IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF ON BEHALF OF
	)	APPELLEE
Appellant	)	
v.	)	
	)	
Private (E-1)	)	Crim. App. Dkt. No. 20160402
JUSTIN M. GURCZYNSKI,	)	
United States Army,	)	USCA Dkt. No. 17-0139/AR
Appellee	)	

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Appellee	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN SUPPRESSING EVIDENCE OF CHILD PORNOGRAPHY A DIGITAL FORENSIC EXAMINER DISCOVERED DURING A SEARCH FOR APPELLEE'S COMMUNICATIONS WITH A CHILD VICTIM.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter pursuant to Article 67(a)(2), UCMJ, which mandates review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

Statement of the Case[1]

Appellee was charged with two specifications of possessing child pornography, in violation of Article 134, UCMJ. (JA 6). On May 13, 2016, the military judge granted the defense's motion to suppress evidence of child pornography from digital media devices belonging to appellee. (JA 166–71).[2] The government appealed this ruling pursuant to Article 62(a)(1)(B), UCMJ.

On August 31, 2016, the Army Court heard oral argument on this case. (JA 1). Six days later, the Army Court denied the government's appeal. (JA 1–4). The government filed a motion for reconsideration and suggestion for en banc consideration, which the Army Court also denied. (JA 5). On December 21, 2016, a certificate for review signed by the Judge Advocate General was filed to this Honorable Court, accompanied by a supporting brief on behalf of appellant.

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[1] Prior to the charges in this case, appellee was court-martialed and convicted of one specification of false official statement, two specifications of indecent liberties with a child, and two specifications of abusive sexual contact with a child, in violation of Articles 107 and 120, UCMJ. On August 31, 2016, the Army Court set aside and dismissed one of the specifications for indecent liberties with a child, but affirmed the remaining findings of guilty and the sentence. *United States v. Gurczynski*, ARMY 20140518, 2016 CCA LEXIS 530 (A. Ct. Crim. App. Aug. 31, 2016). On December 14, 2016, this Honorable Court subsequently granted a petition for review on three issues. *United States v. Gurczynski*, Dkt. No. 17-0041/AR, 2016 CAAF LEXIS 989 (C.A.A.F. Dec. 14, 2016).

[2] The military judge's written ruling is dated May 13, 2016 (JA 166), but the government's initial notice of appeal says the ruling was issued on May 10, 2016. (App. Ex. IX). Appellant's brief states the military judge's ruling was issued on May 13, 2016. (Gov't. Br. at 1).

Statement of Facts

In December 2012, the Criminal Investigation Command (CID) office at the Presidio of Monterey initiated an investigation into appellee for abusive sexual contact with a child named DB. (JA 59–60). Appellee was subsequently interviewed by CID. (JA 60). During this interview, appellee admitted befriending DB on Facebook, but denied the remainder of the allegations. (JA 60).

Thirteen (13) months later, in January 2014, Special Agent (SA) JT filed an application for a search warrant in the United States District Court for the Northern District of California. (JA 66). The application requested to search appellee's "cellular device, computers, and associated digital media storage devices." (JA 66). This requested search related to suspected violations of three UCMJ articles: Article 80 (Attempted Aggravated Sexual Assault of a Child), Article 120 (Indecent Acts with a Child), and Article 134 (Child Endangerment). (JA 66). The application did not reference possession of child pornography. (JA 66).

In support of this application, SA JT attached an affidavit stating "probable cause exists to believe that between the dates of September 1, 2007 and May 15, 2011, [appellee] utilized his cellular device and computer, through various online mediums, to engage in indecent acts with [DB] and to plan and execute a meeting with [DB]." (JA 68). Special Agent JT said this meeting led to "indecent acts and sexual contacts with [DB]," and appellee "continued to use his cellular device and

computer to maintain contact with [DB] and to discuss with [DB] and with others the crimes that had been committed." (JA 68).

The affidavit explicitly listed several offenses as being under investigation by CID: Article 80 (Attempted Aggravated Sexual Abuse of a Child) and Article 120 (Abusive Sexual Contact with a Child; Indecent Liberties with a Child). (JA 68–70). The affidavit also used the residual phrases "and other offenses related to these allegations" and "among others." (JA 68). To that extent, the affidavit also mentioned potential "indecent acts with a child" and "endanger[ing] the welfare of a child." (JA 68, 70). However, similar to the application, the affidavit did not reference possession of child pornography. (JA 66, 68–73).

On January 24, 2014, a magistrate judge issued a search warrant for appellee's digital items in his off-post residence. (JA 67).[3] The magistrate judge incorporated the affidavit into the warrant. (JA 67). That same day, CID executed the warrant and seized a variety of digital media devices from appellee's residence, including computers, cell phones, hard drives, and thumb drives. (JA 65).[4]

---

[3] In its brief, the government states the search warrant was issued on January 14, 2014. (Gov't. Br. at 2, 5). This same date was cited by SA CJP, the digital forensic examiner. (JA 94). However, the record establishes this warrant was issued on January 24, 2014. (JA 52, 65–67, 73, 80, 114, 128, 138–39, 145, 166).

[4] The government says "twenty-eight digital media devices" were seized. (Gov't. Br. at 4). However, while the examination request does contain twenty-eight exhibits, several exhibits contain multiple items—for example, Exhibit 28 contained six different CDs and DVDs. (JA 77–78, 97–102).

After CID seized these items, SA JT submitted a "Forensic Laboratory Examination Request" (hereinafter "examination request") to the Joint Base Lewis-McChord (JBLM) CID office on March 5, 2014. (JA 77–78). This form included a section for the "Examination(s) Requested." (JA 78). In this section, SA JT included additional language about examining the items for child pornography:

> Please preview Exhibits 4, 6, 15, 16, 18, 19, and 21-28 for the presence of digital media pertaining to *child pornography* or correspondence with [DB].
>
> Please examine Exhibits 1-3, 5, 7-14, 17, and 20 *for the presence of child pornography, to include photo, video, websites, chats, e-mail and any other digital media*. Additionally, please examine aforementioned items for email correspondence, web chat, online messages, text messages, photographs, [and] video between [Appellee] and [DB] (please see attached photo for reference).

(JA 78) (emphasis added).

On April 30, 2014, CID placed its investigation into abeyance, as "a thorough review for critical leads that would have an adverse impact on the overall sufficiency of this investigation has been conducted. No critical leads were noted." (JA 84). On May 12, 2014, CID closed the investigation, but said the investigation would be reopened upon completion of the digital forensic examination. (JA 84).

Special Agent CJP, a digital forensic examiner (DFE), was assigned to conduct the examination of appellee's items and completed his final report on March 4, 2015. (JA 94, 112). The first page of his DFE report specifically noted

the Monterey CID office requested the items be examined for both child pornography and communications between appellee and DB. (JA 94). Within his report, SA CJP wrote "all Exhibits containing *relevant evidence* will be discussed further in the Detailed Findings section of this report." (JA 97) (emphasis added). The "Detailed Findings" section listed communications between appellee and DB, but also described child pornography on appellee's digital devices. (JA 102–112). This child pornography did not include any image or video of DB. (JA 102–112).

Based on this evidence, appellee was charged with two specifications of possessing child pornography on February 25, 2016. (JA 6). The charges were referred to a general court-martial on April 1, 2016. (JA 7). The defense filed a motion to suppress on April 19, 2016, alleging that CID had exceeded the scope of the warrant in searching for child pornography. (JA 51–58).

In his response, the trial counsel outlined SA CJP's examination of the thumb drive. (JA 114–15). More specifically, the trial counsel wrote SA CJP "suspected" the thumb drive contained child pornography when he observed "one of the *file names*." (JA 115) (emphasis added). The trial counsel did not mention any image preview as causing suspicion. (JA 115). The trial counsel then explained "this *file name* was in plain view of the agent, and he then 'double-clicked' the file opening the file. This file *then revealed* to SA [CJP] to be a video of suspected child pornography." (JA 115) (emphasis added).

The motion to suppress was argued by the parties on April 25, 2016. (JA 8). At this hearing, the military judge said, "I've looked at your pleadings and read those carefully along with everything that's attached to them and I'll consider those for the purposes of this motion." (JA 11). Next, the government called SA CJP as a telephonic witness. (JA 12). During SA CJP's testimony, the trial counsel asked about the laboratory request and the search warrant:

> Q. All right, in this particular case you said—I'm going to take you back a second. You said you received the evidence custody document. Did you receive a search warrant as well?
>
> A. Yes, from a federal search.
>
> Q. And is that what you based your search on, like the limits of your search?
>
> A. The limits? Yes.
>
> Q. So you used the search warrant. Did you also receive a request from CID where----
>
> A. No---I'm sorry.
>
> Q. *Okay. Now how did those two—do you use those two simultaneously or do you just use the search warrant?*
>
> A. *No, I use both.*
>
> Q. Okay.
>
> A. But the authorization, the search warrant actually determines the laboratory [examination] requests.

(JA 15–16) (emphasis added).

During the motions hearing, the trial counsel also asked SA CJP about his examination of the thumb drive:

> Q. And when you examined this thumb drive particularly, how did you examine it? So you made an image of it?
>
> A. Yes, sir.
>
> Q. Okay, and then talk about the forensic examination of that digital media, the thumb drive.
>
> A. I load the imaging to a--I utilize ENCASE forensic software and what that will show me, in this case, all the different files that are on the device.
>
> Q. And in this case, when you received that, what did you observe when you looked at the ENCASE report on your digital software?
>
> A. That there were files of child pornography.
>
> Q. *And how did you know they were child pornography?*
>
> A. Based on my experience, I've received the *file names that were indicative of child pornography.*

(JA 17–18) (emphasis added).

The government did not call any other witnesses during the motions hearing. (JA 25). Therefore, SA JT—the agent who prepared the examination request—did not testify about why he included the additional language about child pornography.

After SA CJP's testimony, both parties argued that SA CJP relied on file names rather than picture previews before clicking on the files. (JA 26–50). During their argument, the defense counsel noted SA CJP testified about "the name

of the file, which in his experience, believed that was child porn . . . [h]e had to actually click on the file and open it up in order to look and see what it actually contained." (JA 27). During his response, the trial counsel argued SA CJP "[i]mmediately upon opening that examination, boom . . . all those very explicit *file names*. Immediately apparent right then and there in plain view that there is evidence of child pornography." (JA 38–39) (emphasis added). Again, the trial counsel did not reference any image previews as causing suspicion.

The military judge told both parties they could file supplemental pleadings for the motion. (JA 30, 50). The defense filed its supplemental pleading on April 27, 2016, and the government responded on April 29, 2016. (JA 122–137). The defense counsel's pleading explained it was file names that caused SA CJP's suspicion. (JA 125). In his pleading, the trial counsel said "SA [CJP] testified that immediately upon examination of the USB drive . . . the clearly incriminating *file names* of child pornography appeared on his screen." (JA 135) (emphasis added). Put another way, in the final motions filed prior to the military judge's ruling, both parties stated it was the file names—and not any image preview—that caused SA CJP to believe the video files contained child pornography.

On May 13, 2016, the military judge issued his written ruling granting the defense motion to suppress. (JA 166–171). Within his factual findings, the military judge stated "[SA CJP] opened item 18 – the thumb drive – and saw

several *file names* of videos normally associated with child pornography" and "[SA CJP] immediately suspected that these video files were child pornography." (JA 167) (emphasis added). The military judge did not find SA CJP saw an image preview indicative of child pornography, nor did he find that SA CJP's suspicion was based on an image preview. (JA 167).

The military judge also found that "[w]ithout seeking or obtaining a new search warrant, [SA CJP] opened one file and viewed it and determined that, based upon his professional experience in such matters, the video was child pornography." (JA 167). Furthermore, the military judge found "[w]hen determining the scope of his search of the digital items, [SA CJP] used the search warrant *and* the DD Form 2292, Forensic Laboratory Examination Request sent in by SA [JT]." (JA 168) (emphasis added).

In his legal analysis, the military judge concluded this examination request "improperly expanded the scope of the search," as "[n]either the affidavit nor the warrant mention anything about or even closely approximating evidence of child pornography." (JA 170). The military judge added "[SA CJP] had no authority to search for child pornography" and "should have stopped when he saw the file name and asked for a new or expanded search warrant." (JA 170). The military judge also found "[g]ood faith does not save this search, because [SA JT] had no authority or apparent authority to authorize any search and certainly [SA CJP],

himself an experienced law enforcement agent, knew this." (JA 171). The military judge further noted "[t]he communications between the accused and the victim that were the real object of the investigation almost appear as an afterthought in [SA JT's] request. The court will not speculate as to the reason for this change of course as there is no evidence to explain it." (JA 170).

As necessary, additional facts relevant to the issue presented are included in the relevant subsections below.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN SUPPRESSING EVIDENCE OF CHILD PORNOGRAPHY A DIGITAL FORENSIC EXAMINER DISCOVERED DURING A SEARCH FOR APPELLEE'S COMMUNICATIONS WITH A CHILD VICTIM.

Summary of Argument

The military judge did not abuse his discretion in granting the defense motion to suppress. First, the military judge correctly found SA CJP "had no authority to search for child pornography" under the warrant, but followed both the search warrant *and* the expanded examination request when determining the scope of his search. (JA 168, 171). Second, the military judge did not abuse his discretion by not applying plain view to this case. Finally, based on the troubling facts and circumstances of this case, the military judge did not abuse his discretion in suppressing the evidence.

Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Henning*, 75 M.J. 187, 190–91 (C.A.A.F. 2016) (quoting *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015)) (internal quotation marks omitted).

This Court "review[s] a military judge's ruling on a motion to suppress for abuse of discretion." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (citations omitted). During this review, this Court analyzes "factfinding under the clearly erroneous standard and conclusions of law under the de novo standard." *Id*. (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). "Thus on a mixed question of law and fact . . . a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id*.

However, "[t]he abuse of discretion standard calls for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id*. (citations omitted) (internal quotation marks omitted). "Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Law

"The Fourth Amendment protects the people against unreasonable searches and seizures and provides that warrants shall not be issued absent probable cause. The military has implemented the Fourth Amendment through Military Rules of Evidence 311-17." *United States v. Hoffmann*, 75 M.J. 120, 123 (C.A.A.F. 2016) (internal citation omitted).

"A search that is conducted pursuant to a warrant is presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within 'a few specifically established and well-delineated exceptions.'" *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

However, "[w]here the government obtains evidence in a search conducted pursuant to one of these exceptions, it bears the burden of establishing that the exception applies." *Id.* (quoting *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000)). *See also* Mil. R. Evid. 311; *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) ("[T]he burden is on those seeking the exemption to show the need for it.").

As necessary, additional legal principles, cases, and authorities are included in the relevant subsections below.

Argument

A. Special Agent CJP exceeded the scope of the warrant when searching for evidence of child pornography.

The government provides four reasons why SA CJP purportedly acted within the scope of the warrant. (Gov't. Br. at 10–21). As shown below, each of these lacks merit.

However, as a preliminary matter, the government asserts "[SA CJP's] understanding of the parameters of the search and his actions in executing the search should be viewed in terms of reasonableness and should be reviewed by this court de novo." (Gov't. Br. at 9). Appellee firmly disagrees.

Instead, as outlined above, this Court should review the military judge's specific finding of fact that "[w]hen determining the scope of his search of the digital items, [SA CJP] used the search warrant and the DD Form 2292, Forensic Laboratory Examination Request sent in by SA [JT]" for clear error. (JA 168). *See Henning*, 75 M.J. at 190–91 (in reviewing a motion to suppress, findings of fact by the military judge are reviewed for clear error; also, in an Article 62, UCMJ, appeal, this Court reviews the evidence "in the light most favorable" to the prevailing party at trial). By contrast, any conclusions of law from the military judge should be reviewed de novo. *Id*. at 191.

1. <u>The military judge properly analyzed the issue of images and communications.</u>

For its first argument, the government states "evidence of communications could be images." (Gov't. Br. at 10). Notably, the military judge directly addressed this same exact argument in his ruling: "these communications could arguably and logically include pictures and even child pornography, if such child pornography were part of a communication or possible communication to the alleged victim. *Alas, the files in question were neither*." (JA 170) (emphasis added). Furthermore, "it was or should have been clear to [the examiner] that they were not and likely would not have been had the DD Form 2292 from [the case agent] not improperly expanded the scope of [the magistrate judge's] warrant." (JA 170).

2. <u>The affidavit did not contain any references to naked or lewd pictures, much less child pornography.</u>

Second, the government notes "the warrant included evidence that photographs of DB were seen on Appellee's computer," but then erroneously concludes "it was reasonable to believe that the images of the minor child could be child pornography." (Gov't. Br. at 11). In his ruling, the military judge explicitly rejected this exact same argument:

> The government vigorously argues that the language in the affidavit discussing photographs should be interpreted to include child pornography. Again, it is clear from the four corners of the warrant that the photos contemplated were those that might have been exchanged between the

> accused and his minor victim as part of getting to know one another and the accused grooming the victim for future sexual activity. *No mention of naked or [lewd] pictures of the victim or any other minor was ever made as part of the warrant issuance process in this case*.
>
> . . .
>
> Also, the government's dependence on the catch all language from the affidavit "among others" and "other offenses related to these allegations" does not satisfy the 4th Amendment. Such loose, catch all, save-the-day language is anything but specific and particular.

(JA 170) (emphasis added).

In seeking to attack this section of the military judge's ruling, the government claims "[t]here is no support in the record for the military judge's factual finding that any photos contemplated by the warrant were those that might have been exchanged between Appellee and his minor victim during the course of getting to know one another." (Gov't. Br. at 12) (citing JA 170).

Contrary to the government's brief, this section of the military judge's ruling is clearly supported by the record. First, in discussing the issue of photographs, the government repeatedly highlights that appellee's boyfriend (Mr. AB) saw pictures and communications between DB and appellee. (Gov't Br. at 3–4, 11, 21). What they do not highlight is that Mr. AB told investigators, even after seeing these pictures and communications, that appellee was "acting in the role as a mentor" to DB. (JA 79). There is no reference to any other pictures seen by Mr. AB

following this statement. Therefore, even after seeing each of the pictures and communications repeatedly cited by the government, Mr. AB categorized appellee as a "mentor" to DB. (JA 79).

Furthermore, during the *thirteen months* between the CID investigation being initiated and the application for a search warrant, CID investigators spoke with DB, received "records of [DB's] Facebook communications with [appellee] and with numerous other individuals that discussed with [DB] his relationship with [appellee]," interviewed "at least two friends [of DB] about their knowledge of the relationship," and also interviewed Mr. AB. (JA 70–71, 79).

Despite all these investigative actions, the military judge accurately concluded "neither the affidavit nor the warrant mention anything about or even closely approximating evidence of child pornography." (JA 170). If the investigators had found explicit evidence of child pornography, this evidence would have been included within the affidavit in support of the search warrant.

Instead, both at trial and now on appeal, the government repeatedly cites to the pictures and communications seen by Mr. AB, even though Mr. AB referred to appellee as a "mentor" to DB after seeing these pictures and communications. (JA 79). As the military judge specifically noted, "[n]o mention of naked or [lewd] pictures of the victim or any other minor was ever made as part of the warrant issuance process." (JA 170).

The government's argument about the photographs also ignores that the only suspected pornographic items on the thumb drive were *video files*, not pictures. (JA 111).[5] As outlined in the military judge's factual findings, "[SA CJP] opened item 18 – the thumb drive – and saw several file names of *videos* normally associated with child pornography." (JA 167) (emphasis added). These are the same video files on the charge sheet. (JA 6, 111).

Lastly, the government states "[c]ase law supports the proposition that child pornography is reasonably contemplated by a warrant authorizing a search of communications between an adult and his minor victim." (Gov't. Br. at 12–13) (citing *United States v. Richards*, AF 38346, 2016 CCA LEXIS 285 (A.F. Ct. Crim. App. May 2, 2016), *rev. granted*, *United States v. Richards*, No. 16-0727/AF, 2016 CAAF LEXIS 1051 (C.A.A.F. Dec. 15, 2016)).

Appellee firmly disputes such a characterization of *Richards*, as well as the government's contention that possession of child pornography is inherently interconnected to other child sexual offenses. *See Hoffmann*, 75 M.J. at 124–27 (concluding that evidence of soliciting children for sexual activity does not establish probable cause for possession of child pornography) (citing *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008)).

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[5] There was "one active *non-pornographic* image file" on the thumb drive. (JA 111) (emphasis added).

In *Richards*, the Air Force Court of Criminal Appeals (Air Force Court) did not—contrary to the assertion within the government's brief—provide any language to "support the proposition that child pornography is reasonably contemplated by a warrant authorizing a search of communications between an adult and his minor victim." (Gov't. Br. at 12–13). The language cited by the government merely related to whether an agent reasonably clicked on a "pictures" folder when searching for communications. *Richards*, 2016 CCA LEXIS 285 at *60. That remains a completely separate and distinct issue from whether child pornography is "reasonably contemplated" by a warrant.

Furthermore, while appellee does not concede *Richards* is correctly decided, it is also distinguishable from this case: the primary issue in *Richards* was whether the search was constitutionally overbroad. 2016 CCA LEXIS 285 at *50–60. [6]

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[6] On December 15, 2016, this Honorable Court granted a petition for review of the decision of the Air Force Court on the following two issues:

> I. WHETHER THE PANEL OF AFCCA THAT HEARD APPELLANT'S CASE WAS IMPROPERLY CONSTITUTED.
>
> II. WHETHER THE 9 NOVEMBER 2011 SEARCH AUTHORIZATION WAS OVERBROAD IN FAILING TO LIMIT THE DATES OF COMMUNICATIONS BEING SEARCHED, AND IF SO, WHETHER THE ERROR WAS HARMLESS.

United States v. Richards, No. 16-0727/AF, 2016 CAAF LEXIS 1051 (C.A.A.F. Dec. 15, 2016).

However, in also determining whether the agent exceeded the scope of the search authorization, the Air Force Court found the agent's intent "was to find evidence of communications," noted he "promptly ceased the search when he found images of child pornography, exactly the conduct courts have repeatedly cited in distinguishing from cases where the scope of the warrant was exceeded," and "maintained his focus on the subject of the search warrant." *Id*. at *60–61. After ceasing his search, the agent "obtained another search authorization to look for further evidence involving child pornography." *Id*. at *49.

Based on the overall facts of the case, the Air Force Court held "the military judge did not abuse his discretion in declining to suppress the child pornography images found during this search." *Id*. at *61. However, in conjunction with this holding, the court included further information in an explanatory footnote:

> . . . If the request to the laboratory only sought evidence of online communications between Appellant and AP, one might wonder why the forensic laboratory provided investigators with a forensic data extraction containing more than 10,000 images of child pornography. However, it appears as if a miscommunication might have been caused by the Florida statute Appellant was suspected of violating. The search authorization cited the Florida statute, which covers a wide array of misconduct related to computers and sexual acts, including child pornography. The title of the statute also contains the words "child pornography." Therefore, we find it entirely reasonable to believe that when the laboratory received the search authorization, the laboratory believed investigators

> were seeking evidence that included child pornography, even though investigators were not actually seeking such evidence.

Id. at *61–63 n.18.

For this issue, this case is the polar opposite of *Richards*. In this case, the military judge found SA CJP was not solely following the scope of the warrant, but was also following the improperly expanded examination request. (JA 168). Furthermore, unlike the agent in *Richards*, SA CJP did not "promptly cease" his search and seek a new or expanded search warrant after uncovering evidence of child pornography. Finally, unlike the Air Force Court in *Richards*, the military judge in this case did not find a "reasonable" explanation for the actions of either SA JT or SA CJP. Instead, the military judge concluded "[SA JT] had no authority nor apparent authority to authorize any search [for child pornography] and certainly [SA CJP], himself an experienced law enforcement agent, knew this." (JA 171).

Therefore, under the facts of this case, the military judge did not abuse his discretion in finding the references to photographs within the warrant did not authorize SA CJP to search for child pornography. As the military judge accurately and succinctly explained, "[n]o mention of naked or [lewd] pictures of the victim or any other minor was ever made as part of the warrant issuance process." (JA 170).

3. The military judge's finding of fact that SA CJP used both the search warrant and the examination request in determining the scope of his search is supported by the testimony and actions of SA CJP.

Third, the government inaccurately claims "[SA CJP] knew he was limited by the terms of the search warrant" and "[t]he military judge made a clearly erroneous finding of fact when he stated that the request from the Presidio [CID Office] improperly expanded the scope of the warrant." (Gov't. Br. at 14).

As an initial matter, the government fails to acknowledge the military judge made a clear factual finding over the scope of SA CJP's search: "when determining the scope of his search of the digital items, [SA CJP] used the search warrant *and* the DD Form 2292, Forensic Laboratory Examination Request sent in by SA [JT], the case agent." (JA 168) (emphasis added). This factual finding is amply supported by the record.

In fact, contrary to the government's position, the strongest support for this finding of fact comes from SA CJP's testimony at the motions hearing:

> Q. So you used the search warrant. Did you also receive a request from CID where----
>
> A. No---I'm sorry.
>
> Q. *Okay. Now how did those two—do you use those two simultaneously or do you just use the search warrant?*
>
> A. *No, I use both.*
>
> Q. Okay.

> A. But the authorization, the search warrant actually determines the laboratory requests.
>
> Q. Okay, so you follow what the search warrant says?
>
> A. Yes.

(JA 15–16) (emphasis added).

Despite the clearly suggestive questions from the trial counsel, SA CJP explicitly said he followed both documents. (JA 15–16). Plain and simple, when viewed in the light most favorable to appellee, SA CJP's testimony supports the military judge's factual finding that he followed both documents in determining the scope of his search.

While SA CJP subsequently testified that laboratory examination requests are *supposed to be* based on the search warrant, the examination request submitted by SA JT in this case was not. Instead, SA JT requested that SA CJP search appellee's items for child pornography, which was not contained in the warrant. Therefore, by following both documents (as he himself testified), SA CJP exceeded the scope of the warrant by searching for child pornography.

In attempting to explain away this testimony, the government cites to language from the DFE report to claim SA CJP followed the narrower limits of the search warrant. (Gov't. Br. at 14). However, this claim is undermined by the extensive actions SA CJP took to fulfill the broader language of the laboratory

examination request. In fact, when viewed in the light most favorable to appellee, the DFE report clearly supports the military judge's finding.

As a baseline matter, here is what SA CJP wrote in his report about the differences between the examination request and the search warrant:

> The request stated "please examine (evidence) for the presence of Child Pornography to include photo, video, website, chats, email, and any other digital media. Additionally, please examine aforementioned items for email correspondence, web chat, online messages, text messages, photographs, video between [Appellee] and [DB]."
>
> A Federal Search Warrant, dated 14 Jan 14 . . . authorized the examination; however, limited the analysis of the media for items of evidence pertaining to the offenses under investigation which occurred between 1 Sep 2007 and 28 Dec 2012. In addition, the Search Warrant pertained only to the property of [Appellee].

(JA 94).

In this section, SA CJP identifies two restrictions from the warrant: the dates of the evidence and the owner of the property. To that extent, in his report, SA CJP annotated whether the evidence was within the proper date range, and he did not examine any digital items that were not owned by appellee. (JA 94–112). However, SA CJP's actions during the examination show he did not take any such restrictions regarding child pornography. In fact, rather than curtailing his actions to the warrant, SA CJP did *exactly* what the improperly expanded examination request asked him to do.

The scope of SA CJP's actions becomes clear by simply reviewing the DFE report. Most notably, SA CJP wrote "all Exhibits containing *relevant evidence* will be discussed further in the Detailed Findings section of this report." (JA 97) (emphasis added). Many of the detailed findings of this "relevant evidence" describe child pornography. (JA 104–112). Furthermore, at the end of his analysis of exhibits containing files of suspected child pornography, SA CJP highlighted how he "generated" EnCase reports providing additional details or even "extracted" the files "in their raw form" for viewing. (JA 106–9, 111).

Essentially, rather than reviewing and filtering the evidence down to items directly within the scope of the *warrant*, SA CJP instead compiled summaries, generated reports, and extracted evidence related to the broader *laboratory request* for the Monterey CID office.

Ultimately, when viewed in the light most favorable to appellee, SA CJP's testimony and the DFE report both support the military judge's factual finding that "when determining the scope of his search of the digital items, [SA CJP] used the search warrant *and* the DD Form 2292, Forensic Laboratory Examination Request." (JA 168) (emphasis added). Furthermore, despite the government's attempt to say this examination request was simply "inartfully" written, the military judge correctly concluded its language over child pornography improperly expanded the scope of the search warrant. (Gov't. Br. at 15).

In a final effort to claim SA CJP was following the scope of the warrant, the government seeks to compare his actions with the investigators in *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010) and *United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009). (Gov't. Br. at 16–18). These cases are easily distinguishable, as neither involve an examiner using both a search warrant and an improperly expanded examination request in determining the scope of the search. However, in making this comparison to *Mann* and *Burgess*, the government ignores additional key facts and language from each court's ruling.

Critically, in *Mann*, rather than finding every single file opened by the examiner was within the scope of the warrant, the Seventh Circuit found that four flagged "KFF (Known File Filter) Alert" files were not. 592 F.3d at 781, 784–85. These files are flagged to be "identifiable from a library of known files previously submitted by law enforcement—most of which are images of child pornography." *Id*. at 781. Therefore, "[the detective] knew (or should have known) that files in a database of known child pornography images would be outside the scope of the warrant." *Id*. at 784. To that extent, the court found the detective "exceeded the scope of the warrant by opening the four flagged 'KFF Alert' files." *Id*. at 785.

The language in *Burgess* omitted from the government's brief is even more striking. In analyzing whether the agent was acting within the scope of the warrant, the Tenth Circuit said "*as our cases seem to require*, [he] immediately

closed the gallery view when he observed a possible criminal violation outside the scope of the warrant's search authorization and did not renew the search until he obtained a new warrant." 576 F.3d 1078, 1094–95 (emphasis added). The court also discussed how "file or director names may sometimes alert one to the contents (e.g. 'Russian Lolitas')" and "[w]hen a computer search for drug related evidence reveals filenames strongly suggesting pornography, an officer might be required to get another warrant before proceeding." *Id*. at 1093, 1095.

4. <u>SA CJP followed the improperly expanded examination request throughout his search of appellee's items.</u>

Finally, the government seeks to distinguish this case from the ruling in *United States v. Carey* by claiming "[SA CJP] never abandoned the original purpose of the search warrant." (Gov't. Br. at 19) (citing 172 F.3d 1268, 1273 (10th Cir. 1999)). The government is partially correct: SA CJP never abandoned the original purpose of the *examination request*, which both included and exceeded the scope of the warrant. As found by the military judge, SA CJP used both documents to determine the scope of his search. (JA 168).

In actuality, this case strongly resembles *Carey*, where the investigator saw an image of child pornography while searching for evidence of drug trafficking, then "continued to open every JPG file to confirm his expectations" of finding child pornography. 172 F.3d at 1273. Based on the facts, the Tenth Circuit said "[w]e must conclude [the detective] exceeded the scope of the warrant" but

acknowledged "these results are predicated only upon the particular facts of this case." *Id*. at 1276.

In this case, the military judge made factual findings that SA CJP "saw several file names of videos normally associated with child pornography," "immediately suspected that these video files were child pornography," then opened a file "and determined that, based upon his professional experience in such matters, the video was child pornography." (JA 167). Therefore, as in *Carey*, SA CJP appeared to be "confirming his expectations" of finding something outside the scope of the warrant.

In summary, based on the testimony of SA CJP, language of the DFE report, and supporting evidence attached to the motions, the military judge properly concluded SA CJP exceeded the scope of the warrant during his search for child pornography. Put most simply, "[t]he warrant issued by [the judge] did not include searching for child pornography. SA [JT] did not have authority to expand the scope of the search. [SA CJP] had no authority to search for child pornography." (JA 171).

B. The plain view doctrine does not apply in this case.

Based on the factual findings in his ruling—which are readily supported by the record—the military judge did not abuse his discretion by not applying the plain view doctrine to this case.

1. <u>Legal Framework and Recent Application of the Plain View Doctrine</u>

The plain view doctrine applies when "[law enforcement officials] are acting within the scope of their authority, and . . . they have probable cause to believe the item is contraband or evidence of a crime." *United States* v. *Fogg,* 52 M.J. 144, 149 (C.A.A.F. 1999). *See also* Mil. R. Evid. 316(c)(5)(C) (stating plain view applies if "[t]he person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.").

The Supreme Court outlined three requirements for the plain view doctrine in *Horton v. California*, 496 U.S. 128, 136–37 (1990). For plain view to apply, *Horton* explains: 1) an officer must not have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, 2) the incriminating character of the evidence must readily apparent, and 3) the officer must also have a lawful right of access to the object itself. 496 U.S. at 136–137 (1990).

Several federal courts have discussed the issues related to applying plain view in the digital context. Most explicitly, the Ninth Circuit explained:

> The problem can be stated very simply: There is no way to be sure exactly what an electronic file contains without somehow examining its contents . . . Once a file is examined, however, the government may claim (as it did in this case) that its contents are in plain view and, if incriminating, the government can keep it. Authorization

> to search *some* computer files therefore automatically becomes authorization to search all files.

United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010) (emphasis in original).

In *Galpin*, the Second Circuit similarly noted "[o]nce the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant." 720 F.3d 436 (2d Cir. 2013).

In *Mann*, the 7th Circuit discussed these issues and decided "the more considered approach would be to allow the contours of the plain view doctrine to develop incrementally through the normal course of fact-based case adjudication." 592 F.3d at 785–86. To that extent, *Mann* noted that the 10th Circuit stated their decision to not apply plain view in *Carey* was an outcome determined "only by its own facts." *Id.* at 783 (citing *Carey*, 172 F.3d at 1273). *Mann* further explained the 10th Circuit specifically chose to avoid delving into the "intriguing" question in *Carey* of "what constitutes 'plain view' in the context of computer files." *Id.* (citing *Carey*, 172 F.3d at 1273). Notably, in *Mann*, the court did not apply plain view to the four "KFF Alert Files" discussed above. *Id*. at 784–86.

For the issue of digital searches uncovering evidence outside the scope of the existing authorization (i.e. search warrant or consent), several federal courts

have looked to whether the examiners stopped their search and obtained a new or expanded authorization. In *Burgess*, the 10th Circuit even said "*as our cases seem to require*, [the Agent] immediately closed the gallery view when he observed a possible criminal violation outside the scope of the warrant's search authorization and did not renew the search until he obtained a new warrant." 576 F.3d 1078, 1094–95 (emphasis added). *See also United States v. Koch*, 625 F.3d 470, 476–78 (8th Cir. 2010) (applying the good faith exception where: "when [the agents] unexpectedly discovered child pornography, they obtained a new warrant"); *United States v. Lucas*, 640 F.3d 168, 180 (6th Cir. 2011) (citing to various cases where the investigators stopped searching to obtain new authorization and stating "we find the reasoning of these cases persuasive.").

Military cases have also discussed digital evidence and plain view. In *United States v. Conklin*, a senior non-commissioned officer started opening the appellant's computer files after a room inspection inadvertently activated the appellant's computer and showed a wallpaper photo violating base regulations. 63 M.J. 333 (C.A.A.F. 2006). This Court found the initial wallpaper was in "plain view," but stated "[w]e agree with the court below that the originally lawful and proper inspection became an unlawful search when [the senior non-commissioned officer] began examining files on the computer that were not in plain view." *Id*. at 335–36.

Additionally, as cited by the government, two service court cases have recently examined the plain view doctrine in the context of investigators opening images of child pornography. (Gov't. Br. at 24–26).

First, in *United States v. Osorio*, the Air Force Court did not apply plain view where an OSI agent clicked on thumbnail images to see if they were child pornography. 66 M.J. 632 (A.F. Ct. Crim. App. 2008). The court explained "without opening the thumbnails, it was impossible for [the agent] to determine the true contents of the picture. Therefore, she double-clicked on one thumbnail . . . [and] she continued to open thumbnails to see how many similar pictures were on the computer and noticed several more pictures of nude minors." *Id*. at 635. Essentially, "[the agent] had to enlarge the thumbnails in order to determine that the images depicted were child pornography." *Id*.

After determining the agent's search had exceeded the scope of the warrant, the Air Force Court analyzed whether plain view applied. *Id*. at 637. In rejecting its application, the court quoted *Arizona v. Hicks*: "[the] distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for the purposes of the Fourth Amendment." *Id*. (quoting 480 U.S. 321, 325 (1987)). Applying this principle to the facts, the court found the "act of opening the thumbnails to see if they were images of child pornography is

similar to moving an object, which is more than trivial for purposes of the Fourth Amendment. Thus, the images were not in plain view." *Id*.

Second, in *United States v. Washington*, the Army Court found the military judge erred by determining plain view did not apply under the facts of the case. ARMY M2010961, 2011 CCA LEXIS 18 (A. Ct. Crim. App. Feb. 8, 2011) (unpublished), *rev. denied*, *United States v. Washington*, 2011 CAAF LEXIS 345 (C.A.A.F. Apr. 22, 2011).

In *Washington*, an alleged rape victim told police the defendant showed her a camera and software that would allow him to make videos of them having sex. *Id*. at *2. Pursuant to their investigation, CID received a warrant that authorized searching items for "text; documents; pictures; graphics/images; electronic mail messages; chat room databases; software; video files; peer to peer systems; file sharing; computerized logs; account names; passwords; encryption codes, algorithms and formulae, personal notes, diaries, and other data including deleted files and folders; containing the name or image" of the alleged victim. *Id*. at *3.

In conducting this search, the CID forensic examiner opened videos that appeared to contain child pornography. *Id*. at *4. However, he later testified "I wasn't focusing on the child pornography. I was actually just focusing on the files related to the subject and the victim." *Id*. He further testified, "I really don't focus on file names. I actually validate the contents of the file" and "I don't focus on a

file name. I don't even pay attention to that." *Id*. Under these circumstances, the Army Court discussed *Osorio*, but held plain view should apply. *Id*. at *15.

However, the Army Court's discussion of *Osorio* warrants a closer examination. The relevant portions of the Army Court's analysis include:

> In considering the *Osorio* opinion, we find that court's specific holding to be that the technician "exceeded the scope of the search warrant" for two clearly established reasons. First, while capable of doing so, she did not search as required by the warrant for files within the specific date. Second, she specifically searched for child pornography rather than the evidence specified in the warrant.

Id. at *11–12.

> In *Osorio*, the court begins its discussion of the plain view doctrine by indicating appellant in that case asserted plain view could be applied even if the court "found the search invalid." *See Osorio,* 66 M.J. at 637. *However, when the Osorio court found the technician was not searching pursuant to the scope of the federal magistrate's warrant, plain view could not apply*. That is because an invalid search constitutes a violation of the first requirement of the *Horton* test ("the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed").

Id. at *11–12, n.5 (emphasis added).

Therefore, on the facts of *Osorio*, the Army Court in *Washington* disputed the necessity of even conducting a plain view analysis: if the examiner exceeded the scope of the warrant in conducting the search, then plain view cannot be established because of the first *Horton* requirement. *Id*. at *11–12, n.5.

Thus, under either *Osorio* or *Washington*, the overall effect is the same: if a law enforcement official must click or expand an item to confirm its illegality, *and* is acting outside the scope of a warrant when doing so, then plain view cannot save the search. Under *Osorio*, the item was not in plain view. Under *Washington*, the first *Horton* factor is not satisfied. Different reason, same result.

2. <u>The military judge did not abuse his discretion regarding plain view.</u>

In his ruling, the military judge made factual findings that SA CJP "saw several file names of videos normally associated with child pornography," "suspected that these video files were child pornography," and "[w]ithout seeking or obtaining a new search warrant, he opened one file and viewed it and determined that, based on his professional experience in such matters, the video was child pornography." (JA 167). The military judge did not provide any findings that SA CJP saw an image preview indicative of child pornography, that SA CJP's suspicion was based on an image preview, or that SA CJP could determine the video files contained child pornography without opening them and viewing them. (JA 167).

Despite the military judge's factual findings regarding the file names, the government claims SA CJP made his assessment based on seeing the file names *and* image previews. (See Gov't. Br. at 5–6, 31). The government cannot show the military judge's findings of fact are clearly erroneous (especially in the light

most favorable to appellee), as these findings are consistent with SA CJP's testimony and the arguments made by the trial counsel.

First, during the motions hearing, the following exchange occurred between the trial counsel and SA CJP:

> Q. And in this case, when you received that, what did you observe when you looked at the ENCASE report on your digital software?
>
> A. That there were files of child pornography.
>
> Q. *And how did you know they were child pornography?*
>
> A. Based on my experience I've receive the *file names that were indicative of child pornography.*

(JA 18) (emphasis added).

Second, the trial counsel repeatedly stated the file names were the basis of SA CJP's suspicion, and he also said that SA CJP did not know the files contained child pornography until he opened them.

In his initial motion response, the trial counsel wrote SA CJP "suspected" the thumb drive contained child pornography when he observed "one of the *file names*." (JA 115) (emphasis added).[7] The trial counsel did not mention any image preview as causing suspicion. The trial counsel explained "this *file name* was in

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[7] In his written ruling, the military judge said he "considered *the briefs of the parties*, evidence admitted during the hearing on the matter, the testimony of the witnesses during the hearing on this matter, and *the argument of the parties*." (JA 166) (emphasis added).

plain view of the agent, and he then ‘double-clicked’ the file opening the file. This file *then revealed* to SA [CJP] to be a video of suspected child pornography.” (JA 115) (emphasis added).

Then, during his argument at the motions hearing (which occurred *after* SA CJP’s testimony), the trial counsel said SA CJP “[i]mmediately upon opening that examination, boom . . . all those very explicit *file names*.” (JA 38–39) (emphasis added). Again, the trial counsel did not reference any image previews as causing suspicion.

In his supplemental pleading after the motions hearing, the trial counsel reiterated “SA [CJP] testified that immediately upon examination of the USB drive . . . the clearly incriminating *file names* of child pornography appeared on his screen.” (JA 135) (emphasis added). The defense counsel’s supplemental pleading also referenced file names instead of any image preview. (JA 125).

Thus, at the time of the military judge’s ruling, the two parties were in agreement over this issue: SA CJP grew suspicious based on the *file names* of the videos. Under these circumstances, the military judge did not abuse his discretion in making the factual findings that SA CJP saw the file names, suspected they contained child pornography, and then determined they actually contained child pornography by opening and viewing them. (JA 167).

Therefore, under either rationale from *Osorio* and *Washington*, plain view does not apply in this case. Like the OSI agent in *Osorio*, SA CJP had to click on the file to confirm his suspicions of child pornography. As explained by the trial counsel's motion response (which is consistent with the military judge's findings), SA CJP "suspected that the thumb drive contained child pornography," "double clicked" the file, which "*then revealed*" child pornography. (JA 115) (emphasis added). Based on *Osorio*, this does not constitute plain view.

Additionally, pursuant to *Washington*, "an invalid search constitutes a violation of the first requirement of the *Horton* test ('the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.')" *Id.* at *11–12, n.5. This result becomes even clearer when examining *Washington's* analysis of *Osorio*: "when the [Air Force] court found the technician was not searching pursuant to the scope of the federal magistrate's warrant, plain view could not apply." *Id.* at *11–12, n.5.

As applied to appellee's case, substituting "*Osorio* court" with "military judge" and "the technician" with "SA CJP" reaches the same result: "when the [military judge] found [SA CJP] was not searching pursuant to the scope of the federal magistrate's warrant, plain view could not apply."

Despite this language, the government argues *Washington* supports applying plain view in this case. (Gov't. Br. at 23–26). In response, appellee highlights key

differences between the two cases. First, in *Washington*, the examiner did not receive and then follow an improperly expanded examination request related to child pornography. Second, in *Washington*, the Army Court found the examiner's search was "for images of the alleged rape victim," which was explicitly authorized by the warrant. 2011 CCA LEXIS 18, at *15. In this case, the military judge found the scope of SA CJP's search included both the warrant and the improperly expanded examination request. (JA 166). Third, the examiner in *Washington* repeatedly testified "I wasn't focusing on the child pornography. I was actually just focusing on the files related to the subject and the victim," "I really don't focus on file names. I actually validate the contents of the file," and "I don't focus on a file name. I don't even pay attention to that." 2011 CCA LEXIS 18, at *4. This type of testimony did not occur in this case. Finally, in light of the language in *Washington* regarding the first *Horton* requirement, appellee reiterates his prior arguments over why SA CJP acted outside the scope of the warrant.

3. <u>A severability analysis is neither warranted nor appropriate under the unique facts of this case.</u>

The government asks this Court to "remand the case back to the military judge for him to conduct a severability analysis." (Gov't. Br. at 34). Under the specific facts of this case, such a request is neither warranted nor appropriate.

First, this is a case where CID did not seek a warrant related to child pornography, but specifically told SA CJP to search for it. When law enforcement

personnel properly pursue a warrant, it might truly "be unduly 'harsh medicine' to suppress evidence whose seizure was authorized by a particular portion of a warrant simply because other portions of that warrant failed [a] requirement." *Galpin*, 720 F.3d at 448. However, such logic does not apply to situations where law enforcement personnel specifically tell an examiner to look for evidence of crimes outside the scope of the warrant. This type of shell game – getting a warrant to search for evidence of one crime, then inexplicably telling an examiner to search for evidence of a different crime – is not the type of scenario envisioned by the severance doctrine.

Second, the government's position would actually require the military judge to sever the *examination request*, instead of the *warrant*. The examination request both included and exceeded the scope of the warrant. Therefore, the government is not asking for the warrant to be severed; instead, the government is asking for the military judge to simply pretend the expanded examination request did not exist.

Finally, in addition to being nonsensical in the context of the severance doctrine, such an action is not feasible based on the military judge's factual findings. The military judge made a specific factual finding that SA CJP followed *both* documents in determining the scope of his search. Under the facts of this case, there is no rational methodology for the military judge to attempt to unravel his clear factual finding regarding both documents.

C. Based on the facts of this case, the military judge did not abuse his discretion in suppressing the evidence.

Based on the troubling facts and circumstances of this case, the military judge did not abuse his discretion in granting the defense motion to suppress the evidence.

"The exclusionary rule exists to deter police misconduct." *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (citing *Davis v. United States,* 564 U.S. 229, 236-237 (2011)). "The exclusionary rule is a judicially-created rule for violations of the Fourth Amendment." *Wicks,* 73 M.J. at 103. "'[S]uppression is not an automatic consequence of a Fourth Amendment violation,' but turns on the applicability of specific exceptions as well as the gravity of government overreach and the deterrent effect of applying the rule." *Id.* (quoting *United States v. Herring*, 555 U.S. 135, 137 (2009).

In *Herring*, the Supreme Court explained:

> In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, *e.g.*, *Leon*, 468 U.S. at 909-910, 104 S. Ct. 3405, 82 L. Ed. 2d 677, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way."

Herring, 555 U.S. at 147–48 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

Additionally, in an earlier section of *Herring*, the Court again cited *Leon* when stating "the benefits of deterrence must outweigh the costs." *Id*. at 141 (citing *Leon*, 468 U.S. at 910). The Court also cited to *Leon* when discussing the "good faith exception." (*Id*. at 142–44).

1. <u>The military judge applied the correct law in suppressing the evidence.</u>

Contrary to the government's position, the military judge accurately applied the law in his ruling. In its brief, the government claims "the military judge did not even address the balancing test," and "this Court should grant the military judge's erroneous ruling no deference." (Gov't. Br. at 35–36). This claim ignores the clear language in the military judge's ruling regarding the purpose of the exclusionary rule and the various exceptions outlined in Mil. R. Evid. 311.

First, the military judge cited *Leon* in his ruling when he wrote "the purpose of the exclusionary rule is to deter police misconduct." (JA 169).[8] Critically, *Herring* cited *Leon* in explaining "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." 555 U.S. at 147 (citing *Leon*, 468 U.S. at 909–10). Similarly, in *Hoffmann*, this Court cited to *Leon* in stating "[t]he Supreme Court has recognized that the exclusionary rule 'cannot be

[8] Similar language was recently used in *Utah v. Strieff*, 136 S. Ct. at 2063 (citing *Davis v. United States,* 564 U.S. 229, 236–237 (2011)). This Court has also recently used nearly identical language. *See United States v. Irizarry*, 72 M.J. 100, 113 (C.A.A.F. 2013) ("The fundamental purpose of the exclusionary rule is to deter improper law enforcement conduct.") (citing *Conklin*, 63 M.J. at 340).

expected, and should not be applied, to deter objectively reasonable law enforcement activity . . . this has become known as the good-faith exception to the exclusionary rule." 75 M.J. at 127. This Court further explained "The President, exercising his authority under Article 36, UCMJ, promulgated a military good-faith exception rule" in Mil. R. Evid. 311. *Id*. at 127–28 n.6.

To that extent, the military judge directly analyzed the applicability of the good-faith exception when he concluded "[g]ood faith does not save this search because [SA JT] had no authority nor apparent authority to authorize any search [for child pornography] and certainly [SA CJP], himself an experienced law enforcement agent, knew this." (JA 171). Thus, the military judge's discussion of *Leon*, the exclusionary rule, and the good-faith exception undercuts any argument he did not apply the correct legal standards in his ruling.

Second, the military judge explicitly noted the "various exceptions to the exclusionary rule" under Mil. R. Evid. 311. (JA 169). In addition to analyzing the "good faith" exception, the military judge also addressed inevitable discovery. (JA 171). When discussing inevitable discovery, the military judge cited *Hoffmann*, which extensively discussed the intent and purpose of the exclusionary rule. 75 M.J. at 124, 127–28. The military judge's discussion of these concepts further demonstrates his familiarity with the relevant legal principles.

In its totality, the military judge's ruling cited to *Leon* and *Hoffmann*, explained "the purpose of the exclusionary rule is to deter police misconduct," described the troubling conduct by CID in this case, and then explicitly outlined the reasons for rejecting both inevitable discovery and the good faith exception. Such a ruling does not constitute an abuse of discretion.

2. <u>The military judge did not abuse his discretion in suppressing the evidence.</u>

Under the facts of this case, the military judge did not abuse his discretion in suppressing the evidence. In his ruling, the military judge referenced the expanded language of the examination request in stating "[t]he communications between the accused and the victim that were the real object of the investigation almost appear as an afterthought in the request. The court will not speculate as to the reason for this change of course as there is no evidence to explain it." (JA 170). To that extent, "the court simply notes this is troubling as it improperly oriented [SA CJP] outside the parameters of the warrant." (JA 170).

In claiming the military judge's ruling constitutes an abuse of discretion, the government claims "the scope of the DFE's search did not exceed the warrant." (Gov't. Br. at 36). This claim again ignores the evidence supporting the military judge's factual finding that "when determining the scope of his search of the digital items, [SA CJP] used the search warrant *and* the DD Form 2292, Forensic Laboratory Examination Request." (JA 168) (emphasis added). By following this

improperly expanded examination request (which asked him to review the evidence for child pornography), SA CJP exceeded the scope of the warrant.

In listing additional reasons why the military judge purportedly abused his discretion, the government also claims "law enforcement did not engage in wanton misconduct," "the deterrent effect of suppression is low," and the "toll upon truth-seeking and law enforcement objectives is high." (Gov't. Br. at 36). The facts of this case clearly show otherwise, and the military judge did not abuse his discretion in suppressing the evidence.

At its core, this case represents significant government overreach without any rational explanation. In this case, SA JT submitted an examination request that extended beyond the scope of the warrant by specifically asking the examiner to search for child pornography. The government did not call SA JT as a witness at the motions hearing, and the military judge found there "is no evidence to explain" this "troubling" discrepancy. (JA 170).

Then, after receiving this expanded examination request, SA CJP did not confirm the intended scope of the DFE regarding child pornography. As pointed out by the defense counsel, "there [is] no evidence that [SA CJP] reached out to [SA JT] to either clarify the request or let him know that the search would not include child pornography." (JA 124–25). Instead, SA CJP did exactly what SA JT asked him to do: he followed "both" documents, the warrant *and* the

examination request, and prepared a report highlighting the child pornography that he found. (JA 15–16, 104–112, 168).

Finally, after receiving the DFE report, there is no evidence that any CID personnel reached out to SA CJP to clarify whether he exceeded the scope of the warrant. Furthermore, there is also no evidence that CID planned to seek a warrant to search for child pornography. Instead, the existing evidence implies the exact opposite: CID did *not* seek a warrant for child pornography, but SA JT told SA CJP to search for it anyway.

Under the government's position, an examination request specifically asking an examiner to search for materials outside the scope of a warrant should not result in any actual consequences. The military judge correctly described SA JT's conduct as "troubling," and law enforcement agents should be adequately deterred from taking similar actions in future investigations. As the military judge stated, "the purpose of the exclusionary rule is to deter police misconduct." (JA 169). Such a purpose is served through the military judge's ruling in this case.

Finally, as this Court has explained, "the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Mott*, 72 M.J. at 329. Under the troubling facts of this case, the military judge's decision to suppress the evidence meets this standard.

Conclusion

WHEREFORE, appellee respectfully requests this honorable court affirm the ruling of the military judge.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Gurczynski*, Crim. App. Dkt. No. 20160402, USCA Dkt. No. 17-0139/AR, was delivered to the Court and Government Appellate Division on January 18, 2017.

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