

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES  
Appellee

**MOTION FOR LEAVE TO FILE  
SECOND SUPPLEMENTAL  
CITATIONS OF AUTHORITY**

v.

**Docket No. ARMY 20200391**

Staff Sergeant (E-6)  
**LADONIES P. STRONG,**  
United States Army  
Appellant

Tried at Fort Stewart, Georgia, on 16  
December 2019, 14–18 July 2020, and  
20 July 2020, before a general  
court-martial appointed by the  
Commander, Fort Stewart, Georgia,  
Colonel G. Bret Batdorff, military  
judge, presiding.

**TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

COME NOW the undersigned appellate defense counsel, pursuant to Rule  
25.5(b) of this court’s Rules of Appellate Procedure, and move to file a  
supplemental citation of authority following oral argument in the above-captioned  
case.

**1. *United States v. Cote*, 72 M.J. 41 (C.A.A.F. 2013)**

In *Cote*, law enforcement seized Cote’s hard drive and retained it in excess  
of 300 days without performing an examination or creating a forensic copy, which  
far exceeded the timeline dictated by the warrant. *Id.* at 42–43. The Court of  
Appeals for the Armed Forces [CAAF] determined that “the Fourth Amendment

**En Banc**

harm being protected against by the [the warrant's time requirements] in [Cote's] case [wa]s from a seizure of unreasonable duration and the resulting interference with Cote's possessory interests in noncriminal materials." *Id.* at 43 (citing *United States v. Metter*, 860 F. Supp. 2d 205, 215 (E.D.N.Y. 2012) ("[t]he government's retention of all imaged electronic documents, including personal emails, without any review whatsoever to determine not only their relevance to this case, but also to determine whether any recognized legal privileges attached to them, is unreasonable and disturbing") (emphasis in original)). Thus, *Cote* recognizes that the moment law enforcement seizes a device, there is interference with an owner's possessory interests in the data contained *inside the device*.

## **2. *Arizona v. Hicks*, 480 U.S. 321 (1987)**

*Hicks* holds that copying information is not a Fourth Amendment "seizure." *Id.* at 324. Here, the government's position that creating a forensic copy of appellant's cell phone is the moment that information is "seized" runs counter to *Hicks*' holding.\*

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\* Appellant clarifies that she is not conceding the first element of the offense, which requires the government to prove that agents were endeavoring to seize the digital contents of the phone. Here, while agents were endeavoring to create a forensic copy, they were not endeavoring to "seize" because no seizure occurs from a copy under these facts. As to the agent's authority to seize, the warrant is not in the record, and the second undersigned counsel mistakenly noted that it was contained within the eROT, when, in fact, it was located elsewhere.

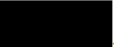
**3. Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700 (2010)**

Professor Kerr's article is cited in *O.L. v. City of El Monte*, 2021 U.S. Dist. LEXIS 127665 (C.D. Cal. 28 May 2021), a case upon which the government relies. Specifically, *City of El Monte* cites Kerr's article for the proposition that "since *Hicks*, it has been suggested by at least one commentator that electronic copying by the government should ordinarily be considered a Fourth Amendment seizure." *Id.* at \*30. Critically, Kerr's article deals with a dissimilar situation where the government does not seize the device. Kerr, 119 Yale L.J. at 705. Where the government does seize the device, as in appellant's case, Kerr specifically states that "surely the data it contains is seized along with the hardware." *Id.* (citing *Brendlin v. California*, 127 S.Ct. 2400, 2406 (2007) ("During a traffic stop an officer seizes everyone in the vehicle, not just the driver.")).

WHEREFORE, appellate defense counsel respectfully request this honorable court grant this motion.

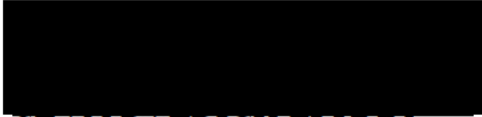
EN BANC


MOTION FOR LEAVE TO FILE  
SECOND SUPPLEMENTAL  
CITATIONS OF AUTHORITY

GRANTED:  \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: 1 September 2022

  
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### **Certificate of Filing and Service**

I certify that copies of the foregoing were electronically submitted to the Court  
and the Government Appellate Division on 29 August 2022.



SEAN PATRICK FLYNN  
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