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	**APPELLANT'S REPLY BRIEF** Crim. App. Dkt. No. 201700077 USCA Dkt. No. 18-0365/MC

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

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COMES NOW Appellant, Sergeant (Sgt) Calvin E. Perkins, USMC, by and through counsel, and provides the following reply to the government's answer.

A. The military judge abused his discretion in finding that probable cause existed to search Sergeant Perkins' home.

The government asks this Court to review "a probable cause determination through two layers of deference," giving deference first to the convening authority's probable cause determination and then to the military judge's denial of the defense motion to suppress.[1] Further, the government asks this Court to excuse the lack of probable cause in this case by deferring to the "good faith" of the NCIS agent in obtaining and relying on a defective search authorization.[2]

This Court, as did the court below, must "determine whether there is substantial evidence in the record [to] support the magistrate's decision to issue the warrant."[3] While deference must be given to a commander's probable cause determination, the court below correctly noted, "deference to the commander's determination is not boundless, and we may conclude that the commander's

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[1] Appellee's Br. at 22.
[2] *Id.* at 30.
[3] Appellee's Br. at 22, quoting *United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F. 2009).

probable cause determination 'reflected an improper analysis of the totality of the circumstances.'"[4]

Here, Col M improperly analyzed the totality of the circumstances in determining probable cause existed to search Sergeant Perkins' home, and the military judge abused his discretion in finding that Col M had a substantial basis for finding probable cause existed for the following reasons:

1. Special Agent (SA) JJ failed to gather sufficient evidence to establish probable cause to search Sgt Perkins' home. She simply declared that it was likely that evidence might be found in his home;

2. Colonel M failed to independently evaluate the lack of evidence presented to him to support a finding of probable cause to search Sgt Perkins' home and simply rubber-stamped SA JJ's declaration;

3. At trial, the government failed to present substantial evidence sufficient to show the validity of the search authorization. It instead relied on Col M's bare-bones affidavit and on the vague and ambiguous testimony of SA JJ; and

4. The military judge failed to both correctly analyze the evidence presented at trial and apply the law regarding the validity of the search authorization. His summary findings failed to provide a sufficient rationale to show why he did not abuse his discretion in allowing evidence derived from the unlawful search to be introduced at trial.

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[4] *United States v. Perkins*, 78 M.J. 550, 556 (N-M. Ct. Crim. App. 2018), citing *United States v. Rogers,* 67 M.J. 162, 164-165 (C.A.A.F 2009)(citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

1. Urgency, allegation, and speculation do not establish probable cause.

In its answer, the government concludes, "Considering Appellant's impending return to his residence and his continuous threats to M.I. to release illicit material, which M.I. reported could be stored at Appellant's house, the Commanding Officer was entitled to infer that this evidence was located in Appellant's house,"[5] and "he thus had a 'substantial basis' on which to conclude probable cause existed to search Appellant's residence."[6]

First, 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. This Court should reject the government's assertion that any exigent circumstances were somehow relevant to determining whether probable cause existed to search Sergeant Perkins' home. While demonstrably exigent circumstances may dispense with the need to obtain a warrant or authorization before conducting a search, they do not dispense with the need to establish probable cause to permit a search in the first place.

Second, a mere allegation does not automatically establish probable cause that an offense has been committed. Here, as the lower court noted, "the record does not include any evidence addressing MI's veracity or provide any reason for

[5] Appellee's Br. at 30.
[6] *Id.*

the CO to have found MI's account credible."[7] Although the government now asserts that "M.I's direct, in-person and videotaped report to federal law enforcement agents bore indicators of veracity because she could be held accountable for a false report,"[8] there is no evidence that SA JJ informed Col M that MI's statement had been videotaped or that he considered that fact in making his probable cause determination. Nor did the government introduce the video recording of MI's statement at the motion to suppress for the military judge to consider.

Third, establishing probable cause that an offense may have been committed does not automatically establish probable cause that evidence of that offense may be located at a particular location.[9] The protections of the Fourth Amendment, especially with regard to a search of a person's home, require more. "We treat the home as first among equals."[10] As the government concedes, "Probable cause to authorize a search requires a 'sufficient nexus' between the alleged crime and the specific item or place sought to be searched."[11]

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[7] *Perkins* 78 M.J. at 557.
[8] Appellee's Br. at 25.
[9] To be clear, Sgt Perkins does not concede that there was probable cause to search based on suspected extortion.
[10] *Florida v. Jardines*, 569 U.S. 1 (2013).
[11] Appellee's Br. at 26 (citing *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017)).

Here, even if MI's allegations alone were sufficient evidence to establish probable cause that an offense had been committed, when SA JJ requested the search authorization from Col M, she had not gathered evidence sufficient to establish a nexus between that offense and Sgt Perkins' home.

SA JJ had not collected sufficient evidence to establish how or where any pictures or videos – if they existed -- had been produced. According to SA JJ's testimony at trial, MI had only stated that "she recalls Sergeant Perkins using his cell phone while they were having sexual relations."[12] SA JJ, and not MI, testified only that "it's possible that [Sergeant Perkins] was using his cell phone."[13] Even assuming this supposition was sufficient to establish probable cause to search Sergeant Perkins' phone, it would still be insufficient to establish the required nexus to establish probable cause to search his home, because there was no basis to believe the phone was in Sergeant Perkins' home at the time the search authorization was sought by SAJJ. SA JJ and Col M both knew that the command had just recently called Sergeant Perkins on his phone for the purpose of revoking his out-of-state leave requiring his return to Yuma that very night to sign the MPO.[14] It was therefore extremely unlikely that Sergeant Perkins' phone was

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[12] R. at 14.
[13] *Id.*
[14] Appellee's Br. at 4, J.A. at 70, 17.

located in his home at the time SA JJ was seeking to search it. In fact, there was no factual basis to believe the phone was there at all.

The government repeatedly asserts that M.I. had reported "Appellant may have used other electronic devices to record their sexual activity,"[15] The record does not support that assertion. SA JJ testified that MI "did elude [sic] to the potential of him using other devices. She mentioned that he had other devices in his house, electronic devices capable of storing such media."[16] This testimony -- elicited on cross-examination -- does not establish that the electronic devices to which SA JJ was referring were recording devices. SA JJ's testimony makes clear that she was seeking authorization to search for electronic evidence of images that she believed had been created using Appellant's cell phone, as evidenced by the trial counsel's follow-up questioning on redirect examination:

> Q. SA [JJ], you asked for – even though it was – the information you had was that these photos were taken with a cell phone. Why did you ask for the search to broader [sic] than just cell phones?
>
> A. Because cell phones are known to contain media cards capable of storing information and data on them. These media cards can be removed from the cell phone at any time, and they can be stored in a residence anywhere virtually. So the potential that this media, that was stored on the phone, may have been stored separately on a media card required us to have a broad search for anything that was small enough to contain electronic media on it."[17]

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[15] Appellee's Br. at 3, 28, 29.
[16] J.A. at 73.
[17] R. at 16.

The military judge's findings regarding probable cause were limited to storage devices and did not extend to recording devices:

> There was probable cause to believe that evidence of the accused's extortion scheme might be found in his residence; specifically, that there might be evidence that was contained within electronic storage media that was contained within the home.[18]

This Court rejected a magistrate's determination that a substantial basis existed for finding probable cause under a similar set of facts in *United States v. Nieto*. In its answer, the government asserts, "here, unlike *Nieto*, Special Agent JJ provided the authorizing official with a substantial basis on which he could reasonably believe that evidence of criminality would be found in Appellant's house."[19] The government relies solely on SA JJ's thrice-speculative hypothesis – first, the possibility that Sgt Perkins' cell phone had a removable media card; second, that there was a fair probability that he may have transferred any photos or videos to a media card; and third, that there was any reason to believe he would have removed the card from his phone and stored it in his house while he went on leave to San Diego. This Court should conclude, as did the NMCCA, that "the case for probable cause in this case is weaker than the one in *Nieto*,"[20] and that Col M. did not have a substantial basis to issue the search authorization.

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[18] J.A. at 87.
[19] Appellee's Br. at 28.
[20] *Perkins* 78 M.J. at 558

2. **The government failed to present sufficient evidence at trial to support a finding that the Commanding Officer had a substantial basis to issue the search authorization.**

The government's plea for deference in this case is undermined by a woefully inadequate trial record. Here, the lower court cited the lack of record evidence in finding Colonel M did not have a substantial basis to determine the existence of probable cause:

> We acknowledge that the record may not reflect everything that the CO might have been told. But it is the paucity of the record and the absence of evidence supporting the CO's determination and the military judge's ruling that drive our analysis. Completion of the probable cause picture would require speculation, not reasonable inferences. Even if we credit the CO with every reasonable inference he might have drawn from the information the record shows he had, we still find that there was no substantial basis for his probable cause determination. [21]

When the defense makes an appropriate motion to suppress evidence obtained from a search lacking in probable cause, as here, the government was required to present sufficient evidence at trial to establish by a preponderance of the evidence that the search was not unlawful.[22] The evidence on such a motion is "limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer."[23] The government failed to meet that burden in this case. The government chose the mode and manner of evidence presented to attempt to

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[21] *Id.*
[22] Mil. R. Evid. 311(d) (5)(A).
[23] Mil. R. Evid. 311(d)(4)(a).

establish the validity of the search of Sgt Perkins' home but they also chose to neither call MI to testify nor to offer the video recording of her statement to NCIS into evidence.

Instead, the government relied only on SA JJ's testimony describing what "facts" MI related to her during her interview. While SA JJ testified she "explained to [Col M] all the facts we know – we knew about the case,"[24] she conceded that, "I don't remember the exact verbiage I used; however, that was the parameters of what I explained to him."[25] Because the government relied on SA JJ's spotty recollection about what she told Col M, there is no reliable evidence of what "facts" Col M may have considered beyond what is contained in the affidavit the government chose to present in lieu of his in-court testimony:

In its answer, to overcome the deficiencies in SA JJ's testimony and Col M's affidavit, the government repeatedly cites to the NCIS Report of Investigation (J.A. 99-104) and to the affidavits supporting the application for subsequent searches (J.A. 119-137). Since these documents were prepared after SA JJ made her initial request for a search authorization, Col M could not have considered them in making his initial probable cause determination. While these documents may constitute some evidence of the facts that SA JJ knew at the time, they do not

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[24] J.A. at 71.
[25] J.A. at 73.

reveal whether SA JJ specifically briefed those facts to Col M during their phone conversation.

The government chose not to call Col M at trial, instead relying on his one-page affidavit. The affidavit does not illuminate any independent, rational process by which Col M determined there was probable cause for a search. Instead, the affidavit demonstrates he unreasonably and impermissibly relied on the inferences SA JJ had made.[26] The affidavit establishes a textbook case[27] that Col M merely rubber-stamped SA JJ's assertion "that the videos and pictures were likely

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[26] The essential protection of the warrant requirement of the Fourth Amendment…is in 'requiring that [the usual inferences which reasonable men draw from the evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Illinois v. Gates*, 462 U.S. 213, 240 (1983).

[27]*Id.* "Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe" that liquor illegally brought into the United States is located on certain premises will not do. *Nathanson* v. *United States*, 290 U.S. 41 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "[a]ffiants have received reliable information from a credible person and do believe" that heroin is stored in a home, is likewise inadequate. *Aguilar* v. *Texas*, 378 U.S. 108 (1964). As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."

contained inside of Sergeant Perkins' home,"[28] and thus did not have a substantial basis to determine probable cause existed to search Sergeant Perkins' home.

3. The military judge failed to correctly analyze the sufficiency of the evidence offered to support a finding that the Commanding Officer had a substantial basis to issue the search authorization.

The government asserts that this Court should defer to the military judge's ruling in this case.[29] Deference is not warranted. The military judge's conclusory statement "that the search authorization was based upon a valid probable cause,"[30] delivered without any factual findings or legal analysis (written or otherwise), is not entitled to the same deference it would get if he had provided a sufficient explanation for his conclusion.

The military judge offered only the following with regards to his probable cause determination:

> The Court finds the information provided to the special agent was provided by MI on the 30th of September 2015, and subsequently provided to her as well as a Victim Advocate, once again, at a videotaped interview that occurred at the Victim Advocacy Center there in Yuma, Arizona. That information served as the basis for the probable cause for the original verbal search authorization that was granted.[31]

[28] J.A. at 117.
[29] J.A. at 70.
[30] J.A. at 84.
[31] J.A. at 88.

The military judge performed no real analysis of the evidence presented, instead relying on the vague testimonial recollections of SA JJ and on the existence of a videotaped interview that he had never seen, that Col M had never seen, and that was not offered into evidence on the motion to suppress. Likewise, in his ruling, the military judge offered no analysis or explanation regarding how MI's statements established a nexus between the evidence SA JJ was purportedly seeking and Sgt Perkins' residence. The court below correctly concluded that the military judge abused his discretion in finding that there was probable cause to search Sergeant Perkins' home.

4. The Good Faith Exception should not apply.

Fourth Amendment jurisprudence, including the good faith exception, is grounded in an objective standard of reasonableness.[32] The objective standard "requires officers to have a reasonable knowledge of what the law prohibits."[33]

Here, a government law enforcement agent gave a bare-bones version of an allegation of extortion to a commander with the power to issue an authorization to

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[32] *United States v. Leon*, 468 U.S. at 919, n. 20. "We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." (citing *Gates*, 462 U.S. at 261).
[33] *Id.*

search her suspect's home. The agent then told the commander that she needed to hurry up and search her suspect's house because her suspect had been ordered to return from San Diego back to Yuma and could possibly destroy evidence that the law enforcement agent speculated might be in the suspect's home. When the commander asked for additional information, the law enforcement agent told him she had consulted with two prosecutors and the commander's staff judge advocate about the need to issue a search authorization "to prevent the possible loss and/or destruction of evidence."[34] After she explained the "impact it could have on the community on Marine Corps Air Station Yuma" to the commander, he "agreed to issue a verbal command authorized search and seizure under exigent circumstances."[35]

As presented in Appellants brief, as SA JJ's actions were objectively unreasonable in this case, the good faith exception should not apply – under M.R.E. 311(c)(3), under *Carter*, or under a straightforward reading of the exceptions to the good faith rule enumerated in *Leon*. The government acknowledges, "Officials lack objective good faith when they 'know that the magistrate merely rubber stamped their request.'"[36]

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[34] J.A. at 99.
[35] J.A. at 73.
[36] Appellee's Br. At 37.

The government contends "Special Agent JJ had an objectively reasonable belief that the Commanding Officer had a substantial basis for determining probable cause." To support this position, the government leans heavily on SA JJ's consultation with three judge advocates who "[a]ll agreed that a search authorization could be issued to search for evidence of extortion in Appellant's house."[37]

Here, again, the evidence (or lack thereof) contained in the record does not support this summary conclusion. Since the government did not call any of the three judge advocates to testify, we must rely on SA JJ's recollection of the consultation, and what she told Col M about it. Perhaps that is just as well, as the critical inquiry is not what advice the three judge advocates actually gave her, but what SA JJ *believed* they had told her and whether that belief was objectively reasonable.

In her Report of Investigative Action prepared on October 2, 2015, SA JJ described her interaction with the three judge advocates:

> Due to the strong likelihood S/PERKINS would destroy electronic evidence pertaining to his extortion of V/ upon returning home, a verbal Command Authorization for Search and Seizure (CASS) was considered. RA consulted with Capt. AA (Trial Counsel, MCAS Yuma), Maj EC (Senior Trial Counsel, 3d MAW, Miramar) and Maj GF (SJA, MCAS Yuma) who agreed to the issuance of a verbal CASS *under* ***exigent circumstances in order to prevent the destruction of potential evidence.*** On 1 Oct 15, RA contacted [Colonel M.], and

[37] Appellee's Br. At 35.

> explained the exigency requiring a verbal CASS be issued authorizing the search of S/PERKINS' on-base residence to prevent the possible loss and/or destruction of evidence.[38]

There is no evidence in the record that SA JJ discussed the sufficiency of the evidence she had gathered in establishing sufficient basis for Col M to determine probable cause. At best, this document establishes that SA JJ discussed the exigent circumstances with the three judge advocates and that they agreed a verbal CASS should be issued because of those exigent circumstances. At worst, the document indicates that three judge advocates shared a stunning subjective misunderstanding of the proper basis for a commander to authorize a search.

This document can also reasonably be read to suggest that, rather than believing the search was based on her developing sufficient evidence to establish probable cause to search Sergeant Perkins' home, SA JJ believed that she could obtain a search authorization merely because it was possible that if any evidence existed inside Sergeant Perkins' home, it could be destroyed when he returned home later that night. This interpretation becomes more likely in light of SA JJ's repeated references to "exigent circumstances" and the possibility that Sergeant Perkins' would destroy evidence:

> "Due to Sergeant Perkins returning from leave and regaining access to his residence, we requested a command authorized search and seizure

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[38] J.A. at 99 (emphasis added).

> under exigent circum[stances] because of the possibility of him destroying evidence."[39]
>
> "[A]nd the potential of him destroying electronic evidence, due to him knowing there was an MPO and that there was a potential investigation initiated as a result of that."[40]
>
> "After explaining everything, Colonel M. agreed to issue a verbal command authorized search and seizure under exigent circumstances."[41]

Under M.R.E. 311(d)(5)(a), the government bears the burden of establishing the applicability of the good faith exception by a preponderance of the evidence. Here, the government cannot meet its burden to establish what SA JJ believed, much less whether her belief was objectively reasonable. Her reliance on a rubber-stamped search authorization she believed was based more on exigent circumstances than on probable cause was objectively unreasonable and prevents the government from seeking shelter under the good faith exception from the consequences of an unlawful search of a Marine's on-base home.

B. This Court should reconsider Carter.

Although Appellant believes that, under the specific facts of his case, the good faith exception would not apply under either a plain reading of M.R.E. 311(c)

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[39] J.A. at 71.
[40] J.A. at 73.
[41] *Id.*

or under this Court's holding in *Carter,* this Court should nonetheless reconsider *Carter* in favor of the plain reading of M.R.E. 311(c) applied in *Hoffmann*.

1. **The issues raised by the facts of this case overcome *Stare Decisis***

The government asserts that "Stare decisis compels this Court to uphold its decision in *United States v. Carter.*"[42] In analyzing precedent under *stare decisis*, this Court considers four factors: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of service members; and (4) the risk of undermining public confidence in the law.[43] In *Andrews*, this Court required a "special justification, not just an argument that the precedent was wrongly decided," to overturn.[44]

This case offers sufficient special justification to overturn a poorly-reasoned precedent in favor of a plain-language reading of MRE 311 to reduce future unlawful searches by requiring that probable cause determinations be made with a substantial basis and by encouraging those determinations be made by the most neutral and detached authorizing official practicable.

2. **The NMCCA opinion provides a useful framework to analyze whether Carter should be overturned in favor a plain language reading of MRE 311.**

The court below succinctly framed its rationale for respectfully requesting this Court reconsider *Carter:*

> In our view, *Carter* represents an unwarranted departure from the rule's plain language. We also believe *Carter* misapprehends the Drafters'

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[42] Appellee's Br. at 9.
[43] *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F 2018).
[44] *Id*.

> Analysis and ignores the case law the drafters relied on when they adapted the good faith exception to military practice.[45]

After an exhaustive analysis of the relative merits of the plain language reading this Court applied in *Hoffmann* and the *Carter* court's recasting of the rule's second prong, the NMCCA concluded:

> We find the plain language of the rule to be consistent with the Drafters' Analysis. The good faith rule is based on *Leon* but tweaked to account for the differences between commanders, who have substantial law enforcement responsibilities, and *Leon*'s neutral and detached magistrates. These differences had already been recognized by the Court of Military Appeals and were taken into account by the rule's drafters. The differences are reflected in the second prong of the good faith test, which asks if there was even a substantial basis supporting the authorizing officer's erroneous probable cause determination. If there was not, the exception does not apply. None of this requires *Carter*'s drastic re-interpretation of the rule's plain language.[46]

3. *Carter's* unwarranted departure from the rule's plain language is poorly-reasoned.

In its answer, the government correctly notes, "[p]rinciples of statutory construction have been used to construe the Military Rules of Evidence.[47] This Court "interprets words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the

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[45] *Perkins* 78 M.J. at 562.
[46] *Id*. At 565.
[47] *United States v. Matthews*, 68 M.J. 28, 36 (C.A.A.F. 2009).

broader statutory context."[48] As the lower court indicated, "[its] understanding of M.R.E. 311(c)(3) starts with the rule's text."

In its opinion, the NMCCA analyzed *Carter's* reconciliation of M.R.E. 311(c)(3) with *Leon*. As the NMCCA indicated, the difference between the two, "could not be elegantly harmonized. To make it work, the *Carter* court recast the rule's second prong."[49]

The *Carter* court's "harmonization" required it to depart from the text of the rule in three important ways. First, *Carter* reads language into the rule that simply isn't there. M.R.E. 311(c)(3) does not read, "*If the police officer requesting the search authorization reasonably believed* the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause." Second, *Carter* ignores the drafter's use of different subjects for each of the clauses in the Rule. The subject of the clause in M.R.E. 311(c)(3)(B) is "the individual issuing the authorization" while the subject of the clause in M.R.E. 311(c)(3)(C) is "the officials seeking and executing the authorization." Third, the rule does not use the word "or" between M.R.E. (c)(3)(B) and (C). Thus, for the good faith exception contained in M.R.E. 311(c) to apply, all three prongs must be satisfied.

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[48] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).
[49] *Perkins* 78 M.J. at 560.

In its answer, the government asserts, "Appellant's case demonstrates that *Carter's* rationale is both workable and appropriate."[50] To support this notion, the government offers only that, "the Court of Criminal Appeals' application of *Carter* was brief and straightforward – amounting to three paragraphs – which illustrates the easily applicable nature of *Carter.*"[51] If brevity is the standard by which workability should be judged, the NMCCA needed only a single sentence to apply the plain language of the rule:

> The relevant language of the rule is clear: the good faith exception applies if "the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause[.]"[52]

4. The two "intervening events" cited by the government support the plain-language reading of MRE 311.

The government first misapprehends this Court's decision in *Hoffmann*, claiming "*Hoffmann* is not a good faith exception case." Although this Court did state in *H[53]offmann*, "the military good-faith exception need not detain us in this case," the government ignores this Court's succinct resolution of the issue, "the individual issuing the authorization did not have a substantial basis for determining the existence of probable cause, a requirement for application of the good-faith exception. Thus, the military judge abused her discretion in admitting the fruits of

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[50] Appellee's Br. At 16.
[51] Appellee's Br. at 16.
[52] *Perkins* 78 M.J. at 563, (citing MIL. R. EVID. 311(c)(3)(B)).
[53] *Hoffmann,* 75 M.J. 120, 128 (C.A.A.F.2016).

Appellant's digital media." This intervening event favors the application of the plain language of M.R.E. 311(c).

The second "intervening event" the government cites to support its position in support of *Carter* is the incorporation of two amendments to M.R.E. 311, incorporating the Supreme Court's holdings in *Herring v. United States*[54] and *Illinois v. Krull.*[55] The government, as it does in this case, ignores that the Drafters did not adopt the holding in *Herring* verbatim, but instead adapted it for application in the military justice system. The text of M.R.E. 311(a)(3) does not "focus deterrence on law enforcement behavior,"[56] but more broadly to where the "exclusion of the evidence results in appreciable deterrence of *future unlawful searches."*[57] The incorporation of *Krull* is inapposite in this case, as it addresses cases where the person seeking the evidence acts in objectively reasonable reliance on a statute later held violative of the Fourth Amendment.

5. Service members have a reasonable expectation that civilian Fourth Amendment jurisprudence will be appropriately adapted to military practice.

While citing the drafter's analysis of M.R.E. 311(c)(3) to explain that the rule "was added…to incorporate the 'good faith' exception to the exclusionary rule

[54] *Herring v. United States*, 555 U.S. 135 (2009).
[55] *Illinois v. Krull*, 480 U.S. 349 (1987).
[56] Appellee's Br. At 19.
[57] M.R.E. 311(a)(3).

based on [Leon and Sheppard],"[58] the government's answer does not address the impact of the structural differences between the civilian and military systems on the drafting, implementation, and interpretation of the Military Rules of Evidence. Cases decided in civilian courts must be adapted to the military system, usually through codification in the Military Rules of Evidence or Rules for Courts-Martial. Here, again, the NMCCA's opinion provides a useful framework for addressing this issue:

> "[Rule 311(c)(3)] was added in 1986 to incorporate the 'good faith' exception to the exclusionary rule based on *United States v. Leon* . . . and *Massachusetts v. Sheppard* . . . [.]"[59] The good faith exception is a judicial creation, and *Leon* is the case that created it. (*Sheppard*, decided the same day as *Leon*, does not add substantially to the doctrine announced in *Leon*).[60] It is reasonable to accept that any subsequent codification of the exception—even one that differs from *Leon* in some particular—is *based* on *Leon*. We think it is fair to say that the plain-language understanding of the rule endorsed by the CAAF in *Hoffmann* is based on—though not identical to—*Leon*. [61](Perkins at *19).

The government's answer fails to address the challenges of applying the Supreme Court's judicially-created rules to the uniquely different structure of the military justice system. In the civilian justice system, the Fourth Amendment's reasonableness requirement operates in a binary system consisting of law enforcement officers charged with securing evidence leading to criminal

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[58] Appellee's Br. At 8.
[59] MCM, App. 22, at A22-20.
[60] *See generally Mass. v. Sheppard*, 468 U.S. 981 (1984).
[61] *Perkins,* 78 M.J. at 564.

convictions and judicial officers charged with ensuring that a suspect's due process rights are respected.

A military commander is by virtue of his or her office necessarily interested in both the outcome and the process of a military justice matter. The unique demands of the military justice system, which exists to "strengthen the national security of the United States,"[62] require that military commanders have the power to issue search authorizations. This is especially true when considering that the Uniform Code of Military Justice must operate across the globe, in times of peace and in times of conflict. The ebb and flow of a battlespace may very well determine where and when a commander "has control over the place where the property or person to be searched is situated or found."[63]

The rules pertaining to "exclusionary rules, and related matters concerning self-incrimination, search and seizure, and eyewitness identification" are contained in Part III of the Military Rules of Evidence and are without analogue in the Federal Rules of Evidence. These specifically enumerated military rules of evidence are necessary to adapt the judicially-created rules developed in a binary civilian system -- consisting only of judicial officers and police – where

[62] Manual for Courts-Martial (2016) Part I, para. 3, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the security of the United States."
[63] Mil. Rule. Evid. 315(d)(1).

participants have clearly different interests, to a ternary system that includes a commander who shares characteristics and interests common to both magistrates and law enforcement officials.

Service members rely on the drafters of the Military Rules of Evidence and on this Court's decisions interpreting them to focus civilian Fourth Amendment jurisprudence through the lens of the military rules to fairly resolve issues of neutrality, detachment, deference, and deterrence within the military justice system.

6. Public confidence in the law will be enhanced by requiring a commander to demonstrate neutrality and detachment when determining whether a substantial basis for probable cause to search exists.

The government's mechanical application of *Leon* to the military justice system fails to take into account what members of the public know, and what the drafters incorporated into M.R.E. 315 and 311: that a commander is not equivalent to a judge or a magistrate, thus a commander's probable cause determination should be subjected to a different analysis than that of a judge or magistrate.

Here, again, the NMCCA opinion regarding M.R.E. 311(c) is helpful:

> [A] closer look at the Drafters' Analysis reveals the drafters' rationale for the rule as it is written. The analysis begins by stating that *Leon*'s determination "that the deterrence basis of the exclusionary rule does not apply to magistrates extends with equal force to search or seizure authorizations issued by commanders *who are neutral and detached* . . ." But not all commanders are neutral and detached. The analysis, and the case law it cites, correctly notes that commanders "cannot be

> equated constitutionally to magistrates. As a result, commanders' authorizations may be *closely scrutinized* for evidence of neutrality in deciding whether this exception will apply."[64]

The NMCCA'a opinon also provides a rationale supporting a special justification for this court to reconsider *Carter* to require that commanders have a substantial basis for determining probable cause before authorizing a search and as a necessary precondition for the application of the good faith exception.

> In *United States v. Stuckey*,[65] one of the cases the drafters rely on for this proposition, the Court of Military Appeals drew the magistrate-commander distinction even more sharply: commanders are not similarly situated with *Leon*'s neutral magistrates, uninvolved in "the often competitive enterprise of ferreting out crime."[66] Rather, "[a] military commander has responsibilities for investigation and for law enforcement that a magistrate does not possess."[67] Therefore, "the likelihood that a search and seizure will withstand subsequent attack in court is—and should be—greater when a judicial officer trained in the law has made the determination of probable cause than when a commander does so."[68]

Returning to a plain language reading of M.R.E. 311(c) and its drafter's intent in treating a commander's determination with less deference has the benefit of encouraging law enforcement agents seeking search in the first instance the authorizing official that would get the most deference for these important determinations, a judicial officer or magistrate.

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[64] *Perkins* 78 M.J. at 564. (internal citations omitted).
[65] *United States v. Stuckey,* 10 M.J. 347 (C.M.A. 1981).
[66] *Leon*, 468 U.S. at 914.
[67] *Stuckey*, 10 M.J. at 359.
[68] *Id*. at 365.

This formulation does not prevent a commander from issuing a search authorization, rather, it merely suggests that a probable cause determination made by a more detached military judge or magistrate will be more likely to withstand judicial scrutiny at trial and on appeal and thus encourages a commander to, where practicable, to utilize a military judge or magistrate. This Supreme Court applied a similar logic and application in *Ornelas v. United States*[69] to encourage police officers to seek warrants rather than conduct warrantless searches. Commanders would be encouraged to defer and refer these legally based determinations to a military judge or magistrate for a decision, where practicable, because of the greater degree of deference that would be afforded to those probable cause determinations made by military judges or magistrates who, unlike the Commander, can be treated more fully as neutral and detached judicial officers with no law enforcement or command responsibilities to interfere with their decision making.

This Court can apply the plain language of M.R.E. 311(c) instead of the-reformulation of *Carter* without impeding or disturbing the necessary ultimate

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[69] *Ornelas v. United States,* 517 U.S. 690, 699 (1996) "The Fourth Amendment demonstrates a "strong preference for searches conducted pursuant to a warrant," and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive. "

authority of a Commander to authorize a search when otherwise necessary. The option of deferring search authorization decisions to the authority with the greatest neutrality and detachment must, of necessity, give way to instances of exigent circumstances, or battlefield conditions, or when access to a military judge or magistrate is not practicable. When appropriate, however, there is no reason the rule cannot be read so as to encourage a Commander to consider whether there is a more appropriate, neutral and detached authority to issue the search authorization under a particular set of circumstances.

Conclusion

For the reasons stated above and raised in Appellant's brief, since Col M did not have a substantial basis for determining the existence of probable cause, the good faith exception does not apply in this case. This Court should set aside the findings in this case.

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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 December 27, 2018.

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Certificate of Compliance

This reply brief complies with the type-volume limitations of Rule 21(b) because it does not exceed 7,000 words and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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