IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Specialist (E-4)	)	Crim. App. Dkt. No. 20150386
LUIS G. NIETO,	)	
United States Army,	)	USCA Dkt. No. 16-0301/AR
Appellant	)	

JOSHUA G. GRUBAUGH
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0682
USCAAF Bar No. 36576

HEATHER L. TREGLE
Captain, Judge Advocate
Branch Chief,
Defense Appellate Division
USCAAF Bar No. 36329

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM APPELLANT'S LAPTOP COMPUTER.

Statement of the Case

On March 21, 2016, this Honorable Court granted Specialist (SPC) Nieto's petition for review. On April 19, 2016, SPC Nieto filed his final brief with this Court. The government responded on May 19, 2016. This is SPC Nieto's reply.

Argument

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM APPELLANT'S LAPTOP COMPUTER.

The government wrongly argues that the July 17, 2013, affidavit and Special Agent (SA) Dunn's oral communications are relevant when evaluating the lawfulness of searching SPC Nieto's laptop. The second authorization did not cleanse the initial seizure authorization of May 20, 2013, which was granted without a substantial basis in probable cause. Assuming *arguendo* the July 17, 2013, affidavit is relevant to this Court's analysis, the profile created by SA Dunn did not apply to SPC Nieto. And contrary to the government's assertion, there is no evidence SA Dunn made oral statements to the magistrate which buttressed the affidavit. Further, SPC Nieto's admission to recording fifteen to twenty Soldiers in the latrine did not make discovery of evidence on his laptop inevitable. Nothing about that admission created a nexus from SPC Nieto's phone to his computer, and SA Dunn failed to notify the magistrate how many Soldiers SPC Nieto admitted to recording. Finally, the good faith exception as applied by this Court in *United States v. Hoffman*, 75 M.J. 120 (C.A.A.F. 2016), is the rule to apply to SPC Nieto's case.

1. The profile cited by Special Agent Sandefur to create a nexus to Specialist Nieto's computer was of a typical deployed Soldier and how s/he transfers digital data from his cellphone to his laptop. The government misconstrues Special Agents Sandefur and Dunn's testimony, as neither indicated they orally briefed the magistrates a sufficient law enforcement basis for their profile evidence.

The government justifies the military judge's probable cause finding by focusing on the law enforcement experience of Special Agents Sandefur and Dunn.

The government claims, "SA Sandefur testified that there are investigations that have involved [a scenario where Soldiers transferred data from a phone to a larger storage device] and he was just having trouble recollecting the names and the facts off of the top of his head. (JA 026, 031)." (Gov't Br. 15). This interpretation suggests SA Sandefur was surprised by defense counsel's questions and did not have adequate time to prepare. However, defense counsel had asked SA Sandefur these questions before the motion hearing, and SA Sandefur still could not provide that information.[1] (JA 26-27).

Regardless of whether SA Sandefur conducted investigations involving the transfer of data from a cellphone to a larger storage device, there is no indication SA Sandefur ever briefed this experience to the magistrate, or told the magistrate data transfer was a trait connected to subjects of a criminal investigation. On the contrary, SA Sandefur testified multiple times he told the magistrate he suspected SPC Nieto had transferred data from his cellphone to his laptop because that is what any Soldier would typically do. As he testified on direct examination:

> I briefed her on what I spoke about in reference to the complaint of Specialist Nieto using his cell phone, and I believe during the conversation questions came up, and I explained the--the--my knowledge in reference to *Soldiers using their cell phones* to photograph things, let alone, you know, in this case, he was photographing a male under the

[1] Not only did SA Sandefur's memory and preparation fail him in court, he failed to note this profile or law enforcement experience in his affidavit on May 20, 2013, which created this issue. (JA 30).

> stall, and that those phones are normally downloaded, the photos that they take, *if they're taking scene photos or photos of their friends or whatever while they're out on--on missions or on the FOB*, they'll back those up to their laptops so that when they get to the--a place where they can get Internet, they can post those or send those home to family or whatever.

(JA 17) (emphasis added). And again on direct examination SA Sandefur testified:

> Q. So why did you feel it was important to also request to search the laptop--or seize the laptop in this case? Excuse me.
>
> A. Because, sir, we weren't sure, you know, in this situation, it most likely was not the first time. So with the history of what *Soldiers do with their cell phones and things of that matter…*

(JA 18) (emphasis added). Then later the military judge clarified what SA Sandefur communicated to the magistrate.

> Q. Now, you said that based on your knowledge of *how Soldiers use cell phones*, that they will normally download the information on their cell phones to their laptops. Is that accurate?
>
> A. That is correct, sir.
>
> Q. And did you relay that information to the magistrate?
>
> A. Yes, I did, sir.

(JA 29) (emphasis added). And finally when the defense counsel reexamined SA Sandefur, he admitted he based his profile off his personal experience.

> Sir, at this time, I cannot remember a case. I likely could remember the case at the time of the search authorization.

> And at this time, I can tell you that while I was in Afghanistan, I had my iPhone, and I took photographs on missions that I went on and backed those up to my computer to send home.

(JA 30).

Special Agent Sandefur never testified he told the magistrate his profile was based on investigative experience instead of the personal observations. (JA 13-31). While the government argues SA Sandefur told the magistrate of law enforcement experiences in observing digital file transfers, it provides no citation to support this claim. (Gov't Br. 16). The military judge's findings of fact also support SPC Nieto's interpretation of the record—that SA Sandefur only informed the magistrate of profile evidence based on Soldier's non-criminal behavior while deployed. "SA Sandefur told [the magistrate] that in his experience, [S]oldiers will download pictures from phones containing cameras to laptop computers, *for convenience in storage, organization and sending over the internet*." (JA 162) (emphasis added).

To bolster SA Dunn's experience, the government cites SA Dunn's testimony that law enforcement relies on their past experiences and case files. (Gov't Br. 15-16). While SA Dunn testified about what law enforcement generally knows, he did not testify he communicated this general knowledge to the magistrate. (JA 31-47). The government also claims SA Dunn's experience was communicated to the magistrate, but they provide no citation. (Gov't Br. 16). Special Agent Dunn had

only personally worked one case like this before, and he could not remember if that case was before or after SPC Nieto's. (JA 44-45).

In the context of search authorizations, the military allows probable cause determinations to be based upon a) written statements communicated to the authorizing official; b) oral statements communicated to the authorizing official; or c) information otherwise known to the authorizing official. Mil. R. Evid. 315(f)(2). Nothing authorizes probable cause determinations based on what was known to the agent but not communicated to the magistrate. "An otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971). So what the agents knew about their own experience is immaterial to determining probable cause; the relevant inquiry is what the magistrate knew. And the magistrates only knew what was in Corporal (CPL) Ochiltree's statement, the contents of the affidavits, and SA Sandefur's generic profile that he orally provided to the first magistrate.[2]

[2] The only oral statement either agent made to a magistrate was SA Sandefur explaining the generic Soldier profile. (JA 14-47). The only document attached to either affidavit was CPL Ochiltree's statement. (JA 119-133).

Special Agent Dunn claimed in the July 17, 2013, affidavit that the profile of a pornographer who transfers data came from his professional experience as a CID agent. (JA 127). Yet he had worked one case like this before, and he could not remember if that case was before or after SPC Nieto's. (JA 44-45). While this Court has given deference to extensive law enforcement experiences when establishing a nexus through profile evidence, it has not expanded that to de minims experience. *United States v. Gallo*, 55 M.J. 418, 422 (C.A.A.F. 2001).

Therefore, when evaluating whether the magistrates had a substantial basis to conclude there was probable cause to search and seize SPC Nieto's laptop, this Court must decide if SA Sandefur's personal observations of Soldier's typical behavior and SA Dunn's limited professional experience provided a sufficient empirical link connecting SPC Nieto's cellphone to his computer. This Court must conclude they do not.

2. The profile cited by Special Agent Dunn in the July 17, 2013, affidavit was not applicable to Specialist Nieto.

In the July 17, 2013, seizure authorization request, SA Dunn noted the following profile purporting to link SPC Nieto's cellphone to his laptop computer:

> It is my experience as a CID Special Agent that persons who would use a portable digital media recorder would also transfer the media from a portable device to a computer station or storage device. Persons who view and record *sexual acts* often times store and catalog their images and videos on larger storage devices such as a computer or hard drive.

(JA 127) (emphasis added). While the government claims this profile is material in evaluating the second magistrate's search authorization, it is irrelevant to SPC Nieto's case except for arguing an absence of good-faith on the part of SA Dunn. As of July 17, 2013, all anyone knew was SPC Nieto had recorded Soldiers in the latrine, who presumably were going to the restroom.[3] (JA 119-133). Yet a profile was presented to the magistrates suggesting SPC Nieto recorded Soldiers engaging in sex acts.

Special Agent Dunn's profile did not provide probable cause to search and seize SPC Nieto's cellphone. Specialist Nieto does not fit the profile of someone recording sex acts, since the magistrate had no evidence SPC Nieto had recorded any sexual acts. "[A] profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search." *United States v. Macomber*, 67 M.J. 214, 220 (C.A.A.F. 2009).

3. Regardless of how this Court applies the doctrine of inevitable discovery, the July 17, 2013, affidavit essentially rehashed the same information as the May 20, 2013 affidavit, and neither authorization provided a substantial basis to find probable cause to search Specialist Nieto's laptop.

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[3] Evidence from the laptop later revealed SPC Nieto recorded himself engaging in sex acts with Soldiers before deployment while they were incapacitated by alcohol. (JA 101). Some Soldiers were also masturbating while using the latrine. (JA 100). While this may raise a question if the government viewed the contents of the laptop before they had received a search authorization, they most certainly cannot rely on these sex acts from the laptop to justify searching the laptop.

In *Hoffman*, this Court held that the government cannot freeze a suspected crime scene without probable cause or exigent circumstances. 75 M.J. at 125. Here, the government effectively froze the scene when they seized SPC Nieto's laptop without probable cause on May 20, 2013. The government then executed a search authorization in July 2013 with the same information they had from two months earlier. The government's brief does not respond directly to the rule from *Hoffman*, but rather argues around it, averring the May 20, and July 17, 2013, affidavits each provided the magistrates a substantial basis in probable cause to search and seize SPC Nieto's laptop.[4] In the alternative, the government argues SPC Nieto's admissions from June 4, 2013, trigger the inevitable discovery doctrine, saving the government's prior unlawful seizure. (Gov't Br. 20).

This Court should apply *Hoffman*'s rule that the government cannot freeze the scene without probable cause, and find inevitable discovery does not save the unlawful seizure of May 20, 2013. In the alternative, this Court should find

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[4] In making its argument, the government cites two cases which are inapplicable, *United States v. Doe*, 2013 U.S. Dist. LEXIS 114762 (N.C. Western Dist. Ct. June 21, 2013) (cited incorrectly in Gov't Br. as 2013 U.S. Dist. LEXIS 11472) and *United States v. Mathis*, 767 F. 3d 1264, 1276 (11th Cir. 2014). *Doe* concerns evidence of a crime on a cellphone after the subject is suspected of having taken pictures with that phone. *Mathis* deals with the staleness of the search of a cellphone after the subject made illicit contact with a minor from that phone. Neither case discussed the transfer of digital data from a smaller device to one with a larger storage capacity.

inevitable discovery is inapplicable because SPC Nieto's admissions did not provide a substantial basis in probable cause to search his laptop.

The doctrine of inevitable discovery applies when the government establishes "that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012) (quoting *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982) (internal quotations omitted)). On June 4, 2013, Specialist Nieto voluntarily admitted to an agent at the Criminal Investigative Command (CID) that he recorded more Soldiers than CID was aware of, and he decided to come into CID on his own to clear his conscious. (JA 109).

While the defense may quibble over whether a suspect self-reporting to CID constitutes an active investigation by the government, SA Dunn requested and received a search authorization from a magistrate following the proper procedures. One does not need to engage in thought experiments under the doctrine of inevitable discovery to analyze the sufficiency of the July 17, 2013, search authorization. So the question is not whether the evidence from the laptop would have been inevitably discovered, but whether the July 17, 2013, search

authorization was based on probable cause. And there was no probable cause to search SPC Nieto's laptop on July 17, 2013.

Specialist Nieto reported he recorded between fifteen to twenty Soldiers using the latrine for his own sexual gratification. (JA 109). This information was previously unknown to CID. (JA 119). In the July 17, 2013, affidavit requesting authorization to search SPC Nieto's laptop, SA Dunn noted SPC Nieto's admission of masturbating to the images of Soldiers in the latrine.[5] (JA 127). Thus, the only difference between the May 20, and July 17, 2013, affidavits was the inclusion of one aspect of SPC Nieto's confession—that he masturbated to the images of the Soldiers he recorded.

Specialist Nieto's admission to using his cellphone to record Soldiers did not connect his crimes to his laptop. And that he masturbated to the images explained his intent and informed the government's charging decision. But it did not get the government closer to searching and seizing SPC Nieto's other electronic devices. The evidence the government presented to the magistrate in the July 17, 2013, affidavit was essentially the same evidence presented in the May 20, 2013, affidavit. Neither agent was sure how they knew SPC Nieto owned a laptop. Soldiers typically transfer data from cellphones to computers to share photographs.

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[5] Curiously, this affidavit failed to note the number of Soldiers SPC Nieto admitted he recorded, meaning the magistrates only knew of the two alleged Soldiers SPC Nieto recorded from CPL Ochiltree's statement. (JA 119-133).

Soldiers also transfer data to larger storage devices. Neither agent briefed the magistrate how their professional experience connected voyeurs to digital data transfers from one device to another.

There was also zero evidence SPC Nieto had large amounts of digital data on his phone that he was likely to transfer to a larger storage device. Both agents only attached CPL Ochiltree's statements to their affidavits, and CPL Ochiltree's statement only discussed two Soldiers being recorded by SPC Nieto. (JA 119-133). The investigators simply suspected SPC Nieto was likely to have transferred data because it made sense to them, but they failed to supply an empirical link. *See United States v. Hodson,* 543 F.3d 286, 291 (6th Cir. 2008) (rejecting officer's "belief that probable cause of child molestation supported a search for child pornography was objectively reasonable, based on no more than 'common sense.'"). No reasonable meaning of probable cause allows this Court to say there was a substantial basis to search SPC Nieto's laptop because people typically transfer digital data from one device to another, unless this Court were to hold the Fourth Amendment protections for digital data are de minimis.

4. If the plain language of the military's good-faith exception makes it more stringent than the comparable rule for civilian courts, then the plain language should be followed.

The plain language of Military Rule of Evidence (Mil. R. Evid.) 311(c)(3) provides three conditions before the good-faith exception applies. Here, the

relevant precondition is whether there was a substantial basis for the magistrate to determine the existence of probable cause. Since there was not a substantial basis to find probable cause, the good-faith exception does not apply.

The government argues *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001), held that "substantial basis" in Mil. R. Evid. 311 has a different meaning than it does in *Illinois v. Gates*, 462 U.S. 213 (1983), and the analysis from *Hoffman* is not as straightforward as SPC Nieto argues.

If "substantial basis in probable cause" has two different meanings, *Carter* contradicts principles of statutory construction that direct courts to look at the plain meaning of rules. "It is a well-established rule that principles of statutory construction are used in construing the . . . Military Rules of Evidence . . . ." *United States v. Matthews*, 68 M.J. 29, 36 (C.A.A.F. 2009) (citing *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007). "In construing the language of a statute or rule, it is generally understood that the words should be given their common and approved usage." *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).

A substantial basis in probable cause should be consistent across cases and the Mil. R. Evid., otherwise confusion would reign for law enforcement, magistrates, judges, reviewing courts and practitioners. Such an interpretation of "substantial basis" would also contradict the holding of *Hoffman*, which does not look to

United States v. Leon, 468 U.S. 897 (1984), to read "substantial basis" out of Mil. R. Evid. 311.

In *Carter* this Court worried that interpreting "substantial basis in probable cause" consistent with *Gates* would make the military good-faith exception more stringent than the comparable rule in civilian courts, effectively undermining the good-faith exception. *Id.* at 420-422. Fortunately, this Court does not need to square the possible contradictions of *Carter* and *Hoffman* to decide this case. Whether the rule from *Leon* is applied or not, the government fails to meet the good-faith exception.

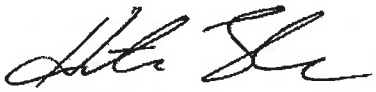
Both magistrates served as a rubber stamp for CID, and both affidavits were so lacking in indicia of probable cause as to render official belief in its existence unreasonable. *Carter* at 419. As discussed previously, the only information presented to the magistrates was that SPC Nieto recorded Soldiers on his cellphone and masturbated to the images, and that Soldiers typically transfer digital files from their cellphone to other digital formats. This meager evidence is completely lacking in probable cause, unless digital devices receive fewer protections under the Fourth Amendment than other property. Additionally, SA Dunn's affidavit contained a profile of SPC Nieto that was recklessly false. No one in law enforcement should have known the digital files on SPC Nieto's laptop contained evidence of Soldiers engaging in sex acts, unless the files from his laptop had

already been examined. Considering the bare bones affidavits, and the recklessly misleading profile evidence in SA Dunn's affidavit, this Court should find the good-faith exception does not apply.

Conclusion

Wherefore, SPC Nieto requests this Honorable Court set aside the findings of guilty and sentence.

JOSHUA G. GRUBAUGH
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0682
USCAAF Bar No. 36576



HEATHER L. TREGLE
Captain, Judge Advocate
Branch Chief,
Defense Appellate Division
USCAAF Bar No. 36329

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Nieto,* Army Dkt. No. 20150386, USCA Dkt. No. 16-0301/AR, was electronically filed with the Court and Government Appellate Division on May 26, 2016.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737