IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee	)	
	)	BRIEF ON BEHALF
v.	)	OF APPELLANT
	)	
James Richards, IV	)	
Lieutenant Colonel (O-5),	)	Crim. App. Dkt. No. 38346
United States Air Force,	)	USCA Dkt. No. 16-0727/AF
Appellant	)	

BRIEF ON BEHALF OF APPELLANT

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

ISSUE PRESENTED

II. WHETHER THE 9 NOVEMBER 2011 SEARCH AUTHORIZATION WAS OVERBROAD IN FAILING TO LIMIT THE DATES OF THE COMMUNICATIONS BEING SEARCHED, AND IF SO, WHETHER THE ERROR WAS HARMLESS.

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for the jurisdiction of the Air Force Court of Criminal Appeals (AFCCA) was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for the jurisdiction of this Court to consider Appellant's petition for grant of review is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant was tried by a general court-martial concluding February 21, 2013. A military judge convicted Appellant, contrary to his pleas, of one

specification of possessing digital images of minors engaging in sexually explicit conduct and five specifications of committing an indecent act with a male under 16 years of age in violation of Article 134, UCMJ (Charge I); and four specifications of failing to obey a lawful order, in violation of Articles 92 and 134, UCMJ (Charge II). JA at 1-2; 86-97.

The AFCCA remanded for a hearing pursuant to *United States. v. DuBay*, 37 C.M.R. 411 (C.M.R. 1967). JA at 5. On 2 May 2016, the AFCCA affirmed the findings and sentence. JA at 1, 85. Appellant filed a Petition for Grant of Review in this Court, and on 15 December 2016 this Court granted the Petition on two issues, requiring briefing only on Issue II.

STATEMENT OF THE FACTS

The Air Force Office of Special Investigations (AFOSI) began a formal investigation of Appellant April 22, 2011, after it was notified of an allegation of misconduct. JA at 171. On 16 August 2011, AFOSI Detachment 419 requested authorization for "Non-Consensual Signal Surveillance." JA at 127-28. The surveillance was requested to "determine the locations [Appellant] frequents [and] if other possible victims exist." *Id.* On 19 August 2011 the request was approved by the regional commander. *Id.*

AFOSI mounted the tracking device on Appellant's car on August 23, 2011, and Appellant's movement was tracked constantly by AFOSI until October 12,

2011. JA at 127-156. Based on this tracking, AFOSI was able to determine that Appellant made frequent stops at the Tyndall AFB Visitors' Center. *Id.* As a result, AFOSI decided to investigate why Appellant was going to the Visitors' Center; the investigation disclosed that Appellant had sponsored AP onto base. JA at 233. The AFOSI reported that the times when Appellant sponsored AP coincided with the GPS tracking data. *Id.* This was apparently the first time that AP was brought to AFOSI's attention.

On 9 November 2011, AFOSI contacted the Bay County, Florida, Sherriff's Office (BCSO) and requested assistance. JA at 217. BCSO suggested an interview with AP's parents. *Id.* When interviewed, AP's parents agreed to allow BCSO detectives to interview AP, then age 17. *Id.* During an interview that day, AP claimed that he met Appellant online and engaged in sexually explicit conversations with him for approximately one year prior to the start of a physical relationship in April of 2011. *Id.*

On 9 November 2011, and based on the claims of AP, AFOSI requested authorization to search Appellant's on-base residence. JA at 217, 270-72. AFOSI specifically requested authorization to conduct a search to obtain "all electronic media and power cords for devices cable of transmitting or storing online communications." JA at 270.

In the search authorization request, SA Winchester noted that she was "investigating the offense of Florida Statute Section 847.0135 Computer Pornography; Traveling to meet a minor." JA at 270. The affidavit accompanying the search authorization requests states that the "[m]atter being investigated is Florida Statute Section 847.0135 Computer Pornography; Traveling to meet a minor." JA at 271. Although SA Winchester states that she contacted BCSO for assistance with an AFOSI Investigation, and provides the investigation number, she provides no details about any Air Force investigation unrelated to AP. Instead, all of the factual details relate to AP:

> Search and seizure of above is being requested based on the following information gathered during the course of investigation: SA WINCHESTER contacted Bay County Sheriff's Office (BCSO) requesting their assistance with AFOSI Investigation 419-C-120-Bl-32737111122007, of which [Appellant] is the SUBJECT. Detectives at the BCSO conducted an interview of AP who resides at []. AP, who is currently 17 years old, was identified by AFOSI special agents as possibly having a personal relationship with SUBJECT. AP admitted during a recorded statement taken by BCSO that he had been involved in a sexual relationship with SUBJECT since approximately April 2011. AP further admitted that he met SUBJECT online and engaged in sexually explicit conversations with him for approximately one year prior to the start of a physical relationship. AP stated that he and SUBJECT engaged in oral and anal sex approximately 25 times since April 2011. AP further stated that SUBJECT provided him with a cover story should he ever be questioned about their relationship. SUBJECT used his computer services to entice AP into sexual conversations which ultimately resulted in SUBJECT escorting AP onto TAFB where the two engaged in sexual intercourse. At the time of the alleged offense SUBJECT was over the age of 25 and AP was under the age of 17 in violation of Florida State law.

> On 9 Nov 11, I coordinated with Capt. COURTNEY ZUERCHER, 325th FW/SJA, TAFB, FL, on the aforementioned information and requested probable cause determination to conduct a search of SUBJECT's residence. Capt ZUERCHER agreed probable cause existed to conduct a search to obtain all electronic media and power cords for devices capable of transmitting or storing online communications related to the matter being investigated against SUBJECT. Capt ZUERCHER and I conducted a conference call with Lt Col JAMES RICH, 532 Maintenance Group (MXG), TAFB, FL and explained the above mentioned facts. Lt Col RICH concurred that probable cause existed and provided verbal search authorization for the above mentioned residence and to seize the requested items. This Affidavit is in support of the verbal authorization provided.
>
> * * *
>
> In view of the foregoing, I respectfully request that a search authority be issued for a search of SUBJECT's residence for any and all materials relating to the matter being investigated.

JA at 271-72. Lt Col James Rich, a military magistrate, determined probable cause existed and provided verbally provided authorization for the requested items; the authorization was later memorialized in writing. JA at 270, 272.

On 9 November 2011, pursuant to the search authorization granted by Lt Col James Rich, AFOSI searched Appellant's on-base residence. JA at 240-41. During this search, AFOSI seized the following items: (1) Western Digital 80 GB laptop computer hard drive, (2) Toshiba 80 GB laptop computer hard drive, (3) Gateway laptop computer hard drive, (4) Maxtor computer hard drive. *Id.* Each of these drives were "loose" – meaning that they were not located within a computer, but rather, were found alone. *Id.* In addition, AFOSI seized a number of other

items, including: (1) multiple phones (most of which were no longer in use), (2) thumb drives; (3) 75 floppy diskettes, and (4) multiple camera memory cards. *Id*.

AP called Detective Willis within a week of his interview and recanted the claims he made during the interview. JA at 338-39. During this phone call, AP informed Detective Willis that Appellant and he were just friends and that there was not a sexual relationship between Appellant and him. *Id*. Detective Willis, in turn, notified his superiors of the recantation and AFOSI. *Id*.

On 16 November 2011, SA Winchester and SA Nishioka interviewed AP at the AFOSI Detachment 419 office. JA at 190. During this interview, AP further indicated that his claims to BCSO investigators were false. *Id*. Despite these two recantations, AFOSI never contacted Lt Col Rich (the magistrate who had given search authorization) to inform him of AP's recantation.

On 29 November 2011, SA Winchester requested the Defense Computer Forensics Laboratory (DCFL) to conduct an examination of the computer equipment seized from Appellant's on-base residence during the 9 November 2011 search. JA at 367-73. This process is referred to as Forensic Data Extraction (FDE). Within this request, SA Winchester requested that DFCL:

> Search [Appellant's] Cell Phones, laptop computers, digital cameras and memory cards for all video, images, and *possible* online communication. To include, but not limited to the following: any and all information saved or maintained on [Appellant's] cellular telephones, laptop computers or hard drives; all associated SIM cards, components, peripherals or other data, *relating to the matter being*

> *investigated*. This would include, but not limited to all e-mail traffic, text messages, contact information, phone numbers and internet records, regardless of whether the information was sent, received, or forwarded from [Appellant's] media devices. This would also include, but not limited to, information regarding content, sender, and recipient of all phone calls, text messages, e-mail or otherwise; all pictures, videos, chat logs, times of access and use, and any other historical or current use information relevant to the matter being investigated.

JA at 368. (emphasis added).

SA Winchester never indicates what the "matter being investigated" is. Although she references this twice, she never includes this in her request. Of course, the "matter being investigated" at that time was "traveling to meet a minor" in violation of Florida Statute 847.0135. JA at 270-72.

The mirrored hard drives were returned to AFOSI Detachment 419 in December of 2011. JA at 375. SA Nishioka began searching these drives on 23 December 2011. JA at 380. According to SA Nishioka, when he plugs in a mirrored hard drive file produced by DCFL, it automatically opens a program (referred to as a Graphical User Interface, or GUI, of the FDE program). *Id*. When the GUI opens up, there is a toolbar within the program that allows the user to select the types of files he wants to view. *Id*. Among these categories are "photos," "videos," and "chats." *Id*. When SA Nishioka opened the first DCFL image, he immediately looked at the "photos" category. *Id*.

According to SA Nishioka, upon opening this type of category, the user is faced with two types of files – "attributable" and "unattributable," although he did not know what that meant. JA at 380. SA Nishioka looked through all 100 subfolders of the "attributable" folder and did not find anything of interest. *Id*. He then began looking through the "unattributable" subfolders. *Id*.

On 3 January 2012, when SA Nishioka started searching the fifth subfolder (or so), he discovered what appeared to be child pornography. JA at 380. It was at this point that SA Nishioka stopped his search and requested search authorization to look for child pornography. JA at 242. This request was based on SA Nishioka's search disclosing what appeared to be electronic images of minors. JA at 382-84. This search authorization was granted. *Id*.

As a result of the new search authorization, OSI discovered "thousands" of suspected child pornography images. JA at 237. In addition, OSI later discovered child pornography images that appeared to depict two "little brothers" of Appellant. *Id*. All of these images were discovered on the drives seized during the 9 November 2011 search of Appellant's home. *Id*.

Once the suspected images of child pornography were discovered, AFOSI's investigation mutated into a child pornography investigation. From that point forward, each of their investigative steps relied upon the discovery of the suspected child pornography allegedly found on Appellant's hard drives. For example, on 2

April 2012, AFOSI requested another search authorization for Appellant's home. JA at 246, 395-97. AFOSI supported this request by citing the images previously found on Appellant's hard drives and the belief that more evidence may exist within the home. JA at 396-97. This search authorization was granted. *Id*. As a result of this search, AFOSI found and seized a Western Digital external hard drive. JA at 262. AFOSI then sent this Western Digital external hard drive to DCFL on 9 April 2012. JA at 400. Upon its return to AFOSI on 6 July 2012, AFOSI discovered a number of images that appeared to be child pornography. JA at 208. The government offered a number of the images found on this drive as proof of Charge I, Specification 1. JA at 385.

SUMMARY OF THE ARGUMENT

The warrant clause of the Fourth Amendment prohibits the issuance of any warrant that does not describe with particularity the place to be searched and the persons or things to be seized. The scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe it may be found. The constitutionality of police conduct is judged in light of the information available to them at the time they acted, and the validity of the warrant is assessed on the basis of the information that the officers disclosed, or had a duty to disclose, to the issuing magistrate. When the inclusive dates of an offense are known to law enforcement, the agent has an obligation to inform the magistrate so

the magistrate may tailor the search authorization to permit a search only for evidence for which there is probable cause. And the magistrate has an obligation to issue a search authorization so tailored.

In this case, the search authorization was overbroad. Although the agent and the magistrate were aware of the approximate earliest date of the offense for which the agent was seeking evidence, neither the agent in requesting the search authorization or the magistrate in issuing it made any attempt to limit the scope of the authorization to that time frame.

The good-faith exception to the warrant requirement should not apply. The good-faith exception is unavailable when the affidavit in support of a warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and where the warrant itself is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot presume it to be valid. The affidavit in support of the request for the authorization fails to request that the search authorization be limited in its scope to include only the time frame for which there was probable cause. The search authorization itself failed to particularize the things to be seized because it likewise included no temporal limitation. And the agent executing the search admitted to searching for evidence that was not covered by the search authorization.

Nor would the evidence have been inevitably discovered. At the time of the request for the search authorization, none of the leads developed by law enforcement had panned out with respect to any of the Little Brothers. Other than an allegation of misconduct committed prior to Appellant's entry into the Air Force, and the allegation that Appellant violated Florida law as described in the search authorization, nothing that law enforcement had developed would have led to the discovery of this evidence.

And the error was not harmless beyond a reasonable doubt. Evidence obtained in violation of Appellant's Fourth Amendment right against unreasonable search and seizure led directly to his conviction of eight specifications under Article 134, UCMJ.

ARGUMENT

II. THE 9 NOVEMBER 2011 SEARCH AUTHORIZATION WAS OVERBROAD BECAUSE IT FAILED TO LIMIT THE DATES OF THE COMMUNICATIONS BEING SEARCHED, AND THIS ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

The military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). The military judge's findings of fact are reviewed for clear error, and the conclusions of law are reviewed *de novo*. Whether a search authorization is overly

broad resulting in a general search prohibited by the Fourth Amendment is reviewed *de novo*. *United States v. Maxwell*, 45 M.J. 406, 420 (C.A.A.F. 1996). Whether constitutional error is harmless beyond a reasonable doubt is a question of law reviewed *de novo*. *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013).

Argument

A. The 9 November 2011 search authorization was overbroad.

The warrant clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The purpose of this particularity requirement was to prevent general searches. "By limiting the search authorization to search the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the nature of the wide ranging exploratory searches the framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Thus, the scope of a lawful search is "defined by the *object* of the search and the *places* in which there is probable cause to believe that it may be found." *Id*. (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). There must also be a showing of a nexus to the place to be searched. *United States v. Lopez*, 35 M.J. 35, 38-39 (C.M.A. 1992). In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court set the standard of review for a magistrate's probable cause determination. The judge

must ensure that the magistrate had a "substantial basis" for finding probable cause. *Id*. at 238.

An illustrative case in this area is *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980). In that case, the investigators received information indicating that the suspect (a medical doctor) was engaged in defrauding Medicare by billing for services not provided. Despite having information that could help officers separate the "suspect" from the "innocent" files, the warrant authorized the seizure of all the patient records "in order that a detailed examination could be made later." *Id*. at 543. The court noted that this "is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent." *Id*. Any warrant that is amorphously worded so as to result in an indiscriminate seizure of relevant and non-relevant material is unconstitutional. *Id*. at 544-45.

The question presented in this case requires this Court to determine whether the Fourth Amendment requires a search authorization to include a temporal limitation when that information was available and known to law enforcement at the time the authorization was requested. Appellant respectfully submits that it does. The Supreme Court, in *Maryland v. Garrison*, stated that the constitutionality of police conduct must be judged "in light of the information available to them at the time they acted," and the "validity of the warrant must be

assessed on the basis of the information that the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate." 480 U.S. at 85.

The only military case dealing with the temporal limitation in a search authorization is *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008). In that case the agent was authorized by the warrant to search only for photographs related to a specific date. The AFCCA concluded, "The federal magistrate limited the scope by the date of the photos. Searching beyond that date exceeded the warrant's scope. To conclude otherwise would invalidate our conclusion that the warrant was sufficiently specific to be valid." *Id*. at 636. Implicit in this conclusion is that a warrant that does not include a temporal limitation is not sufficiently specific in the AFCCA's view.

Several of the United States Circuit Courts of Appeals have considered whether the Fourth Amendment imposes a temporal limitation in describing places to be searched or the items to be seized. In *United States v. Diaz*, 841 F.2d 1, 5 (1st Cir. 1988), the court concluded that "the government should have advised the magistrate of its belief regarding the duration of the suspected scheme, and the basis for that belief." This would have permitted the magistrate to "reach a reasoned decision as to the first date on which there is probable cause to believe that evidence of criminal acts" could be found in the records to be seized. *Id*. at 5. The court noted that "[t]he problem could also be characterized as one of lack of

particularity," because "nothing in the warrant guides the executing officer in seizing only those documents for which probable cause existed (i.e., those covering a period of time during which fraud was likely ongoing)." *Id.*

Similarly, in *United States v. Abrams*, 615 F.2d at 545, the United States Court of Appeals for the First Circuit concluded that "a time frame should also have been incorporated into the warrant." *See also In re Application of Lafayette Academy, Inc.*, 610 F.2d 1, n.4 & n.9 (1st Cir. 1979)("In many instances of warrants authorizing the seizure of documents from a general file efforts may also be required to narrow the documents by category, time periods, and the like;" "The government's brief states that in order for HEW to review Lafayette's eligibility for FISLP as well as to 'make other evaluation,' pre-1972 records are essential. While this may be true, it is not supported by anything said in the affidavit.").

The Second Circuit, in *United States v. Bucuvalas*, 970 F.2d 937, n.7 (2d Cir. 1992) stated in a footnote that while there was no absolute requirement for a temporal limitation, "[t]emporal delineations are but one method of tailoring a warrant description to suit the scope of the probable cause showing." More recently, the Second Circuit considered the lack of "the temporal scope of the materials that could be seized" in concluding that a warrant lacked particularity. *650 Fifth Ave. v. Alavi Found.*, 830 F.3d 66 (2d Cir. 2016). The Court of Appeals for the Fourth Circuit concluded that a search warrant need not be limited by

specific time periods where the "dates of specific documents could not have been known to the Government . . . ." *United States v. Schilling*, 826 F.2d 1365 (4th Cir. 1987).

The Court of Appeals for the Sixth Circuit, in *United States v. Ford*, 184 F.3d 566, 576 (6th Cir., 1999), held, "Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." *See also United States v. Abboud*, 438 F.3d 554, 576 (6th Cir. 2006)(holding that the warrant was valid only for a three-month time period, law enforcement knew that the evidence in support of probable cause only involved that three-month period, and "the authorization to search of evidence irrelevant to that time frame could well be described as 'rummaging.'").

The Court of Appeals for the Ninth Circuit, in *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) held the execution of a warrant invalid where the government "did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place, even though [the] affidavit indicates that the alleged criminal activity began relatively late in HK Video's existence." The Court of Appeals for the Tenth Circuit, in *United States v. Leary*, 846 F.2d 592, 604-605 (10th Cir., 1988) held that the warrant at issue "could have been limited to . . . a specific period of time coincident to the suspect transaction."

Thus, it appears that every Circuit to consider the issue has concluded, at the very least, that a temporal limitation regarding the offense is a relevant consideration with respect to formulating a constitutionally valid warrant, and in some cases may be determinative of the warrant's validity, particularly where that information is available and known to law enforcement. As noted, the most definitive statement on this issue was from the Sixth Circuit in *Ford*. In that case, the affidavit supporting the warrant described the items to be seized, but nevertheless "authorized a broader search than was reasonable given the facts in the affidavit supporting the warrant" because the affidavit stated a start date of the criminal activity and "there was no indication in the affidavit of criminal activity before that date." *Ford*, 184 F.3d at 575-76. The Court noted that the "degree of specificity required in a warrant depends on what information is reasonably available to the police in the case," and a "general description may suffice when the police could supply no better information, but fail when a narrower description was available." *Id*. at 575. This is consistent with the holding in *Maryland v. Garrison* that the constitutionality of police conduct must be judged "in light of the information available to them at the time they acted." 480 U.S. at 85. The search warrant in that case permitted law enforcement to seize "documents dating from years before the bingo operation began and which pertain to an entirely unrelated crime." *Ford*, 184 F.3d at 577.

In this case, SA Winchester was aware that AP had stated that he was engaged in a sexual relationship with Appellant since April of 2011, and had met Appellant online approximately a year prior to that. She made those facts known to the military magistrate at the time she requested the search authorization. JA at 271-72. Thus, the military magistrate was aware that the crime currently under investigation was violation of "Florida Statute Section 847-0135 Computer Pornography; Traveling to meet a minor," and was aware that the earliest date of commission was approximately April of 2010.

Admittedly, it is often impossible to determine the contents of electronic devices until they are opened and their contents are identified by date and type, and it may not have been readily apparent from looking at a particular device that its contents were irrelevant to the object of the search. But that does not relieve the law enforcement officers or the magistrate of their obligations under the Constitution. As the Court of the Appeals for the Tenth Circuit stated in *United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999)(internal quotations and citations omitted),

> Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, computers make tempting targets in searches for incriminating information. Relying on analogies to closed containers or file cabinets may lead courts to oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage. Alternatively, courts can acknowledge computers often contain "intermingled documents." Under this approach, law enforcement

> must engage in the intermediate step of sorting various types of documents and then only search the ones specified in a warrant. Where officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents. The magistrate should then require officers to specify in a warrant which type of files are sought.

In this case, it appears that neither law enforcement nor the magistrate made *any* attempt to impose a temporal limitation on the search – not in the request for the search authorization, in the search authorization itself, or in the execution of the search authorization. When SA Winchester requested that DCFL examine the hard drives, she made no mention to DCFL of the date ranges in which to search. Yet it was obvious from AP's interview that any communications must have occurred within the last year and a half.

Similarly, when SA Nishioka began reviewing the mirrored hard drives, he made no attempt to confine his search to the relevant date ranges. The 12 September 2012 DCFL report indicated that the files found in the unallocated space came from two devices, a "loose Toshiba hard drive" and a "Gateway external hard drive." JA at 541. The report states that the Toshiba files were "likely deleted on 5 Jan 07," and the Gateway files were "likely [deleted] around 26 Oct 06, the date the files were last accessed." *Id.* This was years before the alleged offenses for which AFOSI sought the search authorization and therefore

had no relevance to the search, which was for evidence of communications as they related to an allegation of a violation of Florida law involving AP.

B. The good faith exception should not apply

Where a search authorization lacks probable cause, evidence obtained in execution of the search authorization may nevertheless be admissible under the "good faith" exception to the warrant requirement established in *United States v. Leon*, 468 U.S. 897 (1984). *See also* Mil. R. Evid. 311(b)(3).[1] The good faith exception announced in *Leon* does not apply in the case of (1) a false or reckless affidavit; (2) where the magistrate wholly abandons his judicial role; (3) where the affidavit in support of the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where the warrant itself 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. *Leon*, 468 U.S. at 923.

In this case, the affidavit fails the third prong of *Leon*, and the search authorization fails the fourth. As discussed previously, both SA Winchester and the military magistrate were well aware that the earliest date of the offense that

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[1] In *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2000), this Court recognized that Mil. R. Evid. 311(b)(3) does not establish a more stringent rule with respect to the good-faith exception than the Supreme Court announced in *Leon*, and held that the three prongs of the good-faith exception in Mil. R. Evid. 311(b)(3) addresses the same exceptions noted in *Leon*.

was the subject of the search authorization was approximately April of 2010. That is, there was no probable cause in the affidavit to support a conclusion that Appellant had committed any offense prior to that time, and there was no probable cause to believe that any relevant evidence of any offense committed prior to that time could be found in the items to be seized. Thus, the magistrate could not have reasonably relied on the affidavit in determining there was probable cause to permit a wholesale search of the devices for files without imposing a reasonable temporal limitation on the files to be searched for and seized.

Similarly, since the search authorization was supported wholly by the affidavit, any officer conducting the search, including SA Nishioka, could not reasonably presume it to be valid. The affidavit accompanying the search authorization clearly states that the matter under investigation was limited to the previous one and one half years. Yet the search authorization permitted examination of all the contents of all the electronic devices found in Appellant's home, irrespective of the dates of the files contained therein.

Finally, SA Nishioka testified at the Article 32, UCMJ, hearing that during the search conducted on 23 December 2011 he was "only looking for communications between Appellant and AP *or the little brothers.*" JA at 380. Of course, the warrant request does not discuss any offenses relating to any "Little Brothers"; it is limited to AP. SA Nishioka's testimony at the Article 32 reveals

what this search really was – a pretext; the agents were really looking for incriminating information relating to the Little Brothers even though there was no probable cause with respect to any Little Brother.[2] SA Nishioka's admission that he was searching for evidence outside the scope of the search authorization undercuts any claim that the search authorization was executed in good faith.

C. The pre-April 2010 evidence would not have been inevitably discovered.

Ordinarily, the fruits of a search or seizure obtained in violation of the Fourth Amendment are inadmissible. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961); *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006); Mil. R. Evid. 311(a). However, an exception to the exclusionary rule provides for admission of evidence that would have been inevitably discovered. In such a case, the government must establish by a preponderance of the evidence "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 that would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016)(emphasis in original)(*quoting United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012)).

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[2] *See Ford*, 184 F.3d at 579 (the Fourth Amendment "prevents officers from using a warrant describing one kind of evidence as a pretext for searching for evidence outside the warrant.").

At the time of the 9 November 2011 search, and the subsequent examinations of the digital media seized pursuant to the search authorization, there was no probable cause to believe these devices contained evidence of criminal activity prior to April of 2010. It is true that AFOSI commenced an investigation against Appellant after it was notified of an allegation of misconduct occurring prior to Appellant's military service. JA at 171. And it is true that the AFOSI doggedly attempted to determine whether Appellant was currently engaging in unlawful activity. *Id.* And it is true that the AFOSI did turn up evidence involving AP, which was the subject of the search authorization at issue. But at the time of the request for the search authorization, and the subsequent search of the digital media, the agents did not possess, nor were they pursuing, evidence or leads that would have inevitably led to the discovery of evidence of misconduct unrelated to or predating misconduct with AP.

By the time the agents sought a search authorization for the online communications involving AP, other than JP, all of the Little Brothers (or their parents) that the agents had interviewed had denied that Appellant had done anything inappropriate with them, and there was therefore no probable cause with respect to any of the Little Brothers. See JA at 174 (Interviewed of on 13 May 2011; Little Brother DB denied any wrongdoing by Appellant); 175 (Interviewed on 17 May 2011, Little Brother JR denied any wrongdoing by Appellant); 176-77

(Interviewed on 13 June 2011, AD, mother of Little Brother BD, denied knowledge of wrongdoing between Appellant and BD); 178-79 (Interviewed on 13 June 2011, Little Brother BD denied any wrongdoing by Appellant); 185 (Interviewed on 5 July 2011, BR, mother of NR and RR, said she believed the allegations were false). Nor had the interviews of others unrelated to the Little Brothers revealed any evidence of wrongdoing. JA at 186-88. There is simply nothing to suggest that any of these people would have changed their opinions, and there do not appear to be any other leads that the agents were following that would have led to the discovery of this evidence.

C. The error was not harmless beyond a reasonable doubt.

Since this was an error of constitutional dimension, this Court may not affirm the findings unless the error was harmless beyond a reasonable doubt. *United States v. Hall*, 58 M.J. 90, 94 (C.A.A.F. 2003). The burden is on the government to prove that constitutional error is harmless beyond a reasonable doubt. *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004). The question is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained." *Simmons*, 59 M.J. at 489 (quoting *Mitchell v. Esparza*, 540 U.S. 12 (2003)).

The error directly resulted in the verdicts. Appellant was found guilty under Charge I of possessing child pornography and committing indecent acts, all in

violation of Article 134, UCMJ. JA at 86-97; R. at 659. All of the photographic evidence admitted in support of all of the specifications of Charge I was derived from the search of the digital media recovered during the 9 November search of Appellant's residence, or was derivative of that search. The evidence in support of Specifications 2 through 7 of Charge I was found during the search of the "loose" hard drives seized on 9 November 2011, although it is clear from the record that the files had all been deleted years earlier. JA at 540-79. The evidence of child pornography introduced in support of Specification 1 of Charge I was located in the Western Digital external drive seized during the 2 April 2012 search of Appellant's home. JA at 538, 580-93.

That search would not have been conducted but for the unlawful search of the hard drives. JA at 395-97. As SA Nishioka noted in the affidavit in support of the 2 April 2012 search, the results of the 9 November 2011 search, which was for evidence of "online communications," served as the basis for the 2 April search authorization request, and the "residence has not been searched specifically for evidence of possession or manufacturing child pornography." *Id.* And the reason for that is obvious. Before the unlawful search of the hard drives seized on 9 November 2011 there was no probable cause to search for evidence of possession or manufacturing child pornography.

RELIEF REQUESTED

Based on the foregoing, Appellant requests that the findings under Charge I and the sentence be set aside. WHEREFORE Appellant so prays.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 6,275 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on January 17, 2017.

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