IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866(b). The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On June 3, 2015, a military judge sitting as a general court-martial convicted Specialist (SPC) Luis G. Nieto (appellant), pursuant to his pleas, of absent without leave, violation of a lawful general order, false official statement, abusive sexual

contact (four specifications), and indecent visual recording in violation of Articles 86, 92, 107, 120 and 120c, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 886, 892, 907, 920 and 920c (2012). (JA 072-73, 096). The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for five years, to forfeit all pay and allowances and to be discharged from the service with a dishonorable discharge. (JA 098). The convening authority approved only so much of the sentence as provided for four months of confinement, forfeiture of all pay and allowances, and a bad-conduct discharge, crediting appellant with 142 days of pretrial confinement credit. (JA 014).

On December 31, 2015, the Army Court affirmed the findings sentence, however, they modified the promulgating order to reflect the military judge's finding of an unreasonable multiplication of charges and renumbered the specifications of Charge I. (JA 001-02). On January 28, 2016, appellant petitioned this Honorable Court for review, and this Court granted appellant's petition on March 21, 2016.

Statement of Facts

In May of 2013, appellant deployed to Regional Command (RC) South and stationed at Forward Operating Base (FOB) Azzizulah, Afghanistan. (JA 100). During that month, a number of male soldiers made allegations that a cellular phone was being held over the latrine stalls to record them while they were using

the latrine. (JA 100). Two of the soldiers that identified appellant as the person holding his phone over the stalls reported him to the Army Criminal Investigation Division (CID) who opened an investigation. (JA 100). One soldier made a sworn statement wherein he stated that he and another soldier worked together to identify appellant after both observed him holding a cell phone over their latrine stalls. (JA 123). Pursuant to the investigation, Special Agent (SA) Scott Sandefur sought an authorization to seize appellant's "cellular telephone(s) and Laptop computer (White Samsung Galaxy cellular Telephone and the personal laptop computer the cellular telephone syncs with to upload and download data)." (JA 122).

On May 20, 2013, SA Sandefur met with the part-time military magistrate (PTMM) to request the authorization. (JA 110). In support of the requested authorization, SA Sandefur included the soldier's sworn statement as an exhibit to his affidavit in support of the authorization. (JA 013, 100). In his affidavit, SA Sandefur stated, "[P]reliminary investigation revealed that [appellant] was using his Samsung telephone to view and possibly record other male Soldiers while they were on the toilet. Victims reported that they observed someone holding a cellular telephone over the wall of the bathroom stall . . . ." (JA 119). Special Agent Sandefur explained to the PTMM his "knowledge in reference to Soldiers using their cell phones to photograph things, . . . and that those phones are normally

downloaded, the photos that they take, . . . 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, 29).

Based on the information SA Sandefur provided during their conversation and in his affidavit, the PTMM authorized the search of appellant's bunk for his cell phone and "the personal laptop computer the cellular telephone syncs with to upload and download data." (JA 122). With this authorization, agents working on the investigation seized appellant's laptop computer from his bunk and received his cellular phone from appellant's chain of command.[1] (JA 110).

Later that day, CID interviewed appellant and he denied holding his cellular phone over the toilet stalls to take pictures or video recordings. (JA 100). However, on June 4, 2013, appellant was re-interviewed and admitted that he had previously lied and stated that he held his cellular phone over the latrine stalls and video recorded between fifteen and twenty male soldiers using the latrine for his own sexual gratification. (JA 100).

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[1] Appellant expressly did not challenge the search and seizure of his phone. In the Article 39(a) hearing the defense counsel stated, "There was always probable cause for the phone. There was enough there. The defense admits that." (JA 059). The defense further admitted that there would have been inevitable discovery for the phone if there had not been probable cause, but asserted that inevitable discovery did not apply to the laptop computer. (JA 058).

On July 17, 2013, the primary case agent, SA Dunn, contacted the PTMM and requested a new search authorization for both the cellular phone and the laptop computer for "texts, graphics, images, multimedia files, chat/instant message logs, electronic email messages, electronic mail messages, and other data pertaining to the offenses of indecent viewing/recording." (JA 133). The purpose of this second search authorization was because the first authorization was only to search for and seize appellant's cell phone and laptop computer, but not to actually search those items for the data on them. (JA 033).

In the affidavit in support of this search authorization SA Dunn stated, "About 1024 4 Jun 13 [appellant] admitted to using his cellular telephone to view and record Soldiers utilizing the latrine while at FOB Azi Zullah, Afghanistan. [appellant] admitted to masturbating to the images on his cellular telephone of Soldiers utilizing the latrine." (JA 127). Special Agent Dunn also explained that based on that information, there was probable cause that those images would also be found on other storage media belonging to appellant. (JA 127). Specifically,

> In 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).

Prior to trial, appellant moved to suppress all evidence obtained as a result of the search of the laptop computer seized by SA Sandefur on May 20, 2013. (JA 116). The military judge held an Article 39(a) hearing to hear both parties on the motion to suppress. (JA 012). During the Article 39(a) hearing, the government called SA Sandefur and SA Dunn to testify. (JA 013, 031).

Special Agent Sandefur testified that he had been a CID special agent for almost fifteen years and was currently the special agent in charge. (JA 013-14). He also testified that he had requested at least thirty search authorizations in his time with CID. (JA 016). As it related to the ongoing investigation involving appellant, he described his role stating, "I supervised the investigation, supervised the agents that were conducting the investigation, as well as obtained a magistrate search authorization for my agents that were at FOB Azizullah to collect Specialist Nieto's laptop and cell phone." (JA 015). Special Agent Sandefur testified that he briefed the PTMM "based on [his] knowledge of how Soldiers use cell phones, that they will normally download the information on their cell phones to their laptops." (JA 017, 29).

Special Agent Sandefur further testified that while he did not have any direct evidence that there would be photographs or videos on the computer, "with the history of what Soldiers do with their cell phones and things of that matter, it was probative to obtain that laptop which would have been most likely a storage device

for images for the Soldier." (JA 018). On cross examination, SA Sandefur stated, "There was a probability that there was evidence on his computer . . . ." (JA 020). When asked if we could remember a case that involved a similar situation, SA Sandefur explained, "There were investigations that involved it, but I cannot recall them at this time." (JA 31).

Special Agent Dunn also testified at the Article 39(a) hearing regarding his subsequent request for a search authorization. (JA 031). He testified that he had been a CID special agent for three and a half years and had requested approximately fifteen search authorizations in the past. (JA 033). In explaining the process of seeking a search authorization he stated,

> I use my knowledge and experience of past cases as well as the current case facts to draft it, and then I present it to my supervisors who approve or deny it, and then I make corrections based on that, and then eventually, I brief the magistrate who will either approve or deny the search authorization.

(JA 033).

Special Agent Dunn then testified that he believed there was probable cause to search the phone based on witness interviews with people who saw appellant use his cell phone to videotape them in the latrine while they were naked. (JA 034). He followed up by stating that,

> It's common knowledge among federal investigators that those who collect and produce pornography will do so with a device such as a camera or laptop—or excuse me,

> camera or cell phone or any other kind of digital recording device, and then transfer that data to a larger system such as a laptop, video game system, storage hard-drive, and the purpose of that is so they can store large files and catalog their data.

(JA 035). He testified that he had worked several child pornography cases and that based on his experience with that type of cases, "those who produce these types of pornographic materials will transfer them from the cell phone to a larger storage device." (JA 042).

Following the hearing, the military judge made written findings of fact and conclusions of law. (JA 162). In his findings of fact, the military judge found that SA Sandefur requested a seizure authorization from the PTMM on May 20, 2013 and provided a soldier's sworn statement as an attachment to his affidavit. (JA 162). He further found,

> In addition to the information contained in his affidavit and the attachment to it, SA Sandefur told [the PTMM] that in his experience soldiers will download pictures from phones containing cameras to laptop computers, for convenience in storage, organization and sending over the internet. At that time, SA Sandefur had no direct evidence that there were any images on the accused's laptop computer.

(JA 162). The military judge found that the PTMM authorized the search and based on the authorization, SA Sandefur seized the cell phone and laptop. (JA 162).

As to the digital search of appellant's devices, the military judge found that after the devices were seized by CID, they were sent to a Digital Forensic Examiner (DFE) who requested an additional search authorization. (JA 163). Special Agent Dunn received the additional search authorization from a different PTMM after appellant had admitted to recording images of male soldiers using the latrine on his cell phone and viewing the images later. (JA 163). "Finally, similar to what SA Sandefur told [the first PTMM], SA Dunn averred to [the second PTMM] that it was his experience that persons using a portable digital recorder will transfer those recordings to a computer with a larger storage capacity to store and catalog those recordings." (JA 163). The authorization was acted on revealing the evidence defense sought to suppress. (JA 163).

In his conclusions of law the military judge stated that the decisions of a magistrate are given substantial deference because of the "strong preference for warrants [authorizations]." (JA 163) (citing *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996); *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001) (additional citation omitted)). He further noted that because of the substantial deference given, "close calls will be resolved in favor of sustaining the [PTMM's] decision." (JA 163) (quoting *Cater*, 54 M.J. at 421) (additional citation omitted). The military judge then referenced three exceptions to the "great deference" given to the PTMM's decision: 1) "knowing or reckless falsity" of the information

supporting the request; 2) the PTMM failed to perform his "neutral and detached function[;]" and 3) the PTMM "merely ratified the bare conclusions of others . . . ." (JA 163-64) (internal citations and quotations omitted).

In reaching his holding, the military judge reasoned, "Context will often provide a 'nexus between the alleged criminal activity and the place to be searched.'" (JA 164) (quoting *United States v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010)). The military judge further explained that such "nexus 'need not be based on direct observation but can be inferred from the facts and circumstances of a particular case' including 'normal inferences as to where a criminal would likely hide [the evidence sought].'" (JA 164) (quoting *Clayton*, 68 M.J. at 419).

Based on the legal standards articulated, he held that both magistrates "were provided a substantial basis for determining the existence of probable cause as to images being found on the accused's laptop computer." (JA 164). The military judge further held, "The normal inference to be drawn from the accused placing a cell phone over a latrine stall (which direct evidence in both affidavits supported) is that the accused was recording images. In fact, the accused admitted as much prior to [the second PTMM] issuing his search authorization." (JA 164). The military judge concluded,

> It is a normal inference to be drawn – as was done in *US v.* Clayton—that data is transferred from one digital device to another. Both SA Sandefur and SA Dunn told [both PTMMs] as much. Accordingly, both [PTMMs]

> legitimately concluded evidence would be found on the accused laptop computer and legitimately included that laptop within the scope of their authorizations.

(JA 164).

Granted Issue

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

Summary of Argument

The military judge did not abuse his discretion in not suppressing the evidence because there was a substantial basis in probable cause to support the military magistrates' authorizations to seize and subsequently search appellant's laptop computer. In reaching his determination the military judge properly relied on this court's decision in *Clayton*, stating, "These cases reflect a practical, commonsense understanding of the relationship between the active steps that a person might take in obtaining child pornography from a website and retaining it for an extended period of time on the person's computer." 68 M.J. at 424. Further, the military judge did not abuse his discretion in admitting the evidence because it was also admissible under the good faith exception and in the alternative the evidence would have been admissible under the doctrine of inevitable discovery.

Standard of Review

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (internal citations omitted). "In reviewing a ruling on a motion to suppress, [the Court] consider[s] the evidence in the light most favorable to the prevailing party." *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996) (internal quotations omitted)). "The task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727,728 (1984). "[T]his determination is based in large part on facts found by the military judge, the review of which [appellate courts] conduct under a 'clearly erroneous' standard." *Id.* As such, the military judge's findings of fact are not disturbed "unless they are clearly erroneous or unsupported by the record." *Id.* at 213.

Law and Analysis

The Constitution of the United States prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. A "search" is defined as "a government intrusion into an individual's reasonable expectation of privacy." *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (citing *Soldal v. Cook County*, 506 U.S.

56, 69 (1992)). Military Rule of Evidence (Mil. R. Evid.) 311(a) excludes "evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity." A military magistrate may authorize a search based on probable cause. Mil. R. Evid. 315(d)(2), (f)(2). The threshold for determining whether probable cause exists "requires more than bare suspicion, but something less than a preponderance of the evidence." *Leedy*, 65 M.J. at 213.

Probable cause to search exists when there is a reasonable belief that the property sought is located in the place to be searched. Mil. R. Evid. 315(f)(2). In determining whether there is probable cause, the military magistrate will apply a totality-of-the-circumstances test. *United States v. Mix*, 35 M.J. 283, 287 (C.M.A. 1992). "Importantly, 'a determination of probable cause by a neutral and detached magistrate is entitled to substantial deference.'" *United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004) (quoting *Maxwell*, 45 M.J. at 423 (C.A.A.F. 1996) and *United States v. Oloyede*, 982 F.2d 133, 138 (4th Cir. 1993)). The analysis for determining whether a military judge has abused his discretion begins "by examining whether the magistrate had a 'substantial basis' for determining that probable cause existed." *Leedy*, 65 M.J. at 213.

A reviewing authority "should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (citing *Jones v. United States*, 362 U.S.

257, 270 (1960)). Accordingly, this court's "[r]esolution of doubtful or marginal cases should be largely determined by the preference for warrants. Close calls will be resolved in favor of sustaining the magistrate's decision." *Monroe,* 52 M.J. at 331. "It follows that where a magistrate had a substantial basis to find probable cause, a military judge would not abuse his discretion in denying a motion to suppress." *United States v. Macomber*, 67 M.J. 214, 219 (C.A.A.F. 2009).

A. The military judge did not abuse his discretion in holding there was a substantial basis upon which the PTMMs could have found probable cause to seize and subsequently search appellant's laptop.

A probable cause determination is "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before" the search authority, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Macomber*, 67 M.J. at 219 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982)). "[E]vidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false." *Leedy*, 65 M.J. at 213. Furthermore, the magistrate is not solely limited to the evidence contained in the search authorization. *Mason*, 59 M.J. at 421. When examining the totality of the circumstances, the magistrate is permitted to consider oral statements made to the magistrate to support the search authorization request. *Id.*

Here, the military judge found that the military magistrate had a substantial basis to support a probable cause for each of the search authorizations. (JA 164). Just as this Court held in *Mason*, the military judge was free to look outside the affidavit to any oral statements made by the agent in support of the authorization. *Id.* In doing so, the military judge found that both agents made oral statements that soldiers regularly use their computers as storage devices. (JA 164). Special Agent Sandefur's testimony during the Article 39(a) hearing directly supports this proposition. Contrary to appellant's assertion that SA Sandefur had not seen a case where this was the situation, SA Sandefur testified that his knowledge in reference to soldiers who video record and photograph things on their phones is that they transfer them to a larger storage device comes from investigations as well as personal experience. (JA 017). On two separate occasions SA Sandefur testified that there are investigations that have involved this fact scenario and he was just having trouble recollecting the names and the facts off of the top of his head. (JA 026, 031).

Moreover, SA Dunn also testified that it was common knowledge amongst investigators that those who collect and produce pornography will transfer and store the data on a larger device. (JA 035). He explained, "Sir, that's where, again, the affidavit – that's where we rely on our experience and past case files and investigations that those who produce these types of pornographic materials will

transfer them from the cell phone to a larger storage device." (JA 042). Both agents relayed that they had conveyed their experience and knowledge about this to the PTMM's prior to receiving authorizations to seize and to search.

Considering the evidence, "in the light most favorable to the prevailing party," the military judge's findings of fact were not clearly erroneous and his conclusions of law are supported by the facts. *Clayton*, 68 M.J. at 424 (citing *Reister*, 44 M.J. at 413. Importantly, the military judge relied on this court's decision in *Clayton*. There, in dealing with a probable cause search for child pornography, the court stated, "These cases reflect a practical, commonsense understanding of the relationship between the active steps that a person might take in obtaining child pornography from a website and retaining it for an extended period of time on the person's computer." 68 M.J. at 424. The court noted there that the magistrate was aware that the appellant was in possession of a laptop stating,

> In view of the ease with which laptop computers are transported from work to home and the ease with which computer media may be replicated on portable devices, the information provided to the magistrate was sufficient to support a practical, commonsense decision by the magistrate that there was a fair probability that contraband would be located in [a]ppellant's quarters.

Id. at 4324-25.

The facts in this case are much stronger than those in *Clayton*. In the dissent in *Clayton*, Judge Ryan looked to this Court's decision in *Macomber*, stating, "But the magistrate in that case at least had in front of him a generic 'pedophile profile' which indicated that persons with a sexual interest in children often store child pornography in their homes." *Id.* at 428. Here, at least as it related to the authorization to search the computer, SA Dunn testified that it is common knowledge in the law enforcement community that those involved in the viewing or production of pornography store it on devices such as computers or hard drives. (JA 035). Thus, the magistrate had in front of him a generic profile as it related to soldiers who take videos and photographs on portable devices.

Additionally, the facts in this case are much different than those contemplated by this Court in *United States v. Hoffman* and the Second Circuit in *United States v. Falso*. This Court found in *Hoffman* that there was not probable cause to authorize a search of appellant's digital media for child pornography based on the investigator's affidavit that in her experience "there is an intuitive relationship between acts such as enticement or child molestation and possession of child pornography." 75 M.J. 120, 126 (C.A.A.F. 2016). In so finding this Court relied on the Second Circuit's decision in *Falso*, quoting

> It is an inferential fallacy of ancient standing to conclude that, because members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even

> largely composed of, members of group A. Although offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, the correlation drawn by the district court.

544 F. 3d 110, 122 (2d Cir. 2008).

In both of those situations, the authorizations were based on drawing a connection between different crimes that a person is likely to commit. In this case, the connection that the agent drew was based only on where evidence of the crime that appellant was suspected of would be stored. *Id.* In other words, in this case there is a much greater nexus. Accordingly, the military judge did not abuse his discretion by filling in the gaps based on the affiant's experience and the military judge gave proper weight to "the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found,' [who] is 'entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of the offense.'" *United States v. Gallo*, 55 M.J. 418, 422 (C.A.A.F. 2001). (citing *United States v. Fannin*, 817 F.2d 1379, 1382 (9th Cir. 1987)).

Akin to the facts of this case, in *United States v. Doe*, the magistrate's authorization was based on the following language asserted by the agent,

> Through my training and experience, I know that individuals often take pictures, videos, send text messages, and other uses of digital media which will implicate or document crimes in which they take part of. It is through

> this training experience that I believe such digital media will be present in the cellular telephone of Lawrence Elijah Doe, Jr. to show that he owned or possessed the firearm located under his foot on more than one occasion, as well as evidence of the stolen motorcycle which was recovered.

2013 U.S. Dist. LEXIS 11472 *6 (N.C. Western Dist. Ct. June 21, 2013). The court found that the military judge did not abuse his discretion in not suppressing the evidence found. *Id.* Moreover, the court stated that "The degree of training and his past experience concerning the discovery of evidence in an examination or other information contained in a cellular telephone might have aided in the probable cause determination," but the lack thereof did not invalidate it. *Id.*

In *United States v. Mathis*, the Eleventh Circuit Court of Appeals found that there was no abuse of discretion in not suppressing evidence found on the appellant's phone stating, "based on her knowledge, experience, and training, [the detective] knew that individuals who sexually abuse children sometimes maintain copies of communications with their victims 'in the privacy and security of their personal cell phones and retain these items for many years.'" 767 F. 3d 1264, 1276 (11th Cir. 2014).

B. Apart from the probable cause determination, the evidence would not have been suppressed because of the inevitable discovery exception.

The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means. *United States v. Wallace*, 66 M.J. 5,

10 (C.A.A.F. 2008) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)). Mil. R. Evid. 311(b)(2) states that "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made."

Even if this court were to find that the initial seizure authorization exceeded the scope of probable cause at the time of issuance of the search authorization, as did the subsequent search authorization, the computer would have been seized and searched after appellant made a statement to law enforcement on June 4, 2013. (JA 100). In that statement, appellant stated that he held his cellular phone over the latrine stalls and video recorded between fifteen and twenty male soldiers using the latrine for his own sexual gratification. (JA 100). The DFE examiner did not find evidence of any of the videos or photographs appellant admitted to masturbating to on his phone. (JA 100). Therefore, the knowledge that these videos existed would have established a logical basis for finding probable cause to seize and search appellant's laptop or other electronic storage devices for these videos. (JA 100).

C. Even if there was not probable cause to authorize the search, the good faith exception applies.

In *United States v. Leon*, the Supreme Court stated, "the balancing approach that has evolved in various contexts -- including criminal trials – 'forcefully [suggests] that the exclusionary rule be more generally modified to permit the

introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.'" 468 U.S. 897, 909 (1984) (quoting *Illinois v. Gates*, 462 U.S. at 255). The Supreme Court noted that where the officer's conduct is objectively reasonable, excluding evidence would not have the deterrent effect on otherwise unlawful police misconduct. *Id.* The Supreme Court stated, "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 923.

There are "four circumstances where the Good Faith Exception would not apply:"

> (1) False or reckless affidavit--Where the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";
>
> (2) Lack of judicial review--Where the magistrate "wholly abandoned his judicial role" or was a mere rubber stamp for the police;
>
> (3) Facially deficient affidavit--Where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and
>
> (4) Facially deficient warrant--Where the warrant is "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid."

Here, the military judge found that none of the above factors were present in this case. (JA 163-164). *Carter*, 54 M.J. at 419-20 (quoting *Leon*, 468 U.S. at 922-23 and *Massachusetts v. Sheppard*, 468 U.S. 981, 988-91 (1984)). The President promulgated the Good Faith Exception in Mil. R. Evid. 311(b(3) stating that evidence that was obtained as a result of an unlawful search or seizure may be used if:

> (A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
>
> (B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

Mil. R. Evid. 311(b)(3)(A)-(C).

All three circumstances are met in this case. In *Carter*, this Court looked to the drafter's analysis, stating:

> The drafters of Mil. R. Evid. 311(b)(3) intended "to incorporate the 'good faith' exception to the exclusionary rule based on *United States v. Leon* . . . and *Massachusetts v. Sheppard* . . . ." Drafters' Analysis of Mil. R. Evid. 311(b)(3), Manual, *supra* at A22-18. Of course, the intent of the drafters is not necessarily the intent of the President.

> However, the parties do not assert that the President had a contrary intent with respect to this rule, and we have discovered nothing suggesting that the President's intent in promulgating Mil. R. Evid. 311(b)(3) was different from the drafters' intent.

54 M.J at 421. In looking to the history, this Court concluded,

> Mil. R. Evid. 311(b)(3) does not establish a more stringent rule than *Leon* did for civilian courts. The first prong (a search warrant or search authorization issued by competent authority) is identical to the civilian rule. The second prong addresses the first and third exceptions noted in *Leon*, *i.e.*, the affidavit must not be intentionally or recklessly false, and it must be more than a "bare bones" recital of conclusions. It must contain sufficient information to permit the individual executing the warrant or authorization to reasonably believe that there is probable cause. The third prong addresses the second and fourth exceptions in *Leon*, *i.e.*, objective good faith cannot exist when the police know that the magistrate merely "rubber stamped" their request, or when the warrant is facially defective.

Id.

Thus, this Court explains that the phrase "substantial basis" as the second element raises an "interpretive issue" as it is the same language used as the standard for finding probable cause under *Illinois v. Gates*. *Id.* Therefore, this Court ultimately held, "If we were to interpret the 'substantial basis' language in Mil. R. Evid. 311(b)(3)(B) as an additional requirement beyond the requirements of *Leon*, the good-faith exception would not be an exception at all, and the language would serve no purpose. We need not construe the rule in that fashion." *Id.* at 422. Instead, this Court held that the words "substantial basis" have

different meanings depending on the issues and as related to the good faith exception, this Court,

> Examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization. In this context, the second prong of Mil. R. Evid. 311(b)(3) is satisfied if the law enforcement official had an objectively reasonable belief that the magistrate had a "substantial basis" for determining the existence of probable cause.

Id.

Using the definition of "substantial basis" set forth in *Carter*, this case is distinguishable from *Hoffman*. Here, the magistrate had a substantial basis in probable cause to issue the authorization. The law enforcement officer had an objectively reasonable belief that the magistrate had a substantial basis for issuing the warrant based on his assertions that those who use their phones to take pictures and videos generally transfer them to larger storage devices. Moreover, when viewing the facts of this case using an objective standard, it is clear that a reasonable person with law enforcement training could believe that the search authorization was sound.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 19 day of May, 2016 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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