IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *v.* Staff Sergeant (E-5) **JARED D. BAVENDER,** United States Air Force, *Appellant.*	**APPELLANT'S BRIEF IN SUPPORT OF THE GRANTED ISSUE** USCA Dkt. No. 20-0019/AF Crim App. No. 39390

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE LOCATED ON APPELLANT'S DIGITAL MEDIA?

Statement of Statutory Jurisdiction

The lower court had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On August 31 and September 25-29, 2017, Appellant was tried by officer members at Buckley Air Force Base, Colorado. Appellant was charged with two specifications in violation of Article 134, UCMJ, 10 U.S.C. § 934, for wrongfully viewing and receiving child pornography on divers occasions. Appellant was also charged with one specification in violation of Article 92, UCMJ, 10 U.S.C. § 892, for violating a general regulation by wrongfully searching for and viewing pornography on a government computer on divers occasions. (JA 53.)

Appellant pleaded to and was found guilty of a violation of Article 92, UCMJ. (JA 38, 119.) Contrary to his plea, Appellant was found guilty of viewing and receiving child pornography in violation of Article 134, UCMJ. *Id*. The panel sentenced Appellant to reduction to E-1, three years confinement, and a dishonorable discharge. (JA 38, 120.) The convening authority approved the sentence as adjudged (JA 38.)

On August 23, 2019, the Air Force Court affirmed the findings and sentence. *United States v. Bavender*, No. ACM 39390, 2019 CCA LEXIS 340, (A.F. Ct. Crim. App. 23 Aug. 2019) (unpub. op.) (JA 37.) Appellant petitioned this Court for review on October 17, 2019, and this Court granted review on January 21, 2020.

Statement of Facts

The Interview

The Air Force Office of Special Investigations (AFOSI) interviewed Appellant on August 7, 2016. App. Ex. IV, Attachment 3, Disc 1 (hereinafter "Interview"). (JA 130.)[1] AFOSI conducted this

[1] App. Ex. IV, Attachment 3, contains SSgt Bavender's entire AFOSI interview. For consistency, throughout this brief, counsel cites to the white timestamp on the recording, which reflects the approximate time of day. Counsel would note that some timestamps referenced in the transcript appear to be incorrect, or do not coincide with the relevant material in the timestamp marked on the video.

interview because Appellant was attending the Landmark seminar in Denver Colorado, which is a "change your life, motivational kind of seminar" that "inspired" Appellant to contact his command and law enforcement in a "frenzy" believing he had committed a crime. (JA 114, 96.) Appellant called his civilian supervisor, Mr. ML, "ranting and raving" that he had broken the law, and requesting his commander's phone number. (JA 95.) Mr. ML ultimately gave the Appellant his commander's phone number, and then called Appellant's immediate enlisted supervisor, TSgt AH, to inform her of the conversation. (JA 96.) TSgt AH attempted to intervene by calling Appellant's First Sergeant, MSgt RH, to inform him of Appellant's statements and desire to speak with the commander. (JA 99.) After notifying MSgt RH, TSgt AH called Appellant who was relieved that the First Sergeant knew, and "was very happy to finally confess that he was doing something that was illegal." (JA 99.)

MSgt RH spoke to the Appellant on the phone about the "illegal things" he had done. (JA 102.) MSgt RH then called AFOSI and picked up Appellant at the seminar. (JA 103-104.) When MSgt RH arrived, Appellant got on stage in front of an audience of 100-150 people and, with a microphone, said "[I have] done some illegal things" and his

"awesome first sergeant was here to help me out with this." (JA 104-105.)

Prior to that day Appellant had no criminal record, and there were no ongoing criminal investigations into Appellant's conduct. Pros. Ex. 9. Appellant had no disciplinary history in his four-year military career, with the exception of a letter of counseling for failing a fitness test after suffering a hernia. Pros. Ex. 10, 20-24; Pros. Ex. 11.

At the AFOSI office, Appellant waived his Article 31 rights and agreed to speak with Special Agents (SA) VL and CB. (JA 125.) SA VL led the interview, and opened by stating, "[S]o go ahead, tell us what you want to tell us." Interview at 17:45:20.[2] Appellant began by stating he was a "pornography and masturbation addict." *Id.* at 17:45:24. His masturbation addiction started at thirteen. *Id.* at 17:45:35. His addiction to adult pornography started at twenty-three years old. *Id.* SSgt Bavender went on to explain:

> And I would say probably in the last 5 years that addiction has gone into illegal forms – with the pornography. I've gone into nudist websites, which I assume is mostly European, to

[2] For the convenience of the Court counsel would generally direct this Honorable Court's attention to Disc 1 at time stamps between 17:45:20- 17:55:49, and 18:29:01-18:37:05 (with special attention to those portions that begin at time stamps 17:45:24, 17:45:30, 17:45:35, 17:47:20, 17:52:44, 17:53:27, 17:54:32, 17:55:06, and 18:36:18) when conducting its review.

> find pictures of underage people, I've done this - past five years – probably – 3 or 4 times a year, maybe 5. Uh, this year has been the worst. Um, I've done it 5 times this year and it's basically half way over. So, uh, yeah that's it.

Id. at 17:45:30.

SA VL asked, "Can you describe how you came about looking at those [nudist websites with underage people]?"

SSgt Bavender explained:

> When I first started looking at internet porn it was just to look at internet porn, but as the addiction worsened, and I started seeing like the more and more I was involved in it the younger and younger and younger porn I was trying to find. Until I was full blown typing in searches on "teenage porn" not thinking that anything illegal will come up, that 18 and 19 year old girls would come up. And then going through the images and then finding one, like "holy shit that's not legal" then ended up clicking on it and seeing what website it was. And it basically was a matter of time before I was actually going to that website to see what else was there.

Id. at 17:47:20.

When asked, SSgt Bavender repeatedly denied viewing images of minors that depicted sexual acts. *Id.* at 17:45:24-17:55:34. He would use Google searches or Google image searches to find what he believed to be "illegal pornography" on these nudist websites. *Id.* at 17:52:44, 18:30:38-18:34:15. The pictures of minors he saw never depicted sexual acts. *Id.* at 17:53:27. He did not believe pictures of minors engaged in

sexual acts could appear in Google search results. *Id.* "The only thing that I could ever find was just the nudist websites with the pictures. And it was really just people standing there, just posing for pictures as if they had clothes on but they just don't have clothes on." *Id.*

SA VL repeatedly asked SSgt Bavender to describe the focus of the images of minors he viewed and whether there was anything specifically sexual about these images. *Id.* at 17:53:16-17:55:34, 18:29:01-18:36:57. SSgt Bavender stated that he knew some of the people in the images from the nudist website were minors, but repeatedly denied there were any sexual acts. *Id.* at 17:54:32. The closest image SSgt Bavender saw to being "sexual" was an image showing a group of people standing naked and looking at the camera. One of those people was a teenage girl. SSgt Bavender stated that it appeared she was looking in the direction of the genitalia of the young boy in the picture. *Id.*

SSgt Bavender considered the images pornography but did not believe the intent of the people who took the photos or were in the images was "something sexual or pornographic." *Id.* at 17:55:06, 18:36:18. SSgt Bavender also talked at length about his sexual attraction to 13-17-year-old females. *Id.* at 17:48:21-17:50:30. SSgt

Bavender spent more than 10 hours with AFOSI and never declined to answer any questions. (JA 130.)

Near the end of the interview SSgt Bavender consented to the search and seizure of his electronic devices. Interview at 21:38:33. AFOSI retrieved the electronics during the interview but did not search them prior to SSgt Bavender withdrawing his consent through counsel the next day. (JA 151-52.)

The Affidavit

On August 8, 2016, SA VL sought authorization to search the seized devices for child pornography. (JA 160-62.) In her affidavit, she repeatedly claimed SSgt Bavender viewed "child pornography." *Id.* She also detailed SSgt Bavender's age preference, how he determined the age of those depicted in the images, that he masturbated to the pictures, and that he downloaded 30-40 images and viewed 100-150 images. *Id.* The affidavit was based solely on selected information provided by SSgt Bavender during his interview. However, the affidavit did not include any of SSgt Bavender's descriptions of the focus, setting, poses, and content of the photographs, or SSgt Bavender's repeated denial that the images depicted any sexual acts. *Id.* Based solely on the affidavit presented to him, the magistrate

granted the search authorization. (JA 163.)

The Military Judge's Suppression Ruling

The defense filed a motion to suppress the images arguing the military magistrate lacked a substantial basis to find probable cause, and that SA VL omitted material facts necessary for the magistrate's probable cause determination. (JA 80, 133). The military judge referred to the latter argument as a "novel issue." (JA 92.)

The military judge denied the defense motion. (JA 181.) The military judge did not rule on whether SA VL's omissions from the affidavit were "material." The military judge believed SA VL's statements calling the images "child pornography" and SSgt Bavender's admitted use of certain internet search terms provided a substantial basis to believe evidence of a crime would be located on the searched devices. (JA 180-81.) The military judge did not determine whether the addition of SSgt Bavender's actual descriptions of the images would have still supported probable cause. *Id.*

The Air Force Court's Ruling

The Air Force Court reviewed eight assignments of error. (JA 2.) Assignment of error 1 aligns with the issue granted. The Air Force Court noted that the military judge, in making his ruling denying the

motion to suppress, "made no findings of fact or conclusions of law in response to Appellant's argument that omissions in SA VL's affidavit were material to the magistrate's probable cause determination." (JA 6.)

Nonetheless, the Air Force Court relied heavily on this Court's decision in *United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007), concluding that the "evidence available to the magistrate, as found by the military judge, offered the magistrate more than the evidence relied on by the magistrate in … *Leedy*." (JA 7.) The Air Force Court noted that a magistrate and reviewing court must "consider[] additional contextual factors…" to include the "Appellant's admission to searching the Internet for 'young teenage porn' and 'young nude girls….'" *Id*. Ultimately, the Air Force Court found "that Appellant's use of these [internet search] terms along with admission to masturbating to pictures of female children he found on nudist websites was part of the total circumstances available to the military magistrate to consider" and supported probable cause. (JA 8.)

The Air Force Court also considered the legal and factual sufficiency of Specifications 1 and 2 of Charge I. Prosecution Exhibit 4 contained the six charged images in this case. (JA 19-20.) The Air

Force Court found that four of those six charged images were not legally and factually sufficient as "no other evidence in the record, either direct or circumstantial, from another witness or exhibit … convincingly establishes Appellant received or viewed … [those four charged images] during the charged timeframe." (JA 28.) As this case stands today, SSgt Bavender remains convicted of receiving and viewing just two charged images (images 43381 and 43871). (JA 24-28.)

Argument

THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE FOUND ON APPELLANT'S DIGITAL MEDIA.

Standard of Review

A 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 party prevailing below. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016) (citing *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015)). A military judge's findings of fact are left undisturbed unless they are clearly erroneous or unsupported by the record. *Leedy*, 65 M.J. at 212-13.

Law & Analysis

Law enforcement, in preparing their affidavit for the search authorization, entirely omitted SSgt Bavender's lawful descriptions of the images he believed to be "illegal" and submitted an affidavit with the bare conclusory statement that SSgt Bavender had stated he viewed "child pornography". (JA 160-62.) No descriptions of the alleged child pornography were provided whatsoever. *Id.*

For 10 hours, SSgt Bavender was interviewed by trained law enforcement agents. SSgt Bavender referred to the images of minors that he viewed variously as "illegal images", and "illegal pornography", but never used the term "child pornography". Interview at 17:45:24 – 18:30:17. Law enforcement agents repeatedly requested detailed descriptions of the images that SSgt Bavender believed to be illegal. *Id.* SSgt Bavender consistently stated that none of the images of children that he viewed depicted sexual acts. *Id.* He also stated that the focus or intent of the subjects in the photographs was not sexual, although he was sexually aroused by the images. *Id.* at 17:55:06, 18:36:18-18:37:05. When questioned about the "child pornography" that SSgt Bavender had viewed he repeatedly described images of nude children or families at the beach in natural poses that he viewed on European nudist

websites. *Id.* at 17:45:24 – 17:55:49.

The military magistrate approved the search authorization based solely on the information in the affidavit, which was based entirely on selected statements that SSgt Bavender made in his law enforcement interview. (JA 160-62.)

The electronic evidence seized as a result of the search authorization is the only evidence of contraband images in this case, and the only corroborating evidence of SSgt Bavender's "confession."

The Fourth Amendment guarantees -

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

To issue a lawful warrant, an objective and independent magistrate must determine that there is probable cause to believe that (1) a crime has been committed, and (2) the particular place or property to be searched may contain the fruits, instrumentalities, or evidence of the crime committed. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). A trial court may uphold a magistrate's probable cause determination only if there is a "substantial basis" for finding probable

cause. *Id.* A substantial basis for probable cause to search an area exists where "based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found[.]" *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017) (citations and internal quotation marks omitted).

In determining whether an affidavit provides a substantial basis to find probable cause, the content of the affidavit controls. In *Leedy* this Court noted that courts typically "rely alone on information that … was presented to the magistrate at the time of his determination, as reflected in the affidavit, the military judge's findings and conclusions of law, and testimony in the record of trial addressed to the suppression motion that is consistent with the military judge's findings." *Leedy*, 65 M.J. at 214 n.5.

Conclusory statements fail to establish probable cause. *See Nathanson v. United States,* 290 U.S. 41, 44-47 (1933) (magistrate erred by basing probable cause determination on affiant's conclusion that he believed evidence was in a specific location without listing supporting facts).

M.R.E. 311(d)(4)(B) states:

> If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, is entitled to a hearing.

Manual for Courts-Martial (*MCM*), United States (2016 ed.).

Material omissions from affidavits fall under M.R.E. 311(d)(4)(B). *United States v. Cowgill*, 68 M.J. 388, 392 (C.A.A.F. 2010). To receive a hearing on alleged material omissions from affidavits, the defense must demonstrate that the omissions were "both intentional or reckless *and* that their hypothetical inclusion would have prevented a finding of probable cause." *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (citation omitted). "[O]missions are made with reckless disregard if an officer withholds a fact in his ken that 'any reasonable person would have known that this was the kind of thing the judge would wish to know.'" *Cowgill*, 68 M.J. at 392 (citations omitted).

If the defense meets this burden, then the government must prove "by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing official [was] sufficient to establish probable cause." M.R.E. 311(d)(4)(B).

Here the military judge erred for at least five reasons. First, the affidavit was defective on its face as it failed to contain a detailed description of the purported "child pornography" images, or an exemplar of those images, contrary to Federal precedent. Second, the affidavit contained knowing omissions of material facts. Third, the affidavit recklessly and/or intentionally contained false statements and conclusory allegations.

Fourth, had the omitted description of the images been included in the affidavit, an admission to viewing lawful child erotica does not in itself support probable cause to search for child pornography. The lawful possession of child erotica does not establish probable cause that an accused also possesses or has viewed illegal child pornography, and the "inclusion [of the descriptions of the lawful child erotica in the search warrant affidavit] would have prevented a finding of probable cause." *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (citing *United States v. Figueroa*, 35 M.J. 54, 56–57 (C.M.A. 1992)). The Air Force Court's ruling is in conflict with Supreme Court precedent in *Jacobson v. United States*, 503 U.S. 540, 551 (1992) that evidence of a predisposition to engage in lawful activity "is not, by itself, sufficient to show predisposition to do what is now illegal." Finally, the Air Force

Court erred in its reliance and analysis of *United States v. Leedy* and *United States v. Mason*.

The military judge and Air Force Court's rulings to admit the fruits of the unlawful search have substantially prejudiced SSgt Bavender. The search authorization served as the sole source for the charged contraband images in Prosecution Exhibit 4, and without the alleged contraband, the government would not have been able to prove the most basic elements of the charged offenses.

1. The Search Authorization Affidavit was Defective on its Face.

In child-pornography cases, where the evidence of suspected criminal activity generally is the image itself, the courts have emphasized that the affiant must either (1) provide to the magistrate a detailed description of the suspected child pornography or (2) provide him an exemplar of the suspected images. *Cf. United States* v. *Lowe,* 516 F.3d 580, 586 (7th Cir. 2008) (finding a detailed description sufficient), and *United States* v. *Chrobak,* 289 F.3d 1043, 1045 (8th Cir. 2002) (finding sufficient the description of photographs as depicting "sexually explicit conduct involving children under the age of 16" and "graphic files depicting minors engaged in sexually explicit conduct"),

with *United States* v. *Doyle,* 650 F.3d 460, 473-74 (4th Cir. 2011) (finding insufficient the agent's description of an image as "nude children") and *United States* v. *Brunette,* 256 F.3d 14, 18-19 (1st Cir. 2001) (finding insufficient the agent's description of an image as "prepubescent boy lasciviously displaying his genitals"); *see also United States* v. *Monroe,* 52 M.J. 326, 332 (C.A.A.F. 2000) (recommending that agents include exemplars or a detailed description of the pictures on which the affidavit is based).

Unlike the probable cause determinations upheld by this Court in cases like *Gallo, Macomber,* and *Clayton,* the decision here to authorize a search of SSgt Bavender's electronic devices suffers from several critical defects, which collectively invalidate the intrusion into his privacy. *See United States v. Macomber,* 67 M.J. 214, 220 (C.A.A.F. 2009); *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010); *United States v. Gallo*, 55 M.J. 418 (C.A.A.F. 2001).

The affidavit provided to the magistrate did not describe any images allegedly viewed by SSgt Bavender, despite the fact that SSgt Bavender did provide detailed descriptions of the images he viewed. (JA 160-162.) Had SA VL done so, the magistrate would have concluded that the images were, at most, legal erotica because SSgt

Bavender described the images and explicitly stated that the images did not contain sexual acts or an intention to display a child in a sexual manner. Interview at 17:53:16-17:55:34, 18:36:18-18:37:05.

2. Knowing Material Omissions.

Defense counsel argued the affidavit was defective because the agent mischaracterized SSgt Bavender's statements by omitting key information. (JA 87-90.) After argument, the military judge said he would further research this "novel issue" before ruling – but he never ruled on that specific issue.

When SSgt Bavender came to the AFOSI, he believed that his masturbation and pornography addiction had gone into "illegal forms." Interview at 17:45:24. But SSgt Bavender believed the images he viewed were "illegal" because of the age of the people depicted – not the content. He did not understand that for an image to be criminal, it has to contain minors engaged in sexually explicit conduct or be lascivious is some way. SSgt Bavender assumed any image of a nude minor was illegal and AFOSI never corrected this assumption. (JA 116-17.) That distinction is critical. *See United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F 2011) ("When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the

distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'") (internal citation omitted).

The record shows that SSgt Bavender did not know the difference between legal and illegal images of minors. As the Preliminary Hearing Officer (PHO) himself noted, "contrary to the Accused's understanding (given his statements to AFOSI and supervisors), not all naked images of a child constitute child pornography." (JA 41.) The PHO also noted that the Accused "believed … that any images of young looking individuals engages in sexual acts were not minors, but instead young-looking adults." (JA 42.) SSgt Bavender only described nude images of minors in natural poses and nonsexual settings like nude beaches or nudist camps. These material facts were omitted from the affidavit.

The military magistrate would have received a different impression if SA VL had included SSgt Bavender's full description of the images he viewed. He would have known that the images were nothing more than people naturally posing at nudist camps or beaches; that Appellant repeatedly denied viewing images of sexual acts; that he did not know how to obtain such images; and that he was never

advised of the legal definition of child pornography before declaring the images to be "illegal pornography." These facts would have negated the suspicion that the crime of viewing/downloading child pornography under Article 134, UCMJ had occurred. Any reasonable person "would have known that this was the kind of thing the judge would wish to know." *Cowgill*, 68 M.J. at 392.

3. False Statements and Conclusory Allegations

In addition to the knowing omissions, the affidavit affirmatively misrepresents SSgt Bavender's statements by injecting the agent's legal conclusions – "Subject began viewing child pornography approximately five years ago; …Subject stated he viewed child pornography approximately four to five times per year; Subject estimated he had viewed [] 100-150 images of child pornography and downloaded 30-40." (JA at 160-61.)

SSgt Bavender referred to some of the images he saw variably as "illegal", "illegal pornography", "illegal porn", and "illegal stuff" but did not use the phrase "child pornography" itself, and was quite clear that he never saw any images of minors "actually having sex with each other on the internet." Interview at 17:53:27. When he was again asked about photos of sex acts or sexual contact, he stated the closest thing to

"sexual" that he saw was a photo from a nudist website of a group posing without clothes, and there was a teenage girl that was looking over in the direction of a boy's penis. *Id.* at 17:54:32.

The agents probed a third time for information that would meet the legal definition for sexually explicit conduct, but again did not get any information that crossed the line from legal child erotica to images that fell outside the protections of the First Amendment. SSgt Bavender searched to give the agents details of any "touching" he saw in the images:

> No. I mean, other than arms around each other and stuff like that. They pose, they really pose as if they had forgotten that they were just standing there naked. It's always, cause obviously, the people in those pictures, the nudity meant something different than it meant to me of course. Um, it did not mean something sexual and pornographic to them.

Id. at 17:55:06. But viewing, receiving, or possessing the images SSgt Bavender described was not criminal under Article 134, UCMJ.

SA VL recklessly presented her affidavit to the magistrate as if she had no information about the content of the images SSgt Bavender said he viewed and downloaded. She included facts as to the age of those depicted and how SSgt Bavender masturbated to the images, which insinuated that the images he viewed were sexually explicit.

Then, SA VL asserted as fact the legal conclusion that SSgt Bavender had viewed child pornography. *See Gallo,* 55 M.J. at 421-22 ("Certainly, conclusory statements should not be in an affidavit.…").

There were two agents in SSgt Bavender's interview. SA CB was consistently taking notes. The affidavit was sought hours after the interview ended. The facts were fresh in SA VL's mind when she wrote the affidavit. Failing to include enough facts to paint an accurate picture of what SSgt Bavender said during his interview must have been either intentional or reckless under these circumstances.

SA VL intentionally or recklessly excluded facts that demonstrated SSgt Bavender "confessed" to viewing legal child erotica and included facts that made it seem as though he "confessed" to illegal child pornography. M.R.E. 311 requires the government to paint an accurate picture to the magistrate. Every fact does not necessarily need to be included, but the facts selected for inclusion must not mislead the magistrate. M.R.E 311(d)(4)(B)

4. Possession of Child Erotica Does Not Support Probable Cause to Search for Child Pornography

The possession of child erotica-standing alone cannot justify governmental intrusion into a person's privacy, and the good-faith

exception does not apply as SA VL recklessly omitted critical information about the images allegedly seen by SSgt Bavender; specifically.

This Court has not yet addressed whether the possession of child erotica, *standing alone*, establishes probable cause that an accused also possesses or has viewed child pornography. *See United States v. Hassell*, 2017 CCA Lexis 247, *13 (A.F. Ct. Crim. App. 2 March 2017) (concluding that possession of child erotica alone may not establish probable cause to believe an individual possesses child pornography, but that evidence of the possession of child erotica when combined with evidence of the possession of child pornography would support such a search as evidence of the crime and contraband). However, the Seventh Circuit has noted that the Government conceded that child erotica would not establish probable cause to believe an individual accessed child pornography. *See United States v. Griesbach,* 540 F.3d 654 (7th Cir. 2008) (noting that two of the three images that purportedly established probable cause were lawful "child erotica," and finding probable cause only because the third image depicted child pornography and was sufficiently described in the affidavit).

Regardless of SSgt Bavender's uninformed legal conclusions, the

underlying facts demonstrate that the images he described were not child pornography, as nothing he described focused on the genitalia or depicted individuals engaged in sexual acts. *See MCM,* pt. IV, para. 68b(c)(7); *see also United States v. Roderick,* 62 M.J. 425, 429-30 (C.A.A.F. 2006) (defining "lascivious exhibition"). Given the lawful nature of the evidence that formed the basis for probable cause, this Court must apply the rule recognized by the U.S. Supreme Court in *Jacobson*, specifically, that evidence of a predisposition to engage in lawful activity "is not, by itself, sufficient to show predisposition to do what is now illegal…." *Jacobson*, 503 U.S. at 551.

5. The Military Judge and Air Force Court's Reliance on *Leedy* and *Mason*

The Air Force court compared the above facts to those in *Leedy*, and incorrectly determined that in light of *Leedy* there is "more than a fair probability Appellant's search history would result in the discovery of visual depictions of minors engages in sexually explicit conduct." (JA 7.) In *Leedy* the appellant's roommate saw titles of files on appellant's computer with names like "14 year old Filipino girl" and other files that "mentioned ages and … [sexual] acts". *Leedy*, 65 M.J. at 211.

There, the Court determined that the "14 year old Filipino girl" file name did "not appear in isolation" and along with the sexually suggestive nature of the titles of other files constituted a substantial basis to believe there would be child pornography on the device. *Id.* at 215-17. In the instant case, the Appellant's misguided belief that the nude images of minors he viewed were illegal, in addition to his description of using the internet search terms "young teenage porn" and "young nude girls" should also not be considered in isolation.

In *Leedy*, the appropriate available context was the sexually suggestive file names that the roommate also recalled in connection with the "14 year old Filipino girl" file. *Id.* at 211. Here, the appropriate context includes the Appellant's detailed description of what these "illegal" images portrayed, and what he viewed after using search terms such as "young nude girls" on the internet. In the context of his description of the images there was not a substantial basis to believe a crime had been committed or that evidence of such a crime would be contained on the electronic devices. As the Air Force Court noted, there was no reason not to take "Appellant's words at face value." (JA 7.) However, the government cannot have it both ways in asking a magistrate to take Appellant's misguided label of the images

as "illegal" at face value, while not accepting or considering his description of those images at face value as well. This is precisely why law enforcement is not permitted to knowingly or recklessly omit material facts in a search warrant affidavit.

The Air Force Court also relies on the language in *Mason* establishing that the "Fourth Amendment is not violated if the affidavit *would still show probable cause* after such ... omission is ... corrected." *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (quoting *Gallo*, 55 M.J. at 421). In the instant case, if the recklessly omitted description of the images would have been included, it would have been clear to the magistrate that the images described as "illegal" were in fact lawful child erotica, which would not in itself support probable cause to search these electronic devices as argued above. Consequently, the Air Force Court turned to other collateral information in the affidavit that could have still supported probable cause even if the omitted descriptions of the images had been included.

The Air Force Court focused on "Appellant's admission to searching the Internet for 'young teenage porn' and 'young nude girls' … [as well as his] admission to masturbating to pictures of female children he found on nudist websites." (JA 7-8.) However, these

additional admissions by SSgt Bavender, especially when considered in the context of an affidavit that *corrected* the improper omission of the descriptions of the images, would still not support a substantial basis to believe a crime was committed, let alone that evidence of that crime was on SSgt Bavender's electronic devices.

With regard to the Internet searches, SSgt Bavender made clear in his interview that these were traditional Google searches (he was not looking on the "dark-web" or anything of that nature), and that he did not even believe that images of children engaged in sexually explicit conduct could come through Google's search filters (all facts that should have been included in the search authorization affidavit). Interview at 17:53:27.

Notably, the search terms "young teenage porn" and "young nude girls" do not in and of themselves establish what types of images would be viewed, or whether they would be lawful or illegal. Both 18 and 19 year-old girls are "young" and in their teens, yet viewing or receiving even sexually explicit images of 18 and 19 year-old girls is clearly lawful. However, the magistrate would not have had to speculate about what sort of images such a search term might produce in the context of a *corrected affidavit* that contained a detailed description of the images

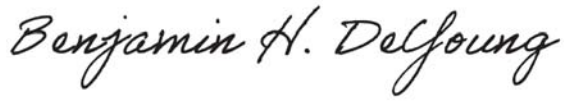
that were viewed after conducting such a Google search. The images described were simply not illegal.

Placed into this proper context (as required by *Leedy* and *Mason*) the additional detail that SSgt Bavender admitted to masturbating to images he found on nudist websites adds nothing to the analysis that would rise to the level of a substantial basis to believe that a crime had been committed and evidence of that crime was located on the searched devices. The appropriate context includes his description of these images on nudist websites as lawful images. The admission that he masturbated to these lawful images does not make create illegal contraband, any more than if SSgt Bavender had admitted to masturbating to images in a Sears catalog.

This Court should find that the military judge erred and abused his discretion when he found the magistrate had a substantial basis to find probable cause to authorize a search of the Appellant's digital media. The search authorization served as the sole source for the charged contraband images in Prosecution Exhibit 4, and their admission into evidence substantially prejudiced the Appellant, as without the alleged contraband the government would not have been able to prove the most basic elements of the charged offenses.

WHEREFORE, this Court should find the military judge abused his discretion when he denied the defense motion to suppress evidence located on Appellant's digital media and, accordingly, set aside the findings and sentence.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and transmitted by electronic means with the consent of the counsel being served to usaf.pentagon.af-ja.mbx.afloa-jajg-filng-workflow@mail.mil on February 20, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because the principal brief contains 5,813 words, and 29 pages.

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 Century Schoolbook 14-point typeface.

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