**Section 400.635 Evidence Obtained from Unlawful Searches and Seizures**

a) General. 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:

1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this Section; and

2) Adequate Interest. 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 seizure under the U.S. Constitution as applied to members of the armed forces.

b) Exceptions

1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

2) 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 the unlawful search or seizure had not been made.

3) 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 Section 400.650(b)(4) or from a search warrant or arrest warrant issued by a 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 shall be determined on an objective standard.

c) Nature of Search or Seizure. A search or seizure is "unlawful" if it was conducted, instigated or participated in by:

1) Military Personnel. Military personnel or their agents and was in violation of the U.S. Constitution as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation of that Act or Sections 400.640 through 400.655 of this Manual;

2) Other Officials. Other officials or agents of the U.S. federal government or its possessions, and state or local government and was in violation of the U.S. Constitution, or is unlawful under the principles of law generally applied in the trial of criminal cases in the U.S. district courts involving a similar search or seizure; or

3) Officials of a Foreign Government. Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure that subjected the accused to gross and brutal maltreatment. A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

d) Motions to Suppress and Objections

1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

2) Motion or Objection

A) When evidence has been disclosed under subsection (d)(1), any motion to suppress or objection under this subsection (d) shall be made by the defense prior to submission of a plea. In the absence of such a motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

C) If evidence is disclosed as derivative evidence under this subsection (d) prior to arraignment, any motion to suppress or objection under this subsection (d) shall be made in accordance with the procedure for challenging evidence under subsection (d)(2)(A). If the evidence has not been so disclosed prior to arraignment, the requirements of subsection (d)(2)(B) apply.

3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. When factual issues are involved in ruling upon the motion or objection, the military judge shall state essential findings of fact on the record.

e) Burden of Proof

1) General. When an appropriate motion or objection has been made by the defense under subsection (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend, a search warrant, or an arrest warrant.

2) Derivative Evidence. Evidence that is challenged under this Section as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend, a search warrant, or an arrest warrant. Notwithstanding other provisions of this subsection (e)(2), an apprehension made in a dwelling in a manner that violates Code Section 7 does not preclude the admission into evidence of a statement of an individual apprehended provided that:

A) the apprehension was based on probable cause;

B) the statement was made subsequent to the apprehension at a location outside the dwelling; and

C) the statement was otherwise in compliance with this Section.

3) Specific Motions or Objections. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

f) Defense Evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this Section. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of that testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subsection (f). When the accused testifies under this subsection (f), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

g) Scope of Motion and Objections Challenging Probable Cause

1) General. If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to, or otherwise known by, the authorizing officer, except as provided in subsection (g)(2).

2) False Statements. If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under this Section.

h) Objections to Evidence Seized Unlawfully. If a defense motion or objection under this Section is sustained in whole or in part, the members may not be informed of that fact except that the military judge must instruct the members to disregard evidence.

i) Effect of Guilty Plea. Except as otherwise expressly provided in Code Section 45, a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the U.S. Constitution, this Section, and Sections 400.640, 400.645, 400.650(a) and (b), and 400.655 with respect to the offense, whether or not raised prior to plea. **(**Il. Mil. R. Evid. 311)