IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Calvin E. PERKINS
Sergeant (E-5)
United States Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim App. Dkt. No. 201700077
USCA Dkt. No. 18-0365/MC

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

William L. Geraty
Lieutenant Commander
JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-8502
Fax (202) 685-7426
william.geraty@navy.mil
CAAF Bar No. 36884

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Certified Issues

I

WHETHER THIS COURT'S HOLDING IN *UNITED STATES v. CARTER* AS APPLIED BY THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS IN THIS CASE, INSTEAD OF THE PLAIN READING OF MRE 311(c) THIS COURT APPLIED IN *UNITED STATES v. HOFFMANN,* CONTROLS IN ANALYZING THE APPLICABILITY OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

II

WHETHER THE MILITARY JUDGE ERRED IN DENYING A DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A SEARCH OF APPELLANT'S HOME?

Statement of Statutory Jurisdiction

Because the Convening Authority (CA) approved a court-martial sentence that included a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] Therefore, this Court has jurisdiction under Article 67, UCMJ.[2]

Statement of the Case

A panel of officer and enlisted members, sitting as a general court-martial, convicted Sergeant (Sgt) Perkins, contrary to his pleas, of one specification of

[1] 10 U.S.C. § 866 (2012).
[2] 10 U.S.C. § 867 (2012).

violating a lawful general order in violation of Article 92, UCMJ, and one specification of conspiracy to commit the offense of larceny in violation of Article 81, UCMJ.[3] The members acquitted Sgt Perkins of one specification of Article 81, UCMJ; two specifications of Article 107, UCMJ; one specification of Article 108, UCMJ; three specifications of Article 121, UCMJ; two specifications of Article 134, UCMJ (Wrongfully Endeavoring to Impede an Investigation); and one specification of Article 134, UCMJ (Adultery). The court-martial sentenced Sgt Perkins to be reduced to pay grade E-1 and to be discharged from Marine Corps with a bad-conduct discharge.[4] The CA approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed.[5]

On July 12, 2018, the lower court affirmed the findings and the sentence as approved by the CA.[6] On September 10, 2018, pursuant to Article 67(a)(2)[7] the Judge Advocate General of the Navy forwarded a Certificate of Review of this case, and requested this Court consider the issues presented above.[8]

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[3] 10 U.S.C. §§ 881, 892, 907, 908, 921, 934 (2012); JA at 0052-0055.
[4] JA at 0052-0055.
[5] Commanding Officer, Marine Corps Air Station, Yuma, General Court-Martial Order No. 01-2017, Feb. 3, 2017.
[6] *United States v. Perkins*, 78 M.J. 550 (N-M.Ct. Crim. App. 2018); JA 0001-0026.
[7] 10 U.S.C. § 872(a)(2) (2012).
[8] Judge Advocate General of the Navy, Certificate for Review of United States v. Perkins, dtd September 10, 2018.

Statement of Facts

Sergeant Perkins adopts the lower court's recitation of the facts of this case:

The appellant was an active duty Marine stationed on board Marine Corps Air Station Yuma, Arizona. MI, a woman with whom the appellant had been romantically involved, complained to Naval Criminal Investigative Service (NCIS) Special Agent JJ that the appellant had committed extortion by threatening to make public nude pictures and videos that the appellant had taken of her without her consent. During the investigation that followed, NCIS agents searched the appellant's on-base residence for digital media and found what they believed to be stolen military property. Before trial, the appellant moved to suppress military property NCIS discovered while searching the appellant's home. The appellant contended that the search authorization was not supported by probable cause. The military judge denied the motion, and the appellant argues that the military judge erred.

During a brief hearing on the motion to suppress, the government presented the telephonic testimony of Special Agent JJ and an affidavit from the base commanding officer (CO) who had verbally issued the search authorization. Special Agent JJ testified to the information she received from MI, whom Special Agent JJ had interviewed at a victim advocate center. Questioning by the military judge revealed that the interview had been recorded, but the record does not indicate that the CO heard the recording before authorizing the search. MI's account was not under oath.

MI told Special Agent JJ that the appellant had threatened to release nude pictures and videos of her unless she agreed to purchase items for him. MI denied ever seeing any such pictures or video and did not specifically claim to have seen the appellant take any. But she did recall the appellant "using his cell phone while they [were] having sexual relations." MI did not say where she thought the recordings might have happened, nor did she suggest that the appellant kept any cameras in his home that could have been used to make these recordings.

According to Special Agent JJ, MI said that the appellant "possibly was storing electronic media containing all these videos and

footage of them having sex," and she "did [al]lude to the potential of him using other devices . . . in his house, electronic devices capable of storing such media." MI also said that the appellant "may have extorted other individuals, that he might possess unregistered firearms, and was possibly storing illegally obtained items in his storage unit that he had off base."

Besides speaking to NCIS, MI told the sergeant major of the appellant's squadron that the appellant had been stalking her, and that she was in fear for her life for having made the report to NCIS. At MI's request, the appellant's squadron drafted a military protective order and contacted the appellant, who was out of state on leave, and directed that he return to base that night to acknowledge receipt of the order. MI did not speak to the base CO.

Since the appellant's squadron had directed the appellant to come back to Yuma that night, Special Agent JJ decided to ask the base CO for "a command authorized search and seizure under exigent circum[stances] because of the possibility of him destroying evidence." Before approaching the base CO, Special Agent JJ consulted with trial counsel and the base staff judge advocate, who agreed that a command authorized search of the appellant's home "under exigent circumstances" was appropriate. Then she called the base CO. She told him "all [the] known facts at the time[.]" When the CO responded by asking Special Agent JJ to "explain all the facts in detail," she told him that she had consulted the staff judge advocate and the trial counsel, and "explained the residence, where it was located, the impact it could have on the community on Marine Corps Air Station Yuma."

Special Agent JJ testified that, based on this information, the CO "agreed to issue a verbal command authorized search and seizure under exigent circumstances . . . ." The authorization covered the entire residence. Because Special Agent JJ thought that the evidence she sought could have been stored on a cell phone's memory, or "SD" card, and that the SD card might have been removed from the cell phone, she understood the authorization to extend to "anything that was small enough to contain . . . a very, very small media storage device . . . it can be something as small as a nail."

At the hearing on the motion, the government also provided an affidavit signed by the base CO explaining his probable cause determination. The relevant portion of the affidavit is short:

> [JJ] informed me that a female civilian, [MI], reported earlier that day that Sgt Perkins was extorting her by threatening to reveal personal nude videos and photographs if she did not purchase him goods. Agent [JJ] informed me that the videos and pictures were likely contained inside of Sgt Perkins' home, and due to an earlier conversation with [the appellant's sergeant major], she believed Sgt Perkins was returning to the home that very evening. I determined that there was probable cause for a search . . . .

The government presented no other evidence supporting the CO's probable cause determination.

The search of the appellant's home did not reveal any nude photos or videos of MI. It did, however, result in NCIS's discovery of government property in the appellant's garage. NCIS obtained a second search authorization allowing agents to seize this property as evidence. This evidence led to the appellant's conviction for conspiracy.

Ruling from the bench, the military judge denied the motion to suppress. The military judge found that the CO's probable cause determination was based on the information he received from Special Agent JJ. The military judge found that this information constituted probable cause to believe that agents would find digital media in the appellant's home containing evidence of the extortion.[9]

Additional facts, as needed, are contained within the discussion of the issues below.

Summary of Argument

This Court should resolve the first certified issue by expressly overruling

[9] JA at 0002-0005.

United States v. Carter[10] and finding the plain reading of MIL. R. EVID. 311(c) this Court applied in *United States v. Hoffmann*[11] controls.

If this Court holds that *Hoffmann* overrules *Carter*, this Court should resolve the second certified issue by applying the plain language of MIL. R. EVID. 311(c)(3) to find that the military judge erred in denying the defense motion to suppress the evidence seized from appellant's home.

But if this Court instead upholds *Carter*, it should resolve the second certified issue by applying the requirements for the good faith exception enumerated in *United States v. Leon*[12] to find that the military judge erred in denying the motion to suppress the evidence seized from appellant's home.

Argument

I.

THIS COURT SHOULD OVERRULE *UNITED STATES v. CARTER* AND APPLY THE PLAIN READING OF MRE 311(c) THIS COURT USED IN *UNITED STATES v. HOFFMANN*, WITH RESPECT TO THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

Standard of Review

Legal questions, including the interpretation of a rule's language, are

[10] *United States v. Carter*, 54 M.J. 414, 418-22 (C.A.A.F. 2001).
[11] *United States v. Hoffman*, 75 M.J. 120, 127-28 (C.A.A.F. 2016).
[12] *United States v. Leon*, 468 U.S. 897 (1984).

reviewed *de novo*.[13]

Discussion

While Sgt Perkins does not agree with the ultimate conclusion reached by the 2-1 majority of the lower court panel, he concurs with the full panel's respectful suggestion that this Court "resolve the tension between *Carter* and *Hoffmann* in favor of *Hoffmann* and the plain language of Mil. R. Evid. 11(c)(3)."[14]

A. The lower court correctly found there was no substantial basis for the commander's probable cause determination.

After a careful analysis of the applicable law,[15] and after noting the limited factual record,[16] the lower court analyzed the commander's probable cause determination in this case.[17] The court concluded, "even if we credit the CO with every reasonable inference he might have drawn from the information the record showed he had, we still find that there was no substantial basis for his probable cause determination."[18] Sergeant Perkins agrees.

B. The lower court's choice of authorities between *Carter* and *Hoffmann* determined the resolution of the applicability of the good faith exception in this case.

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[13] *United States v. Harpole*, 77 M.J. 231, 234-35 (C.A.A.F. 2018)(citations omitted).
[14] *United States v. Perkins*, 78 M.J. 550, 565 (N-M.C.C.A. July 12, 2018).
[15] JA at 0005-0006.
[16] JA at 0006.
[17] JA at 0006-0009.
[18] JA at 0009.

After finding there was no substantial basis to issue the search authorization, and that the military judge abused his discretion by finding otherwise,[19] the lower court evaluated whether the good faith exception contained in MIL. R. EVID. 311(c) applied to evidence otherwise inadmissible under the general exclusionary rule contained in MIL. R. EVID. 311(a).[20]

In determining how to interpret M.R.E. 311(c)(3)(b), which requires "the individual issuing the authorization [have] a substantial basis for determining the existence of probable cause,"[21] the lower court identified "two apparently distinct lines of precedent in [this Court's] case law relevant to determining whether the good faith exception applies." The lower court indicated that one precedent, *Hoffmann*, "applies the plain language of the rule," while the other, *Carter*, "recasts this prong to ask whether the law enforcement official executing the search believed the person issuing the authorization had a substantial basis to find probable cause."[22]

Although one judge, in dissent, indicated he "would find that the government did not establish that the good faith exception applies, even under

[19] JA at 0009.
[20] JA at 0009-0016.
[21] Mil. R. Evid. 311(c)(3)(B); JA at 0028.
[22] JA at 0010.

Carter's more generous test for good faith,"[23] the two judges in the majority "[found] that [their] choice of authorities determin[ed] the outcome of this issue."

The majority found the application of the plain language of the second prong of the good faith exception in M.R.E. 311(c)(3)(B) as this Court did in *Hoffmann* to this case to be 'straightforward."[24] Having found there was not a substantial basis for finding probable cause to authorize the search of appellant's home, the lower court determined "the evidence [did] not qualify for the exception."[25]

Under the second prong as modified by *Carter*, the majority "ask[ed] whether Special Agent JJ reasonably believed that the magistrate had a substantial basis for finding probable cause."[26] The majority found she did,[27] and thus "although the military judge erred by finding that the CO had a substantial basis for his probable cause determination, the evidence in question was nevertheless admissible under the good faith exception."[28] As discussed in the second issue below, Sergeant Perkins disagrees with this conclusion.

C. The lower court reluctantly reached its decision in this case by applying *Carter*. If the lower court applied the precedent it considers to be more legally sound to this case, it would have found in favor of Appellant.

Although they disagreed with regard to the applicability of the good faith

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[23] JA at 0024.
[24] JA at 0011.
[25] JA at 0011.
[26] JA at 0014.
[27] JA at 0014.
[28] JA at 0016.

exception in this case, all three lower court judges joined in respectfully requesting that this Court reexamine *Carter* in favor of following the plain language of MIL. R. EVID. 311(c)(3),[29] and in "respectfully suggest[ing] that [this Court] resolve the tension between *Carter* and *Hoffmann* in favor of *Hoffmann.*"[30] Since the majority indicated that the evidence would not qualify for the exception under *Hoffmann*,[31] and the remaining judge would find the same under *Carter* and *Hoffman*,[32] the clear implication is that the lower court believed this case to be wrongly decided. Appellant agrees and joins in respectfully requesting this Court reexamine *Carter* and require the application the plain language of the rule in this case as it did in *Hoffmann.*

II

THE MILITARY JUDGE ERRED IN DENYING A DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A SEARCH OF APPELLANT'S HOME.

A. If *Hoffman* controls, this Court should find the military judge abused his discretion in denying the defense motion to suppress.

The commander did not have a substantial basis for finding probable cause to authorize the initial search of Appellant's home. If *Hoffmann* controls, by the straightforward application of the plain language of MIL. R. EVID. 311(c)(3) this

[29] JA at 0024.
[30] JA at 0020.
[31] JA at 0011.
[32] JA at 0024.

Court should find that the good faith exception does not apply, and the military judge erred in denying the defense motion to suppress.

B. If *Carter* controls, this Court should find that the circumstances of this case fall within one of the "exceptions to the exception" enumerated in *Leon*.

If this Court determines that *Carter* controls and thus Special Agent JJ should be the focus of the good faith exception analysis, it should reject the lower court's determination that Special Agent JJ reasonably believed that the magistrate had a substantial basis for finding probable cause.

In its opinion in this case the lower court noted:

[This Court explained in *Carter*] that *Leon* listed four circumstances in which the good faith exception was not available to the government:

> (1) False or reckless affidavit – where the magistrate "was misled by information in an affidavit that the affiant know was false or would have known was false except for his reckless disregard for the truth";
>
> (2) Lack of judicial review – where the magistrate "wholly abandoned his judicial role" or was a mere rubber stamp for the police;
>
> (3) Facially deficient affidavit – where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and
>
> (4) Facially deficient warrant – Where the warrant is "so facially deficient – i.e. in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid."[33]

[33] JA at 0012, citing *Carter*, 54 M.J. at 419-420 (citation omitted).

While the fourth enumerated circumstance – facially deficient warrant – does not apply here, each of the other three listed exceptions the good faith exception is fairly implicated in this case.

1. False or reckless affidavit.

This Court could find, as the dissenting judge below did, that "[h]ad Special Agent JJ conveyed the extent to which MI's allegations were uncorroborated, the CO would have been very unlikely to grant the authorization. This would tend to show that Special Agent JJ did not act in good faith when she briefed the CO."[34]

This Court, like the dissenting judge below, should not be "persuaded that the agent did not withhold information that would have allowed the CO to make an independent decision based on the totality of the circumstances."[35] Appellant concurs with the dissenting judge below that "if the agent recklessly provided only selective detail in obtaining the search authorization, this conduct is appropriately deterred by the imposition of the exclusionary rule."[36]

2. Lack of judicial review.

Here, the commander "wholly abandoned his judicial role" and simply rubber-stamped Special Agent JJ's bald assertion that probable cause existed.

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[34] JA at 0025.
[35] *Id.*
[36] *Id.*

As the lower court notes, "the CO's affidavit, prepared for the purpose of supporting his probable cause determination at the motion hearing, contains little more than a recital of the allegation against the appellant and the fact that Special Agent JJ told him that she thought it likely that NCIS would find the nude pictures and videos of MI in the appellant's house."[37]

In evaluating whether the commander abandoned his judicial role, this Court should also consider Special Agent JJ's response to his request for additional facts. As the lower court noted, "she told him that she had consulted the staff judge advocate and the trial counsel and 'explained the residence, where it was located, the impact it could have on the community on Marine Corps Air Station Yuma."[38] This exchange supports a determination that the commander was influenced more by his command responsibilities in his decision to grant the search authorization than he was acting as a neutral and detached magistrate. Accordingly this Court should find that the good faith exception does not apply.

3. Facially deficient affidavit.

Although Special Agent JJ did not prepare an affidavit in support of her application for a search authorization, the statements she made to the commander were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

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[37] JA at 0007.
[38] JA at 0003-0004; R. at 14.

First, it was entirely unreasonable for Special Agent JJ to rely on a rubber-stamped search authorization issued upon the bare-bones information she had provided to the commander.

Second, SA JJ, a trained law enforcement agent, was unreasonably mistaken in her belief that the existence of exigent circumstances was relevant to establishing probable cause to search Sgt Perkins' home. Knowledge of this basic concept falls reasonably within the core skills of any police officer. While exigent circumstances may provide an exception to the requirement to obtain a search authorization, they do not provide a substantial basis for a magistrate to conclude probable cause exists. A simple reading of Military Rule of Evidence 315(g) reveals:

> Evidence obtained from a probable cause search is admissible without a search warrant or search authorization when there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought.

Here, it is unreasonable for SA JJ to believe that the "delay necessary" to obtain a search authorization would cause harm *while she was at that very moment directly requesting a search authorization from a competent authority.* Instead, SA JJ uses the presence of "exigent circumstances" to establish probable cause itself.

At trial, SA JJ testified, "Due to Sergeant Perkins returning from leave and regaining access to his residence, we requested a command authorized search and

seizure under exigent circum [sic] because of the possibility of him destroying evidence."[39] The urgency of the situation or the possibility that evidence could be destroyed does not make it any more or less likely that the evidence, if it existed, was located at Sergeant Perkins' residence.

Accordingly, this Court should find that the good faith exception does not apply.

Conclusion

The Commanding Officer, MCAS Yuma did not have a substantial basis to determine probable cause existed to search Appellant's home. The evidence seized from his home was unlawfully obtained. That evidence, and the evidence derived therefrom, should have been suppressed. The military judge abused his discretion in denying the defense's motion to suppress and this Court should set aside the findings and sentence for Specification 1 of Additional Charge III.

[39] R. at 12.

William L. Geraty
Lieutenant Commander
JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-8502
Fax (202) 685-7426
CAAF Bar No. 36884

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 1, 2018.

William L. Geraty
Lieutenant Commander
JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-8502
Fax (202) 685-7426
CAAF Bar No. 36884

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William L. Geraty
Lieutenant Commander
JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-8502
Fax (202) 685-7426
CAAF Bar No. 36884