRE 315(d), one so narrow in fact that defense did not cite a single case in support of their position despite decades of the rule's existence. Indeed, DAFI 51-201 specifically refutes the defense's argument. It states in paragraph 6.2.6 that allows a tenant unit commander may exercise search authority "to the extent the commander has control [1)] over the place where the property or person to be searched is situated or found, or [2)] over the person to be apprehended." Here, it is uncontested that [redacted] had control over the accused as the Delta 4 commander. Therefore, [redacted] lawfully authorized the search of the accused's blood on 18 October 2022 under DAFI 51-201's express authority. The lawfulness of the search is further evidenced by the fact that [redacted] authorized the search of the accused's vehicle, heeding the final sentence of paragraph 6.2.6 "Depending on the place to be searched,

other commanders on the installation may be the more appropriate choice to exercise search authority."[5]

15. This case is analogous to United States v. Mix, in which C.A.A.F. upheld a search where more than one commander had authority to authorize the search of a member's personal vehicle. M.J. 283, 288 (1992). Here, both [redacted] and [redacted] had authority to authorize the search and seizure of the accused's blood—[redacted] as his commander and [redacted] as the installation commander. As in Mix, a search authorization by either commander would have been proper.

16. Even if it was determined that [redacted] search authorization was improper, the facts here meet the good faith exception and the blood alcohol results should not be suppressed (analogous to Mix, in which C.A.A.F. also upheld the search authorization under the good faith exception). The search here resulted from [redacted] authorization, who as Commander of Delta 4 is an individual competent to authorize searches under MRE 315(d). As in Mix, [redacted] had a substantial basis for determining the existence of probable cause (a conclusion uncontested by defense). Further, he did so deliberately and with the advice of law enforcement and his servicing legal office. Finally, the 460 SFS members seeking and executing the search authorization reasonably and with good faith relied on [redacted] authorization, also a conclusion uncontested by defense. It is objectively reasonable for a security forces member to believe that a member's commander has lawful authority to authorize a search over their member. Therefore, because [redacted] is a commander empowered to authorize searches and seizures, had a substantial basis for determining the existence of probable cause, and all officials acted reasonably and with good faith, the blood alcohol results should be admitted under the good faith exception if it is determined that [redacted] should not have been the commander exercising search authority in this case.

17. Further, if it was determined [redacted] search authorization was improper, the search results should still not be suppressed under the inevitable discovery exception. Had [redacted] not provided search authorization in this case, [redacted] would have. [redacted] already provided authority to search the accused vehicle simultaneously with the authorization given to search the blood of the accused during this incident. The two commanders were used based on the understanding that [redacted] was the proper authority to authorize a search of the property on his installation while [redacted] was the proper authority as a tenant unit commander to authorize a search of a person under his command, this understanding being based the express language of DAFI 51-201. Had it been understood at the time that [redacted] was the sole person with authority to order a search of the accused's blood, [redacted] would have authorized that search at the same time he authorized the search of the accused's vehicle. Therefore, the same results would have been inevitably discovered if [redacted] had not acted.

CONCLUSION

18. Thus, the United States asks the Court to DENY the defense motion.

[5] *See* Attachment 4.

19. As the defense has requested a hearing under Article 39(a), UCMJ, the United States respectfully requests the same to present argument and evidence.

Respectfully submitted,

[redacted]

GLENN L. HOLMES, Capt, USAF
Trial Counsel

4 Attachments:
1. Charge Sheet, dated 20 January 2023 (3 pages)
2. Defense Motion to Suppress, dated 15 April 2023 (5 pages)
3. Web Page for Buckley Space Force Base "Space Base Delta 2 and Tenant Units"
4. AF1176, Search Authorization for 1st Lt Baker's POV, dated 20 October 2022 (1 page)

CERTIFICATE OF SERVICE

I certify that a copy of this Government Response to Defense Motion to Suppress Evidence was served upon the Military Judge and Defense Counsel via electronic mail on 30 May 2023.

[redacted]

GLENN L. HOLMES, Capt, USAF
Trial Counsel