IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Captain (O-3)
TYLER G. EPPES
USAF,
Appellant.

USCA Dkt. No. 17-0364/AF
Crim. App. No. 38881

BRIEF IN SUPPORT OF PETITION GRANTED

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TYLER G. EPPES,	)	
Captain (O-3),	)	AFCCA Dkt. No. 38881
United States Air Force,	)	USCAAF Dkt. No. 17-0364/AF
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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES PRESENTED

I. WHETHER THE SEARCH OF APPELLANT'S PERSONAL BAGS EXCEEDED THE SCOPE OF THE SEARCH AUTHORIZATION WHERE THE AGENT REQUESTED AUTHORITY TO SEARCH APPELLANT'S PERSON, PERSONAL BAGS, AND AUTOMOBILE, BUT THE MILITARY MAGISTRATE AUTHORIZED ONLY THE SEARCH OF APPELLANT'S PERSON AND AUTOMOBILE AND DID NOT AUTHORIZE THE SEARCH OF APPELLANT'S PERSONAL BAGS.

II. WHETHER APPELLANT'S RIGHT TO FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT WHEN THE THERE WAS NO PROBABLE CAUSE FOR THE 7 DECEMBER 2012 WARRANT.

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for the jurisdiction of the Air Force Court of Criminal Appeals 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 on 9-10 and 24-25 March 2015, at Joint Base Andrews, MD, by a general court-martial convened by Commander, Headquarters, Air Force District of Washington. Appellant was initially charged with one specification of conspiracy under Article 81, UCMJ (Charge I); 21 specifications of making a false official statement under Article 107, UCMJ (Charge II); two specifications of larceny and one specification of wrongful appropriation under Article 121, UCMJ (Charge III); three specifications of frauds against the United States under Article 132, UCMJ (Charge IV); and five specifications of conduct unbecoming an officer and a gentleman under Article 133, UCMJ (Charge V). After the Article 32, UCMJ, investigation was complete, the specification of wrongful appropriation under Article 121, UCMJ was withdrawn and an additional specification of larceny under Article 121, UCMJ, was preferred and referred as the Additional Charge. Appellant elected trial by military judge alone. JA at 534. He entered a plea of guilty to all charges and specifications, except he entered a plea of guilty to Specification 1 of Charge II by exception and substitution, and entered a plea of not guilty to Specifications 2 and 3 of Charge II. *Id.* After the plea colloquy the military judge found Appellant guilty in accordance with his pleas, but made a

finding of guilty by exception and substitution with respect to Specification 3 of Charge IV. JA at 535-6. The military judge sentenced Appellant to forfeiture of all pay and allowances; to be confined for 10 years; to pay a fine in the amount of $64,000 (and if the fine is not paid, adjudged an additional three years of confinement); and to be dismissed from the service. JA at 537. The convening authority approved the sentence as adjudged. JA at 36. On 21 February 2017 the Air Force Court of Criminal Appeals denied Appellant's appeal[1] pursuant to Article 66, UCMJ. Appellant appealed to this Court, and on 12 June 2017 this

[1] Before that Court Appellant assigned the following errors: I. The military judge erred in denying Appellant's motion to suppress evidence obtained in the course of warrantless and invalid searches; II. Appellant's plea to conspiring to violate a lawful general regulation under Article 92, UCMJ, is improvident because the general regulation at issue prohibited possession of "controlled substance analogues," but not "controlled substances." III. Appellant's plea to conduct unbecoming an officer and a gentleman under specification 2 of Charge V is improvident because the military judge failed to elicit facts sufficient to support a plea of guilty; IV. Specification 5 of Charge V fails to state an offense. "Structuring" and "failing to file a report" are alternative theories of liability under 31 U.S.C. § 5324(c). A person cannot "structure" by "failing to file a report"; V. The convening authority erred in summarily denying Appellant's request to defer forfeitures; VI. A sentence to ten years' confinement, total forfeitures, a $64,000 fine and a dismissal from the Air Force is an inappropriately severe punishment for the crimes of which Appellant was convicted, where Appellant was sentenced for false official statements, larceny, and false claims, all for the same acts of misconduct; VII. The false official statements alleged in Charge II are lesser included offenses of both the false claims alleged in specifications 1 and 2 of Charge IV. The false claims alleged in specifications 1 and 2 of Charge IV are lesser included offenses of the larceny alleged in specification 1 of Charge III. And Charging Appellant with false official statements, false claims based on those false official statements, and larceny based on those false claims constitutes an unreasonable multiplication of charges.

Court granted Appellant's petition to review the issues presented in this case. JA at 1-2.

STATEMENT OF THE FACTS

The facts necessary for the resolution of the issues can be found in the argument below.

SUMMARY OF THE ARGUMENT

Agents of AFOSI requested authority to search Appellant's person, his personal bags, and his automobile. The military magistrate issued a search authorization authorizing search of Appellant's person and automobile; the magistrate did not authorize the search of Appellant's personal bags. Despite the language of the search authorization limiting the places to be searched, the agents searched Appellant's personal bags and seized incriminating evidence in violation of the Fourth Amendment prohibition against unreasonable search and seizure. The military judge erred in denying the motion to suppress. The AFCCA erred in concluding that the "good faith" exception to the warrant requirement applied because the "good faith" exception does not apply to cases involving the improper execution of a constitutionally valid warrant.

The 7 December 2012 warrant was invalid with respect to Appellant's computer because it was not based on probable cause. There was no probable cause to search Appellant's computer because in requesting the warrant the agent

did not provide a sufficient nexus (or *any* nexus) between the crime Appellant was accused with having committed and Appellant's computer.

ARGUMENT

I. WHETHER THE SEARCH OF APPELLANT'S PERSONAL BAGS EXCEEDED THE SCOPE OF THE SEARCH AUTHORIZATION WHERE THE AGENT REQUESTED AUTHORITY TO SEARCH APPELLANT'S PERSON, PERSONAL BAGS, AND AUTOMOBILE, BUT THE MILITARY MAGISTRATE AUTHORIZED ONLY THE SEARCH OF APPELLANT'S PERSON AND AUTOMOBILE AND DID NOT AUTHORIZE THE SEARCH OF APPELLANT'S PERSONAL BAGS.

Standard of Review

The denial of a motion to suppress is reviewed for an abuse of discretion. *United States v. Leedy*, 56 M.J. 208, 212 (C.A.A.F. 2007). The findings of fact by the military judge are reviewed for clear error, and will not be overturned unless they are clearly erroneous or unsupported by the record. *Id.* This Court considers the evidence in the light most favorable to the prevailing party. *Id.*

Argument

The Fourth Amendment to the Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. Mil. R. Evid. 315(f) provides, "A search authorization issued under this rule must be based upon probable cause," which "exists when there is a reasonable belief that the person, property, or

evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(h)(2) provides, "The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or any applicable Act of Congress." Mil. R. Evid. 315(h)(4). The military judge erred in denying Appellant's motion to suppress evidence in this case that was gathered in violation of Appellant's right to be free from unreasonable search and seizure.

On 4 February 2013, SA Cooper, by affidavit to the military magistrate, requested authority to search "(1) EPPES' person, (2) EPPES' personal bags and (3) EPPES' personally owned vehicle . . . and affects as may be used in the commission of fraud against the United States or against federally insured financial institutions." JA at 736. The authorization itself states that SA Cooper

> has requested that I authorize a search of the person of [Appellant and] premises known as [Appellant's vehicle] and the seizure of the following specified property: Documents and/or items of evidence as may be used in the commission of fraud against the United States Government or against federally insured financial institutions; watches and jewelry matching the description of items claimed lost or stolen in insurance claims against USAA and commercial airline companies.

JA at 734. The authorization says nothing about "personal bags." During the search of Appellant's personal bags agents recovered "one white Office of the Chief of Staff United States Air Force (USAF) envelope, one medication label

reading [Appellant,] AMPHETAMINE SALTS 30 MG TAB." The agents also recovered from Appellant's bag,

> one Marriot room rate discount authorization form with the date covered, an 18-page merchandise inventory sheet, a 10-page United Services Automobile Association (USAA) valuable personal property (VPP) insurance document, 11 airline tickets and travel related documents, three blank USAA checks, 12 pages of USAA VPP documents, three blank Chief of Staff of the United States Air Force (CSAF) letter documents, one Cole Haan receipt, one Citi direct statement, one ATM card with "Africa Russia" written on it, and one Foundry Lofts envelope with four documents inside.

JA at 703.

It is clear that SA Cooper sought authority to search Appellant's personal bags. It is equally clear that the military magistrate did not grant that authority. The military judge found as fact that the military magistrate

> was satisfied there was probable cause to believe documents and/or items of evidence as may be used in the commission of fraud against the United States Government or against federally insured financial institutions, as well as, watches and jewelry matching the description of items claimed lost or stolen in insurance claims against USAA and commercial airline companies were being concealed on [Appellant's] person or in his vehicle.

JA at 999. The military judge found as fact that "SA Cooper and the other agents searched [Appellant's] immediate vicinity and two of [Appellant's] bags," and during this search "the agents discovered, in plain view, documents they immediately identified as evidence of travel fraud." *Id*. The military judge concluded as a matter of law that "The search authorization was reasonably

specific in its particularity and breadth," that "[t]he agents conducting the search knew the authorization's scope," and that the agents "reasonably searched and seized items within the scope of the warrant." JA at 1012. The military judge went on, "[e]ven if any of the evidence could arguably have fallen outside the scope of the authorization, its incriminating character was nonetheless immediately apparent to agents who saw the evidence in plain view while lawfully executing a search authorization for other, similar, contraband." *Id*. It is clear from the findings of fact and conclusions of law that the military judge was aware that the search authorization did not include authority to search the bags.

At the outset, Appellant notes that the military judge's reliance on a search of the "immediate vicinity of [Appellant's] person" was misplaced because this was not a search incident to arrest. The Supreme Court has said that certain warrantless searches of the immediate vicinity of the accused are authorized, but only in limited circumstances. In *Chimel v. California*, 395 U.S. 752, 763-64 (1969), the Court said, "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." The Court said that while there is ample justification to search the arrestee's person and the area within his immediate control, "[t]here is no comparable justification . . . for searching through all the desk drawers or other closed or concealed areas in that room itself."

Chimel, 395 U.S. at 763. And this Court has held that "It is the fact of the lawful arrest which establishes the authority to search," and "the crucial prerequisite for such a contemporaneous search is a prior lawful apprehension or custodial arrest." *United States v. Kinane*, 1 M.J. 309, 313 (C.M.A. 1979). This Court held in *Kinane* that a temporary detention does not constitute notification of custodial arrest, which "implies a more permanent deprivation of liberty evidenced by an actual or constructive order directing an individual to remain within certain specified limits." *Kinane*, 1 M.J. at 313-314 (citations and quotations omitted).

The military judge's ruling is somewhat cagey insofar as the military judge does not come right out and say that there was an authorization to search the bags (because clearly there was not); the ruling simply ignores that fact entirely and discusses the search of the bags under the rubric of the "immediate vicinity." But, as noted, since this was not a search incident to arrest, the agents did not have the authority to search "the immediate vicinity of [Appellant's] person" without a search authorization.

And it is unclear from the military judge's ruling precisely which documents he considered to have been "in plain view" as a result of this search of Appellant's "immediate vicinity." Obviously the documents contained within the bags were not "in plain view" until the bags were opened. Since this was not a search

incident to arrest, and since there was no authorization to search the bags, anything found within the bags should have been suppressed.

The Air Force Court of Criminal Appeals "[did] not subscribe to the military judge's specific theory of admissibility," but nevertheless compounded the error in concluding that the "good faith exception" to the warrant requirement applied in this case. The AFCCA concluded,

> Here, the only factor in dispute is whether, from an objective viewpoint, the AFOSI agents executing the authorization reasonably and with good faith believed the authorization permitted the search of Appellant's personal bag.
>
> We find a reasonable agent would have believed the authorization allowed the search of Appellant's personal bag as requested in the affidavit accompanying the authorization. *See Carter*, 54 M.J. at 420. The language granting the search of Appellant's person could reasonably be interpreted as also authorizing the search of items of personal property in Appellant's possession when the search was executed. This is especially true in this case where the accompanying affidavit endorsed by the military magistrate specifically requested search authority to examine Appellant's personal bags. For this reason, we decline to grant Appellant relief.

JA at 18.

The Supreme Court has held that evidence obtained in the course of an improperly executed warrant that does not otherwise fall into an exception to the warrant requirement must be suppressed. *See Horton v. California*, 469 U.S. 128, 140 (1990). There the Court held, "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or character of the relevant

exception from the warrant requirement, the subsequent seizure is unconstitutional without more."

This Court has held that officers "in executing a search warrant are often required to exercise judgments as to the items or things to be seized," and "in exercising this judgment, the police are not obliged to interpret the warrant narrowly." *United States v. Fogg*, 52 M.J. 144, 148 (C.A.A.F. 1999). Even so, there is no authority for agents to interpret a search authorization to include locations that were requested in the affidavit but excluded from the authorization.

Initially, Appellant notes that the search authorization did not authorize "the search of items of personal property in Appellant's possession when the search was executed." JA at 18. Indeed, the agents specifically requested authorization to search Appellant's "personal belongings that may be located within a reasonable vicinity of [his] person or as may be found at his work location" and his automobile (JA at 740), but were only provided authority to search Appellant's person and his automobile. JA at 734. The AFCCA erred in concluding that it was reasonable to interpret the search authorization to include these things when they were specifically asked for but specifically omitted from the authorization.

The AFCCA cited *United States v. Carter*, 54 M.J. 414, 420 (C.A.A.F. 2001) for the proposition that "a reasonable agent would have believed the authorization allowed the search of Appellant's personal bag as requested in the

affidavit accompanying the authorization." Respectfully, in *Carter* the question was whether the issuing magistrate had a substantial basis for determining the existence of probable cause, and analyzed the application of the good faith exception under Mil.R.Evid. 311 and *United States v. Leon*, 468 U.S. 897 (1984) and concluded that he did because the affidavit in that case went beyond a bare bones affidavit; the agent identified the sources of information and identified conflicts and gaps in the evidence; and once the agent authorization was issued, the agent was objectively reasonable in believing that he had given the magistrate a substantial basis for concluding that there was probable cause.

Carter is simply inapplicable to this issue. This is not a case of agents executing a facially valid but constitutionally infirm warrant. This case involves agents exceeding the scope of an otherwise valid search authorization. Indeed, when announcing the good faith exception, the Supreme Court, in *Leon*, 468 U.S. at 918 n.19, said, "Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." And this Court has held that "[i]n order for the 'good faith' exception to the exclusionary rule to apply here, it must be clear that the agents doing the search

were relying on a defective warrant." *United States v. Maxwell*, 45 M.J. 406, 421 (C.A.A.F. 1996).

The Air Force Court in this case also said that it was reasonable for the agents in this case to interpret the warrant to include Appellant's personal bags "where the accompanying affidavit endorsed by the military magistrate specifically requested search authority to examine Appellant's personal bags." JA at 18. In other words, it was reasonable for law enforcement to assume that they were authorized to search Appellant's personal bags merely because they asked, irrespective of whatever authorization the military magistrate actually provided. The AFCCA cites no authority for this proposition, and Appellant's research reveals none, which is not surprising given that such an interpretation turns the military magistrate into a rubber stamp for law enforcement, in violation of the Supreme Court's holding in *Leon*, Mil. R. Evid. 311(b)(3), and this Court's holding in *Carter*, 54 M.J. at 421, that the good faith exception cannot exist where "police know the magistrate merely 'rubber stamped' their request."

As the United States Court of Appeals for the Ninth Circuit put it, in *United States v. Sedaghaty*, 728 F.3d 885, 913 (9th Cir. 2013), such an approach "would permit a kitchen sink probable cause affidavit to overrule the express scope limitations of the warrant itself." The Court went on, "May a broad ranging probable cause affidavit serve to expand the express limitations imposed by a

magistrate in issuing the warrant itself? We believe the answer is no. The affidavit as a whole cannot trump a limited warrant." *Sedaghaty*, 728 F.3d at 913.

The United States Court of Appeals for the Tenth Circuit held that a search exceeded the scope of the warrant where the affidavit was apparently broader in scope with respect to the place to be searched and the items to be seized, but the warrant itself authorized only a search of a safe and a car at a particular location, and did not extend to the search of the entire home. *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006). The Court concluded that the "good faith" exception was inapplicable because the warrant was not defective and there was no evidence that the magistrate was misled in issuing the warrant. *Angelos*, 433 F.3d at 746. The Court held that the good faith exception did not apply because it was "apparent that the problem lies in the execution, and not the constitutionality, of the search warrant," and "the *Leon* good faith exception will not save an improperly executed warrant." *Id.* (citations omitted). The Court concluded,

> Assuming the agents executing the warrant actually read it, they reasonably should have noticed its limited scope. In turn, the agents could have, upon realizing the scope of the warrant was narrower than requested [in the affidavit], contacted the issuing judge by phone in an attempt to receive authorization to expand the scope of the search to including the entire premises. . . . By failing to do so, the officers cannot be said to have acted reasonably.

Id.

The same is true here. Assuming the agents actually read the search authorization, its limitation to Appellant's person and vehicle would have been readily apparent. And upon realizing the scope of the warrant was narrower than that requested, the agents could have contacted the issuing magistrate and requested to expand the scope. But they did not, and they cannot therefore be said to have acted reasonably.

Based on the foregoing, and as discussed in the "Relief Requested" section of this pleading, all of the findings and the sentence must be set aside.

II. WHETHER APPELLANT'S RIGHT TO FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT WAS VIOLATED WHEN THE THERE WAS NO PROBABLE CAUSE FOR THE 7 DECEMBER 2012 WARRANT.

Standard of Review

The denial of a motion to suppress is reviewed for an abuse of discretion. *Leedy*, 56 M.J. at 212. The findings of fact by the military judge are reviewed for clear error, and will not be overturned unless they are clearly erroneous or unsupported by the record. *Id.* In reviewing probable cause determinations, this Court examines whether a military magistrate had a substantial basis for concluding that probable cause existed. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017)(quoting *United States v. Rogers*, 67 M.J. 162, 164-65 (C.A.A.F. 2009).

Argument

On 7 December 2012, SA Russell Armstrong, an agent of AFOSI, requested a warrant to search Appellant's off-base residence for "evidence of fraud to include travel orders, letters, notes, financial records, receipts, computer hardware, computer software and digital media (e.g., computer equipment, digital storage devices, cameras, photographs, etc.), and for evidence of fraud." JA at 712. SA Armstrong defined "computer hardware" as

> Any and all computer equipment including electronic devices such as cellular phones capable of collecting, analyzing, creating, displaying, converting, storing, concealing or transmitted (sic) electronic, magnetic, optical or similar computer impulses or data. These devices include, but are not limited to, and (sic) data-processing hardware (such as central processing units, memory typewriters, and self-contained "laptop" or "notebook" computers or hand-held computing devices such as, but not limited to, personal digital devices, PDAs); internal and peripheral (external) storage devices (such as fixed hard disks, external hard drives, floppy disc drives and diskettes, compact disc write/rewrite drives and compact discs, DVD write/rewrite drives and DVDs, tape drives and tapes, optical/floptical storage devices, USB based memory units, compact flash card memory devices and other memory storage devices); peripheral input/output devices (such as keyboards, printers, scanners, memory capable copy machines, facsimile machines, plotters, video display monitors and optical/floptical readers); and related communication devices (such as telephone, cable or DSL modems, cables and connections, recording equipment, RAM or ROM units, acoustic couplers, automatic dialers, speed dialers, programmable telephone dialing or signaling devices, electronic tone generating devices and wireless/wired routers); as well as any devices, mechanisms or parts that can be used to restrict access to such hardware (such as physical keys and locks).

JA at 712-3.

In the statement of probable cause, SA Armstrong generally described the offense under investigation, including threatening to change the Adolphus Hotel's General Service Administration classification; attempting to obtain tax exemption by submitting false documents; and falsifying travel orders. JA at 714-5. SA Armstrong also asked to "search for, inventory and recover any and all military, government or law enforcement equipment which was issued to EPPES at or during the time of his employment as a Special Agent. The (sic) EPPES is and has been ordered to a non-law enforcement status in connection with this investigation. As such, all issued equipment and identification emblems and uniforms should be seized." *Id.*

The defense filed a motion to suppress and argued, among other things, that the warrant "lacked specificity in the scope of the warrant," that the term "computer hardware" "lacks specificity," and "no statement of probable cause is offered to support the assertion that evidence of 'fraud' would be found in [Appellant's] DC residence, when all of the facts revolve around [Appellant's] interaction with a hotel in Texas." JA at 686. During argument on the motion the civilian defense counsel argued,

> When you go back to the [7 December 2012 warrant], what you see is that the judge in the warrant itself says – it talks about searching the premises, "there's now being concealed certain property, evidence is more fully described in the affidavit." So he doesn't even – there nothing in the warrant that really specifies the evidence, it just makes a general reference to what's in the affidavits. And then it says, "which

> is evidence of the commission of a crime." I mean, it doesn't even say what crime is being committed.

JA at 401.

Civilian defense counsel then invited the military judge to "look at each affidavit to see what crime is being alleged and to see whether or not there's probable cause covered by the facts within that affidavit that connect to the crime being alleged," and then "look at the face of the warrant and see if the warrant is stating with particularity what crime – what evidence is to be seen and what probable cause establishes in relation to what specific crime." *Id.*

The Fourth Amendment to the Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV. Mil. R. Evid. 315(f) provides, "A search authorization issued under this rule must be based upon probable cause," which "exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(h)(2) provides, "The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or any applicable Act of Congress." Mil. R. Evid. 315(h)(4).

This Court has held that "in order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized. *Nieto*, 76 M.J. at 106. A nexus "may be inferred from the facts and

circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept." *Id.* In *Nieto*, the agent provided a "generalized profile about how servicemembers 'normally' store images" in support of a probable cause determination." *Id.* at 107. This Court concluded that the affidavits accompanying the search authorization did not reference a laptop or data transfers from the appellant's cellphone, and the agent's "generalized profile was not based on a firm factual foundation." *Id.*

In this case, the agent described the offenses that Appellant was believed to have committed, but does not explain at all why he believed any evidence of those crimes would be found in Appellant's home or on Appellant's computer. Indeed, unlike the agent in *Nieto*, the agent in this case didn't even provide any generalized profile. He merely broadly defined computer hardware (JA at 713); described the offenses Appellant was believed to have committed, none of which necessarily required a computer to commit (JA at 714-5); described some previous misconduct having nothing to do with the charges currently under investigation (JA at 715); and then said he wanted a warrant (*Id.*). The agent made *no attempt whatsoever* to link the misconduct described in the affidavit with any of the myriad devices falling within the affidavit's exceptionally broad definition of "computer hardware."

Nor should this Court apply the good faith or inevitable discovery doctrines in saving a search based on a warrant lacking in probable cause. The good faith exception does not apply because the magistrate did not have a substantial basis for determining the existence of probable cause," and the agent did not have an objectively reasonable belief that the magistrate had a substantial basis for finding probable cause. Mil.R.Evid. 311(b)(3)(B); *see United States v. Hoffman*, 75 M.J. 120, 128 (C.A.A.F. 2016). In *Nieto* this Court stated, "We recognize the tension between our discussion of the good-faith doctrine in *Hoffman*, 75 M.J. at 127-28, and *Carter*, 54 M.J. at 419-22." *Nieto*, at 108, n. 6. In *Carter* this Court applied the "good faith" doctrine even though the magistrate did not have substantial basis for determining the existence of probable cause; in *Hoffman* this Court declined to apply the good-faith doctrine because a substantial basis for determining the existence of probable cause is a requirement for the application of the good faith doctrine. In this case, because there was no nexus between the criminal conduct described in the affidavit and the things to be seized – that is, the "computer hardware" – the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and the agent's reliance on the warrant based upon the affidavit was therefore unreasonable. *See Leon*, 468 U.S. at 923.

The inevitable discovery exception does not apply because the government cannot identify any evidence that the law enforcement agents possessed or were actively pursuing at the time of the seizure that would have made the discovery of the evidence in Appellant's computer inevitable. *See Nieto*, 76 M.J. at 108.

Based on the foregoing, all of the findings and sentence must be set aside, as discussed more fully below.

RELIEF REQUESTED

If Appellant prevails on either of the granted issues, *all* of the findings and the sentence in this case must be set aside, irrespective of whether any particular finding would or would not have been impacted by the error. This was a conditional guilty plea. Rule for Courts-Martial 910(a)(2) provides,

> With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty.

MCM (2012 ed.) Appellant and the government agreed, "The pleas of guilty are conditioned upon reserving the right, on further review or appeal, to review the adverse determination of the motion to suppress. If I prevail on further review or appeal, I will be allowed to withdraw the pleas of guilty." JA at 1016.

The military judge noted on the record his understanding that the pleas were conditional, and confirmed with defense counsel that the pleas were "conditioned

upon [Appellant] not waiving any appellate review or relief he may be entitled to based upon my ruling denying your motion to suppress." JA at 532. The military judge acknowledged that such pleas "are not reviewed favorably . . . but they are legal, they are something that you can agree to and have agreed to in this case." *Id.* The military judge went on,

> The evidence that resulted from those searches and seizures would have impacted the government's ability to meet its burden beyond a reasonable doubt maybe not for all but at least for a substantial number of the charges and specifications in this case. Trial counsel had represented[2] that regardless of how the court ruled it would not be case dispositive. I cannot make that determination and I'm not in a position to make that determination based on the evidence that I was provided in consideration of the motion to suppress. However, again, I can state that it's this Court's opinion that it would have impacted the ability of the government to present its case and to meet its burden beyond a reasonable doubt.

JA at 532-3. In accepting Appellant's plea, the military judge stated, "We discussed the conditional pleas yesterday and I find it's not contrary to public policy or my own notions of fairness." JA at 1032. There is no other discussion in the record about the case-dispositive nature of any of the evidence seized, and whether the parties viewed the agreement to mean that Appellant could withdraw all of his pleas or only those affected by an erroneous ruling. Most notably, the military judge did not ask Appellant what he thought it meant.

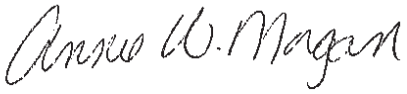
[2] The circumstances and the content of that "representation" are not in the record. Presumably the representation occurred during and R.C.M. 802 conference.

The plain language of the term permits Appellant to "withdraw the *pleas* of guilty" if he "prevail[s] on further review or appeal." JA at 1015. (emphasis added). Since there are no words of limitation in the pretrial agreement, "pleas" means all pleas. Even if the term is somehow susceptible to some other meaning, the military judge failed to explain the meaning and effect of the term. This Court has placed upon the military judge "the primary responsibility for assuring on the record that an accused understands the meaning and effect of *each* condition . . . imposed by any existing pretrial agreement." *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976)(emphasis in original); *United States v. King*, 3 M.J. 458 (C.M.A. 1977).

Based on the foregoing, Appellant respectfully requests the findings and sentence in this case 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 5,508 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 mailed to the Court and delivered to opposing counsel on 12 July 2017.

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