IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201700077
Calvin E. PERKINS, Jr. Sergeant (E-5) U.S. Marine Corps Appellant	)	USCA Dkt. No. 18-0365/MC

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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 [MIL. R. EVID.] 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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad conduct discharge. This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of conspiracy to commit larceny

and violation of a lawful general order, in violation of Articles 81 and 92, UCMJ, 10 U.S.C. §§ 881 and 892 (2012). The Members sentenced Appellant to reduction to pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. The United States charged Appellant with conspiracy to commit larceny.

The United States charged Appellant with, *inter alia*, one Specification of conspiracy to commit larceny, alleging Appellant conspired to commit larceny of property belonging to the United States Government. (J.A. 41-51.)

B. Appellant moved to suppress evidence from a search of his house. The lead investigator testified she obtained a search authorization for Appellant's house after receiving a report that Appellant was extorting M.I. The agents searched and found stolen military property.

Before trial, Appellant moved to suppress evidence seized during searches of his on-base house as part of a Naval Criminal Investigative Service investigation. (J.A. 95-110.) The United States opposed. (J.A. 111-37.)

At the suppression hearing, the United States called Special Agent J.J. of the Naval Criminal Investigative Service, the lead investigator in Appellant's case, to testify to the facts supporting the probable cause determination. (J.A. 69.) She testified to the following facts. (J.A. 69-84.)

1. In a videotaped interview with Special Agent J.J., M.I. said Appellant had and was threatening to release nude videos and photographs of her taken without her consent. She said devices in Appellant's home could store this digital material.

M.I. called the Naval Criminal Investigative Service duty phone and reported that Appellant was extorting her by threatening to release nude videos and photographs of her that he took without her consent. (J.A. 76.) The next day, Special Agent J.J. videotaped an interview of M.I. to discuss the alleged extortion.[1] (J.A. 76.)

During the interview, M.I. disclosed her extramarital affair with Appellant earlier in the year. (J.A. 103.) Though M.I never saw Appellant take videos or photographs of her while they had sex, she recalled Appellant used his cell phone at least once while they engaged in sexual activity. (J.A. 72-73, 103.) She also reported Appellant may have used other electronic devices to record their sexual activities, and Appellant had electronic devices in his house capable of storing digital videos and photographs. (J.A. 73.)

M.I. reported that Appellant stalked her on numerous occasions previously, drove by her residential development, verbally threatened her, and—in the past—threatened to release nude videos and photographs he took of her while the two

[1] The United States presented M.I.'s videotaped interview at the Article 32, UCMJ, hearing. During trial, no party attached M.I.'s videotaped interview to any Motion, and it was never presented to the Military Judge.

engaged in consensual sexual intercourse. (J.A. 103.) Responding to Appellant's threats and demands, M.I. bought Appellant a television, an $1,100.00 gun safe, and a year-long storage unit rental, and gave him some of her furniture. (J.A. 70-76, 103.) M.I. also said that Appellant threatened she would "face consequences" if she reported him to the authorities. (J.A. 103.)

She reported Appellant was threatening to release the nude videos and photographs of her, unless she complied with his demands. (J.A. 70-76.)

Appellant made no threats in writing because "he did not want a paper trail." (J.A. 72.)

2. Appellant's command instructed him to return from leave to sign a Military Protective Order. Special Agent J.J. consulted with three judge advocates on how to proceed.

Following the interview, M.I. contacted Appellant's command to request a Military Protective Order. (J.A. 70, 99.) At the time, Appellant was on leave in California. (J.A. 109.) Appellant's command issued the Military Protective Order, called Appellant's phone, and during the phone call told him to return to base to sign the order. (J.A. 70-71, 99.) The command later called the Naval Criminal Investigative Service to notify them that they were issuing a Military Protective Order. (J.A. 70-71.)

That afternoon, M.I. told Special Agent J.J. that Appellant called her and indicated he was aware she reported him to law enforcement. (J.A. 120.)

When Special Agent J.J. learned Appellant was returning to base that night, to determine how to proceed she consulted with: (1) the local trial counsel; (2) the remotely-located Senior Trial Counsel; and, (3) the base commander's Staff Judge Advocate. (J.A. 73, 99, 120.) All three judge advocates "agreed with the issuance of a verbal [Command Authorization for Search and Seizure] under exigent circumstances in order to prevent the destruction of potential evidence" of extortion located in Appellant's house. (J.A. 73, 99, 120.)

3. The base Commanding Officer issued a verbal search authorization for agents to search Appellant's house for evidence of extortion.

Special Agent J.J. called the base Commanding Officer to request authorization to search Appellant's house before Appellant returned to base. (J.A. 73.) She told the Commanding Officer: (1) each of the facts that M.I. had reported during her interview (J.A. 73, *supra* at section B.1); (2) that Appellant knew there was a Military Protective Order regarding M.I.; (3) that Appellant was likely aware an investigation was underway because of the Military Protective Order; (4) that Appellant was returning to base that evening; (5) that the photographs and videos of M.I. were likely inside Appellant's house; (6) that Appellant might destroy electronic evidence; and (7) "all the known facts to [the Naval Criminal Investigative Service], all the reports that [M.I.] had made to us during her interview." (J.A. 73, 117.)

Before authorizing the search, the Commanding Officer requested more information. (J.A. 73-74.) In response, Special Agent J.J.: explained that she had consulted the local trial counsel and his Staff Judge Advocate; detailed the location of Appellant's house; and described the impact that the extortion could have on the local community. (J.A. 73-74.)

The Commanding Officer then determined probable cause existed to search Appellant's house. (J.A. 117.) He issued a verbal search authorization to search "[Appellant's] home located at [Appellant's address] for all electronic devices and media storage containers capable of containing videos, photographs, and other electronic evidence." (J.A. 117.)

4. <u>During a protective sweep before the search, law enforcement agents found evidence of other crimes in Appellant's garage</u>.

Agents searched Appellant's home while Appellant was returning from leave. (J.A. 71.) During a protective sweep of the house, agents entered Appellant's detached garage and saw a light anti-tank weapon (AT4) tube. (J.A. 101.) They also observed a large amount of other military gear in Appellant's garage. (J.A. 71.) Special Agent J.J. then stopped the search, called the Commanding Officer, and requested and obtained an expanded search authorization to search for stolen military property. (J.A. 77-78, 101, 117.)

Agents ultimately uncovered a large amount of stolen military property from Appellant's garage, including ammunition belonging to the United States Government. (J.A. 104-06, 138-41.)

C. The Military Judge found that the search authorization was supported by probable cause, and denied the Motion to Suppress.

Relying on Mil. R. Evid. 315, the Military Judge denied Appellant's Motion to Suppress. (J.A. 87-88.) The Military Judge found that: (1) the search of Appellant's home was based on valid probable cause; (2) there was probable cause to believe that evidence of Appellant's extortion might be found within electronic storage media in Appellant's home; (3) the Commanding Officer provided Special Agent J.J. a verbal search authorization to search and seize evidence of extortion in Appellant's home; (4) M.I. provided to Special Agent J.J. the information forming the basis for the probable cause determination; (5) the agents stopped their search and requested—and obtained—an additional search authorization to search for stolen government property; and (6) the search was conducted in accordance with Mil. R. Evid. 315. (J.A. 87-88.)

D. Evidence seized during the search of Appellant's home formed the basis for the conspiracy to commit larceny charge.

Ammunition seized from Appellant's home formed the basis for the charge of conspiracy to commit larceny. (J.A. 49, 89-93, 138-41.) The Members convicted Appellant of that charge. (J.A. 52-55.)

Argument

I.

STARE DECISIS COMPELS THIS COURT TO UPHOLD ITS DECISION IN *UNITED STATES v. CARTER*, 54 M.J. 414 (C.A.A.F. 2001). THE *CARTER* HOLDING IS NEITHER UNWORKABLE NOR POORLY REASONED—IT AVOIDS NULLIFYING THE GOOD FAITH EXCEPTION, AND APPROPRIATELY APPLIES SUPREME COURT PRECEDENT. NO "SPECIAL JUSTIFICATION" EXISTS TO OVERTURN *CARTER*.

Following the announcement of the good faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the President promulgated the good faith exception in the Military Rules of Evidence. *See* Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 19, 1986); Mil. R. Evid. 311(c)(3). That rule "was added . . . to incorporate the 'good faith' exception to the exclusionary rule based on [*Leon* and *Sheppard*]." Drafters' Analysis of Mil. R. Evid. 311(c)(3), Manual for Courts-Martial, United States, at A22-18 (2012 ed.). It remains unchanged to this day.

The good faith exception codified at Mil. R. Evid. 311(c)(3) provides that:

> Evidence that was obtained as a result of an unlawful search or seizure may be used if:
>
> (A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

Mil. R. Evid. 311(c)(3).

In *United States v. Carter*, this Court held that the good faith exception could be satisfied—and evidence found in an unlawful search admissible—even if an individual issuing a search authorization lacked a "substantial basis" for determining probable cause. 54 M.J. 414, 422 (C.A.A.F. 2001). Interpreting Mil. R. Evid. 311(c)(3),[2] this Court noted a conflict. The Court's "duty" when reviewing probable cause determinations—under *Illinois v. Gates*, 462 U.S. 213 (1983), and this Court's prior precedent—was "to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.* at 418-19 (citing *Gates*, 462 U.S. at 238-39 (internal citation and quotations omitted)). If the magistrate lacked that "substantial basis" for determining probable cause, the search was generally unlawful and evidence derived therefrom inadmissible—unless an exception applied. *See* Mil. R. Evid 311(a).

[2] For simplicity, the United States refers to the current location of the good faith exception throughout this Answer. *See* Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 21, 2013).

Under the plain language of the codified good faith exception, evidence from that unlawful search could nonetheless be admitted—but only if "the individual issuing the authorization . . . had a substantial basis for determining the existence of probable cause." *Id.* at 421. This created an inherent conflict: to ask whether the good faith exception was applicable in a given case, a reviewing court would necessarily have already determined that the authorizing official lacked a "substantial basis" to determine probable cause. *Id.* The plain language of Mil. R. Evid. 311(c)(3)(B) therefore read out the rule.

To resolve this conflict, *Carter* looked to Supreme Court precedent and the Drafter's Analysis for the Military Rules of Evidence. *Id.* at 420-21. This Court then "conclude[d] that the phrase 'substantial basis' has different meanings, depending on the issue involved." *Id.* at 422. Otherwise, "the good-faith exception would not be an exception at all, and the language [in Mil. R. Evid. 311(c)(3)] would serve no purpose." *Id.* at 421.

To determine whether there was underlying probable cause under Mil. R. Evid. 315 and *Gates*, this Court in *Carter* held that "'substantial basis' . . . examines the information supporting the request for a search authorization through the eyes of a judge evaluating the magistrate's decision." *Id.* at 422. When evaluated with the context of the good faith exception to the exclusionary rule, however, "'substantial basis' as an element of good faith examines the affidavit

and search authorization through the eyes of a reasonable law enforcement official executing the search authorization." *Id.* This Court then held that the good faith exception applied in *Carter*, because the agents executing the search had an objectively reasonable belief that the issuing magistrate had a "substantial basis" for concluding there was probable cause. *Id.*

A. *Stare decisis* compels reaffirming *Carter*.

This Court applies *stare decisis* and is chary about overruling precedent. *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015). *Stare decisis* is "a principle of decision-making, under which a court follows earlier judicial decisions when the same issue arises in other cases." *United States v. Dinger*, 77 M.J. 447, 452 (C.A.A.F. 2018). Adhering to precedent is "the preferred course" because it promotes predictability and consistency in developing legal principles. *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The doctrine is "most compelling" when undertaking statutory construction. *Quick*, 74 M.J. at 335 (internal quotations omitted).

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 servicemembers; and (4) the risk of undermining public confidence in the law. *United States v. Andrews*, 77 M.J. at 393, 399 (C.A.A.F. 2018). Even where these factors weigh in favor of

overturning precedent, this Court still requires "special justification, not just an argument that the precedent was wrongly decided," to overturn. *Id.* (internal citations and quotations omitted).

1. *Carter* is neither unworkable nor poorly reasoned.

a. *Carter* resolves an otherwise absurd result: nullification of the good faith exception.

Principles of statutory construction have been used to construe the Military Rules of Evidence. *United States v. Matthews*, 68 M.J. 29, 36 (C.A.A.F. 2009). The "plain language" of a rule usually controls its application—unless it "leads to an absurd result." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (citations omitted).

When resolving Fourth Amendment search and seizure issues specifically, this Court relies on "a number of principles" from: (1) the Manual for Courts-Martial; (2) this Court's precedent; and, (3) United States Supreme Court precedent. *United States v. Eppes*, 77 M.J. 339, 345 (C.A.A.F. 2018).

i. This Court has used the "substantial basis" test to review probable cause determinations for over fifty years.

This Court's "duty" when reviewing probable cause determinations "is to make sure that the authorizing official had a 'substantial basis' for concluding that probable cause existed." *United States v. Hoffmann*, 75 M.J. 120, 125 (C.A.A.F. 2016) (citing *United States v. Huntzinger*, 69 M.J. 1, 7 (C.A.A.F. 2010)).

This legal standard for reviewing probable cause determinations is well established—this Court has applied it for over fifty years. *United States v. Figueroa*, 35 M.J. 54, 56 n.2 (C.M.A. 1992) (citing *United States v. Penman*, 36 C.M.R. 223, 229 (1966)); *see also Eppes*, 77 M.J. at 345. Further, three years before the President codified the good faith exception, the Supreme Court reaffirmed that "the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Gates*, 462 U.S. at 236-39 (internal citation and quotations omitted).

ii. *Carter* identified, and appropriately resolved, the resulting absurdity created by a literal interpretation of Mil. R. Evid. 311(c)(3)(B).

A literal reading of Military Rule of Evidence 311(c)(3) nullifies the codified good faith exception. *Carter*, 54 M.J. at 421. To rely on the good faith exception to the exclusionary rule, a court reviewing a probable cause determination would necessarily have already determined that the issuing official lacked a "substantial basis" to determine probable cause, based on this Court's long-standing precedent. *Id.* Thus, the requirements in Mil. R. Evid. 311(c)(3) could never be satisfied, and the good faith exception would effectively be abolished in military practice. *Id*. This is an absurd result and contrary to the President's intent to codify the good faith exception to the exclusionary rule based on *Leon*. *See* Drafters' Analysis of Mil. R. Evid. 311(c)(3).

The *Carter* decision explicitly resolves this absurdity. It also interprets the good faith exception in a workable manner. *Carter* is an implicit recognition that the President neither: (1) created a good faith exception with no effect; nor (2) ***sub silentio*** overruled a legal standard for reviewing probable cause determinations that this Court has used since 1966, and that the Supreme Court declared was the "duty" for reviewing courts to apply. *See Gates*, 462 U.S. at 236-30; *Leon*, 468 U.S. at 915; *Figueroa*, 35 M.J. at 56 n.2. Rather than poor reasoning, *Carter* illustrates a workable approach to resolve an otherwise absurd result.

b. *Carter*'s interpretation respects the purpose of the exclusionary rule and good faith exception.

The good faith exception exists because, "where the [police] officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way." *Leon*, 468 U.S. at 919-20. The exception "specifically applies regardless whether the search authorization is by a judge, a magistrate, or a commander." *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992); *see also* Drafters' Analysis of Mil. R. Evid. 311(c)(3), Manual for Courts-Martial, United States, at A22-18 (2012 ed.) (noting "[t]he exception applies to search warrants and authorizations to search or seize issued by competent civilian authority, military judges, military magistrates, and commanders").

The exclusionary rule's "sole purpose . . . is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37 (2011). It was "adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Massachusetts v. Shepard*, 468 U.S. 981, 990 (1984) (internal quotations omitted); *see also Davis* 564 U.S. at 238-39 (stating that "punishing the errors of judges is not the office of the exclusionary rule") (internal quotations and citations omitted). The rule is "drastic and socially costly," and "should only be applied where needed to deter police from violations of constitutional and statutory protections." *Eppes*, 77 M.J. at 349 (internal citation omitted). Exclusion requires "police conduct [to] be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144 (2009).

This Court's analysis and holding in *Carter*—focusing on the "objectively reasonable belief[s]" of law enforcement officials executing a search—reflect the purposes of both exclusion and the good faith exception. *See Carter*, 54 M.J. at 422. *Carter*'s interpretation of Mil. R. Evid. 311(c)(3) excludes evidence where law enforcement cannot reasonably believe that they are complying with the Fourth Amendment. But *Carter* does not apply the "drastic and socially costly" exclusionary rule to evidence obtained by law enforcement officials who

reasonably believe they have complied with the Fourth Amendment. This comports with the purpose of the exclusionary rule, and applies exclusion of evidence where law enforcement conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *See Herring*, 555 U.S. at 144.

Far from being "unworkable or poorly reasoned," *Carter*'s analysis of the codified good faith exception respects the purpose for which the rules exist.

c. Appellant's case demonstrates that *Carter*'s rationale is both workable and appropriate.

Though the Navy-Marine Corps Court of Criminal Appeals expressed its preference for *Hoffmann*'s plain language reading of Mil. R. Evid. 311(c)(3)(B), discussed *infra* at section I.2.a, it did not find *Carter* to be unworkable. *See United States v. Perkins*, 78 M.J. 550, 559-65 (N-M. Ct. Crim. App. 2018). To the contrary, the Court of Criminal Appeals' application of *Carter* was brief and straightforward—amounting to three paragraphs—which illustrates the easily applicable nature of *Carter*. *Id.* at 561.

Further, Appellant's case demonstrates why *Carter* was correctly decided. Following her interview of M.I. and reports that Appellant was aware of law enforcement's involvement, Special Agent J.J. consulted with three different judge advocates to determine how to proceed in her investigation. (J.A. 73, 99, 120.) Those judge advocates agreed with the issuance of a search authorization. (J.A.

73, 99, 120.) Special Agent J.J. then presented the same information to an authorizing official, who issued that search authorization. (J.A. 73-74, 117.) Then, when Special Agent J.J. encountered evidence not explicitly covered in the verbal search authorization, she stopped the search, called the authorizing official, and requested and obtained an expanded search authorization. (J.A. 71, 101, 117.)

Special Agent J.J.'s conduct was objectively reasonable, as was her belief that the authorizing official had a substantial basis to determine probable cause. Recognizing that this objectively reasonable conduct cannot be deterred, *Carter* would not apply the "drastic and socially costly" exclusionary rule here. This comports with the general understanding of the good faith exception. *See Eppes*, 77 M.J. at 349 (noting exclusion "should only be applied where needed to deter police from violations of constitutional and statutory protections").

2. Intervening events justify affirming *Carter*.

Two intervening events since this Court's enunciation of the good faith exception in *Carter* are relevant to interpreting Mil. R. Evid. 311(c)(3). The first is *United States v. Hoffmann*, 75 M.J. 120 (C.A.A.F. 2016). The second is the President's May 2016 amendments to Mil. R. Evid. 311. *See* Exec. Order 13,730, 81 Fed. Reg. 33,331 (May 26, 2016).

a. *Hoffmann* is not a good faith exception case. It cited no prior good faith holdings from this Court, nor did it acknowledge or address the absurdity resolved by *Carter*.

In *Hoffmann*, this Court found the good faith exception to be inapplicable to the results of a search where "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." 75 M.J. at 127-28. In doing so, this Court applied the plain language of the Military Rules of Evidence. *Id.*

Unlike *Carter*, *Hoffmann* did not acknowledge or address the absurdity that results from a literal reading of Mil. R. Evid. 311(c)(3)(B). Rather, *Hoffmann* applied little to no independent factual or legal analysis to the good faith exception, and simply deferred to its determination regarding probable cause itself. *Id.* This nullified the good faith exception—a result *Carter* analyzed and specifically sought to avoid.

Moreover, *Hoffmann* did not reference any of this Court's conflicting prior holdings applying the good faith exception—including *Carter* and *United States v. Monroe*, 52 M.J. 326, 332 (C.A.A.F. 2000).

b. Recent amendments to the codified exclusionary rule reinforce *Carter*'s focus on admitting evidence where law enforcement conducts a search with the reasonable belief they are complying with the Fourth Amendment.

The codified good faith exception has not been modified since *Carter* and *Hoffmann*. However, since those decisions, the President amended Mil. R. Evid.

311 in two significant ways that support upholding *Carter*. First, the President added an explicit focus on the deterrent effect of the exclusionary rule. Mil. R. Evid. 311(a)(3). Second, the President codified an additional good faith exception, allowing admission of evidence where "the official seeking the evidence acts in objectively reasonable reliance on a statute later held violative of the Fourth Amendment." Mil. R. Evid. 311(c)(4).

Both amendments support the underlying rationale in *Carter*, and justify reaffirming *Carter*. The first "incorporates the balancing test limiting the application of the exclusionary rule set forth in *Herring v. United States*, 555 U.S. 135 (2009)[.]" Drafter's Analysis of Mil. R. Evid. 311(a). *Herring* focused deterrence on law enforcement behavior, stating "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." *Herring*, 555 U.S. at 143.

The second amendment "adopts the expansion of the 'good faith' exception . . . set forth in *Illinois v. Krull*, 480 U.S. 340 (1987)[.]" Drafter's Analysis of Mil. R. Evid. 311(c). This further reinforces *Carter*'s application: the good faith exception applies when law enforcement reasonably relies on legal authority authorizing a search. *See Carter*, 54 M.J. at 422; Mil. R. Evid. 311(c)(4).

3. Servicemembers have significant reliance interests in *Carter*'s interpretation of the good faith exception, which encourages law enforcement to rely on probable cause determinations where it is objectively reasonable to do so.

Participants in the military justice system have significant reliance interests in affirming *Carter*'s approach to validating the good faith exception to military practice. *Carter* increases law enforcement's ability to rely on an authorizing official's probable cause determination—reducing futile or potentially costly second-guessing. *See Leon*, 468 U.S. at 920-21 (noting "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient"). Removing the focus of the good faith analysis from the state of mind of law enforcement officers "[p]enaliz[es] the officer for the magistrate's error, rather than his own, [and] cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.*

Moreover, *Carter* implicitly recognizes that penalizing an authorizing official's errors does not meaningfully contribute to the protection of Fourth Amendment goals. This is because there is "no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Leon*, 468 U.S. at 916-17. Thus, *Carter* strikes the appropriate balance between servicemembers' expectations to respect for Fourth Amendment rights and a functioning evidentiary process at court-martial.

4. Overruling *Carter* risks undermining public confidence in the military justice system's ability to acquit or convict defendants based on the maximum amount of evidence obtained by objectively reasonable law enforcement officials.

"Just as overturning precedent can undermine confidence in the military justice system, upholding precedent tends to bolster servicemembers' confidence in the law." *Andrews*, 77 M.J. at 401. The public has an interest in courts-martial considering evidence obtained when law enforcement reasonably believes that they are complying with the Fourth Amendment. *Carter* appropriately considers that public interest by excluding evidence where society has determined the deterrence rationale weighs in a criminal suspect's favor, while admitting evidence where deterrence is unjustified.

5. No "special justification" exists to overturn *Carter*.

Even where the above factors weigh in favor of overturning precedent, this Court still requires "special justification, not just an argument that the precedent was wrongly decided," to overrule precedent. *Andrews*, 77 M.J. at 399.

Here, the United States is unaware of any "special justification" for overturning *Carter*. Nor does Appellant advance a "special justification" for this Court to depart from *Carter*'s reasoned analysis. Rather, Appellant merely desires to "require the application of the plain language of the rule in this case[.]" (Appellant Br. at 10.) But without the necessary justification to overrule precedent, this Court should reaffirm *Carter*.

II.

THE AUTHORIZING OFFICIAL'S DETERMINATION OF PROBABLE CAUSE IS GIVEN SUBSTANTIAL DEFERENCE. THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS AS THE SEARCH AUTHORIZATION WAS BASED ON PROBABLE CAUSE. REGARDLESS, THE EVIDENCE FOUND WAS ADMISSIBLE UNDER THE GOOD FAITH EXCEPTION.

A. This Court reviews a probable cause determination through two layers of deference: (1) the neutral and detached authorizing official receives substantial deference in the initial determination; and (2) the Military Judge's ruling is reviewed for an abuse of discretion.

1. The standard of review for a Military Judge's probable cause determination is abuse of discretion.

This Court reviews a military judge's denial of a motion to suppress for an abuse of discretion. *Eppes*, 77 M.J. at 344. An abuse of discretion occurs where the military judge's findings of fact are clearly erroneous, or where he misapprehended the law. *Id.* In reviewing a ruling on a motion to suppress evidence, this Court "consider[s] the evidence in the light most favorable to the prevailing party." *Id.*

2. Substantial deference is granted to the neutral and detached authorizing official issuing the search authorization.

This Court does not review probable cause determinations *de novo*. *Hoffmann*, 75 M.J. at 125. Rather, this Court's "duty" is to "make sure that the

authorizing official had a 'substantial basis' for concluding that probable cause existed." *Id.* (quoting *Huntzinger*, 69 M.J. at 7).

B. The Military Judge properly found the search valid because it was supported by probable cause and executed pursuant to a command authorization from a neutral and detached authorizing official.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. To do so, it requires that "probable cause" exist to conduct a search before any warrant may be issued. *Id.*

Probable cause to search exists when, based on the totality of the circumstances, "there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). It requires "more than a bare suspicion, but something less than a preponderance of the evidence." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). As a result, the evidence presented in support of a search "need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false." *Id.* (citation omitted).

When a commander is asked to authorize a search, the question is whether, given all the circumstances, a "fair probability" exists that the suspected evidence will be found in the place to be searched. *See Gates*, 462 U.S. at 238. A commander may rely on both written and oral statements communicated to him, as

well as any other information he may know. Mil. R. Evid. 315(f)(2). The question is not whether one fact or another provides sufficient cause to authorize a search, but "whether the facts taken as a whole [do] so." *United States v. Macomber*, 67 M.J. 214, 219 (C.A.A.F. 2009).

This Court applies "four key principles" in reviewing probable cause determinations: (1) determinations made by a "neutral and detached magistrate" are entitled to "substantial deference"; (2) resolution of "doubtful or marginal cases" should be largely determined by the preference for warrants; (3) close calls will be resolved in favor of sustaining the magistrate's decision; and, (4) the evidence must be "considered in the light most favorable to the prevailing party" below. *United States v. Clayton*, 68 M.J. 419, 423-24 (C.A.A.F. 2010) (citations and quotations omitted).

1. Based on the totality of the circumstances, the authorizing official had a substantial basis to conclude that Appellant was extorting M.I.

A person commits extortion when he: (1) communicates a certain threat to another; and (2) intends to unlawfully obtain something of value, or any acquittance, advantage, or immunity. Article 127, UCMJ, 10 U.S.C. § 927.

Here, there was a substantial basis to conclude Appellant committed extortion. M.I. reported that she had engaged in an extramarital affair with Appellant, during which time he at least once used his cell phone while the two

engaged in sexual activity. (J.A. 70, 103.) She also reported that Appellant threatened to release videos and photos of her engaging in sexual activity if she did not comply with his demands. (J.A. 70, 73.) Responding to prior threats of extortion, M.I. bought Appellant a television and a $1,100.00 gun safe, paid for a year-long storage unit rental, and gave him furniture. (J.A. 103.) Finally, Appellant's command issued a Military Protective Order based on M.I.'s report. (J.A. 70.)

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. *See Navarette v. California*, 572 U.S. 393, 400 (2014) (noting "caller's use of the 911 emergency system" served as "indicator of veracity" where "some features [allowed] for identifying and tracing callers, and thus provide[d] some safeguards against making false reports with immunity"); 18 U.S.C. § 1001 (imposing criminal penalties on persons making false reports).

Viewing this evidence in the light most favorable to the United States—as this Court must—there was a "substantial basis" on which the Commanding Officer could determine that Appellant committed extortion. The Military Judge's denial of the suppression motion was not an abuse of discretion.

2. The Commanding Officer reasonably inferred from Special Agent J.J.'s information that a "sufficient nexus" connected Appellant's home and his criminal extortion.

Probable cause to authorize a search requires a "sufficient nexus" between the alleged crime and the specific item or place sought to be searched. *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). This nexus "need not be based on direct observation but can be inferred from the facts and circumstances of a particular case." *Clayton*, 68 M.J. at 424 (internal citation omitted). "Reviewing courts may read the affidavit and warrant to include inferences the issuing magistrate reasonably could have made." *Eppes*, 77 M.J. at 345.

Factors to determine whether a "sufficient nexus" exists include "the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would likely hide the property." *Clayton*, 68 M.J. at 424. The test asks whether a "fair probability" exists that evidence of a crime will be found in a particular place. *Id.* To establish a sufficient nexus, the "burden on the Government is far from onerous." *Nieto*, 76 M.J. at 107 n.3.

A law enforcement officer's experience may be useful to establish this nexus. *Nieto*, 76 M.J. at 106. But this Court has held that:

> [A] law enforcement officer's generalized profile about how people normally act in certain circumstances does not, *standing alone*, provide a substantial basis to find probable cause to search and seize an item in

> a particular case; there must be some additional showing that the accused fit that profile or that the accused engaged in such conduct.

Id. (emphasis added). Thus, a magistrate cannot rely solely on a law enforcement officer's experience when issuing a search authorization.

In *Clayton*, this Court upheld a search of the appellant's quarters and personal laptop for child pornography, even though there was no evidence directly linking either with illicit activity. 68 M.J. at 428. In upholding the search, this Court relied on "the ease with which laptop computers are transported from work to home and the ease with which computer media may be replicated on portable devices." *Id.* at 424-25. With that ease in mind, the magistrate could come to the "practical, commonsense decision" that contraband would be in the appellant's quarters. *Id.*

By contrast, in *Nieto*, the court held that an authorizing official lacked a substantial basis to authorize search and seizure of the appellant's laptop where he relied solely on a law enforcement agent's generalized profile of how people normally use electronic devices. 76 M.J. at 103. There, the magistrate reviewed "three sources of information"—each of which indicated criminality with respect to a cell phone, but none of which connected any criminality to any laptop Appellant may have owned. *See id.* at 103-05. Nonetheless, the magistrate issued a search authorization to search Appellant's laptop because a law enforcement agent stated that "[s]oldiers [use] their cell phones to photograph things" and that

"the photos they take . . . they'll back those up on to their laptops." *Id.* at 104. This Court held this to be an "insufficient particularized nexus" to search the laptop. *Id.* at 103.

This Court noted in *Nieto*, however, that its holding did not create "a heightened standard for probable cause or requir[e] direct evidence to establish a nexus in cases where technology plays a key role." *Id*. at 107 n.3. "Rather, the traditional standard that a nexus may be inferred . . . still holds in cases involving technological devices such as cell phones and laptops." *Id*. (internal quotations omitted).

Here, unlike *Nieto*, Special Agent J.J. 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. She relayed to the authorizing official that: (1) M.I. and Appellant engaged in sexual activity, and Appellant used his cell phone during their sexual activity and "while in bed" with M.I., (J.A. 73, 103); (2) Appellant may have used other electronic devices to record their sexual activity, (J.A. 73); (3) M.I. had personal knowledge of the inside of Appellant's house, including that Appellant had electronic devices in his home that could store the sought-after materials, (J.A. 73); (4) M.I. was so concerned that Appellant actually had compromising images that she spent thousands of dollars to satisfy Appellant's demands, (J.A. 99, 103); and (5) Appellant was returning home, was

aware that M.I. had reported him to law enforcement, and had previously threatened that M.I. would "face consequences" if she reported him to law enforcement. (J.A. 70, 103, 120.) More so than in *Clayton*, where no evidence connected illicit material to the appellant's quarters, the Commanding Officer here could make a "practical, commonsense decision" that a "fair probability" existed that evidence of extortion would be found in Appellant's house. *See Clayton*, 68 M.J. at 424-25.

M.I.'s report also makes Appellant's case unlike *Nieto*. First, no evidence mentioned that the appellant in *Nieto* owned a laptop, only that "somebody" saw a laptop on the appellant's bunk. *Nieto*, 76 M.J. at 104, n.4. Here, unlike the "suspect information" and "unknown source" in *Nieto*, the Commanding Officer had evidence from M.I. indicating personal knowledge of electronic devices in Appellant's house. *Id*. at 108; (J.A. 73.) Second, there was no evidence in *Nieto* that he was storing illicit material on a laptop. *Nieto*, 76 M.J. at 104, n.4. Here, M.I. reported that : (1) Appellant said he took nude videos and photographs of her while they engaged in sexual intercourse; (2) Appellant may have used electronic devices other than his phone to record their sexual activities, and, (3) Appellant had electronic devices at his house that could store digital videos and photographs. (J.A. 73, 103.)

The Commanding Officer did not—as *Nieto* proscribed—rely solely on S.A. J.J.'s "generalized profile" of Appellant to issue the search authorization. Appellant had specifically threatened M.I. that he would release nude images of videos of her. (J.A. 72.)

The Commanding Officer's probable cause determination is due "substantial deference." Considering Appellant's impending return to his house 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 home. He thus had a "substantial basis" on which to conclude probable cause existed to search Appellant's house. Moreover, even if this was a close call, this Court follows its framework that "close calls will be resolved in favor of sustaining the magistrate's decision." *Clayton*, 68 M.J. at 423 (internal quotations omitted).

C. Assuming lack of probable cause, the good-faith exception applies.

1. The exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges.

As discussed *supra* in Assignment of Error I, the President has codified the exclusionary rule, but it is "drastic and socially costly," and "should only be applied where needed to deter police from violations of constitutional and statutory protections." *Eppes*, 77 M.J. at 349 (internal citation and quotations omitted); *see* Mil. R. Evid. 311(a).

When police conduct "involves only simple, 'isolated' negligence . . . the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" *Davis*, 564 U.S. at 238-39 (internal quotations and citations omitted). Exclusion is therefore unwarranted where police negligence is "isolated" or "nonrecurring." *Id.* (citing *Herring*, 555 U.S. at 144). Society must swallow the "bitter pill" of exclusion as a last resort. *Id.* at 237.

2. Evidence obtained from the search of Appellant's home falls within the good-faith exception to the exclusionary rule.

Special Agent J.J. spoke with M.I. during a videotaped interview, during which M.I. detailed Appellant's extortion. (J.A. 70.) Later that day, she received two notifications: (1) Appellant's command informed her they were issuing a Military Protective Order to Appellant based on M.I.'s report, and that Appellant was returning home that evening, (J.A. 70); and (2) M.I. contacted Special Agent J.J. to tell her that Appellant had contacted M.I. and was aware law enforcement's involvement—something that Appellant earlier threatened would result in M.I. "fac[ing] consequences." (J.A. 70, 103, 120.)

Special Agent J.J. then consulted with three different judge advocates, and each agreed with issuance of a search authorization. (J.A. 73, 99, 120.) She then presented the same information to an authorizing official, who issued that search authorization. (J.A. 73-74, 117.) And when agents encountered evidence not explicitly covered in the verbal search authorization, Special Agent J.J. stopped the

search, called the authorizing official, and requested and obtained an expanded search authorization. (J.A. 71, 101, 117.)

These actions met the requirements of the good faith exception. *See* Mil. R. Evid. 311(c)(3).

a. The Commanding Officer was competent to issue the search authorization because he acted impartially, and did not merely "rubber stamp" the search authorization.

A commander is competent to issue a search authorization so long as he is "impartial." Mil. R. Evid. 311(c)(3)(A), 315(d)(1). The commander must perform his function in a neutral and detached manner, and cannot "merely serve as a rubber stamp for the police." *See Carter*, 54 M.J. at 419; *see also Leedy*, 65 M.J. at 217-18. Where the commander "exhibit[s] bias or appear[s] to be predisposed to one outcome or another," he is not competent to determine probable cause. *Huntzinger*, 69 M.J. at 11. However, a commander's "furtherance of command responsibilities, without more," does not render him incompetent to authorize a search. *Id.*

In *Leedy*, this Court upheld a probable cause determination, finding that the magistrate had acted in a neutral and detached manner. *Leedy*, 65 M.J. at 217-18. The *Leedy* court noted that "there [was] no evidence that the magistrate had any generalized proclivity towards simply conceding search requests to investigators,"

had "evidently closely read the affidavit," and spoke with a legal advisor and another commanding officer before authorizing the search. *Id.*

Similarly here, nothing in the Record supports that the Commanding Officer had a "generalized proclivity towards simply conceding search requests to investigators." *See id.* After Special Agent J.J. initially requested the search authorization—providing him with "all [the] known facts at the time"—the Commanding Officer "wanted additional information." (J.A. 73.)

It was only after receiving more information, including that the Special Agent had consulted with both trial counsel and his Staff Judge Advocate, that the Commanding Officer authorized the search. (J.A. 73.)

The Commanding Officer made the probable cause determination himself. (J.A. 117.)

Appellant's argument that the authorizing official "was influenced more by his command responsibilities in his decision . . . than he was acting as a neutral and detached magistrate" misunderstands the relevant analysis. (Appellant Br. at 12-13.) No evidence indicates that the Commanding Officer "exhibit[ed] bias or . . . [was] predisposed to one outcome or another." *See Huntzinger*, 69 M.J. at 11. Even assuming that the Commanding Officer was influenced in some fashion by his command responsibilities, this does not prevent him from being neutral and detached, and Appellant's claim fails. *See id.*

Special Agent J.J. presented the Commanding Officer with all of the facts known to her at the time, and the commander independently determined there was probable cause to authorize the search. No evidence supports that the commander was biased or predisposed to an outcome. He acted impartially.

b. Special Agent J.J. reasonably believed that the Commanding Officer had a "substantial basis" for determining probable cause.

The requirement for a substantial basis to determine probable cause "is satisfied if the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause." *Carter*, 54 M.J. at 421-22. This Court therefore examines the search authorization "through the eyes of a reasonable law enforcement official executing the search authorization." *Id.*

This prong addresses the requirement that information presented to the magistrate not be "intentionally or recklessly false," and the affidavit not be "facially deficient." *Id.*; *Leedy*, 65 M.J. at 212. An affidavit is "facially deficient" where it is a "bare bones" recital of conclusions that is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Carter*, 54 M.J. at 419-21. This occurs where "sources of information are not identified, and conflicts and gaps in evidence are not acknowledged." *Leedy*, 65 M.J. at 212 (citing *Carter*, 54 M.J. at 422). The threshold for establishing that an

affidavit is "facially deficient" is "a high one, and it should be." *Messerschmidt v. Millender*, 565 U.S. 535, 546-47 (2012) (noting "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in . . . 'objective good faith'").

Here, Special Agent J.J. had an objectively reasonable belief that the Commanding Officer had a substantial basis for determining probable cause. She first consulted with three judge advocates to determine how to proceed with the case: (1) a local trial counsel; (2) the remotely located Senior Trial Counsel; and, (3) the Staff Judge Advocate for the installation. (J.A. 73, 99, 110.) All agreed that a search authorization could be issued to search for evidence of extortion in Appellant's house. (J.A. 99.)

Following her conversations with legal advisors, Special Agent J.J. spoke with the Commanding Officer and provided him with:

> [A]ll the known facts to us [at the time], all the reports that [M.I.] had made to us during her interview, the [Military Protective Order] issuance, the return of [Appellant] to base later that night, and the potential of him destroying electronic evidence, due [to] him knowing that there was a[] [Military Protective Order] and that there was a potential investigation initiated as a result of that. I explained all those known facts at the time to [the Commanding Officer] on the phone.

(J.A. 73.) The "affidavit" was thus not "facially deficient"—she provided the Commanding Officer with more than a "bare bones" affidavit by including her

informational sources and, by implication, any gaps and conflicts in the evidence. *See Leedy*, 65 M.J. at 212.

The affidavit described M.I.'s report of an extramarital affair with Appellant—who used his cell phone in bed with her—his resulting threats of exposing nude photographs of M.I., and M.I.'s necessary claim to knowledge of electronic devices in Appellant's home where these photographs could be stored. (J.A. 73, 117.) After Special Agent J.J. provided additional details at the Commander's request, he found probable cause existed for a search. (J.A. 117.)

Viewing the search authorization through the eyes of a "reasonable law enforcement official," Special Agent J.J. had an "objectively reasonable belief" that there was a "substantial basis" to determine probable cause. *See Messerschmidt*, 565 U.S. at 546-47; *Carter*, 54 M.J. at 420-22. Special Agent J.J. provided information to three judge advocates and an authorizing official, and each agreed probable cause existed. Her reliance on those determinations was objectively reasonable.

Appellant's claim the affidavit was "facially deficient" fails to meet the high threshold required to show the required deficiency. *See Messerschmidt*, 565 U.S. at 546-47; (Appellant Br. at 13.) Special Agent J.J. provided information regarding threats by Appellant, as well as M.I.'s claim that photographs were stored in Appellant's house, to three judge advocates and an authorizing official.

Each person determined probable cause existed to conduct a search of Appellant's house. (J.A. 73, 99, 117, 120.) Appellant cites no legal authority demonstrating why an agent cannot reasonably rely on determinations of pertinent legal advisors and an authorizing official.

Finally, Appellant's argument that Special Agent J.J. could not rely on the Commanding Officer's search authorization because she used the term "exigent circumstances" is incorrect. (Appellant Br. at 14-15.) Whether "exigent circumstances" exist does not diminish a reasonable belief—ratified by numerous judge advocates and an authorizing official—that "the person, property, or evidence sought is located in [Appellant's house]." Mil. R. Evid. 315(f)(2).

Appellant fails to demonstrate the high threshold required to find the search request "facially deficient."

c. Special Agent J.J. and the other executing officials reasonably relied on the search authorization.

Officials seeking and executing the authorization must "reasonably and with good faith" rely on the search authorization. *Carter*, 54 M.J. 420-22; Mil. R. Evid. 311(c)(3)(C). This is an objective standard. Mil. R. Evid. 311(c)(3)(C). Officials lack objective good faith where they "know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective." *Carter*, 54 M.J. at 421. A warrant is facially defective where it fails "to particularize the place to be searched or the things to be seized." *Id.* at 419-21.

Here, both Special Agent J.J. and the other law enforcement agents executing the search warrant "reasonably and with good faith" relied upon the search warrant. No evidence indicates the Commanding Officer "merely rubber stamped" the search request; when presented with the initial report, including "all the known facts," he asked for additional information. (J.A. 73-74, 117.)

Nor was the authorization "facially defective." It authorized agents to search a single house for "all electronic devices and media storage containers capable of containing videos, photographs, and other electronic evidence." (J.A. 117.) This particularized the location to be searched, and gave the most precise definition possible for determining what to seize. Its terms were simply recognition of "the ease with which computer media may be replicated on portable devices." *See Clayton*, 68 M.J. at 424-25.

Moreover, the agents executing the search demonstrated their reliance on the search authorization by how they conducted the search. When agents found items suggesting Appellant committed other crimes, they "halted the search," called the Commanding Officer to update him, and "requested an extension for the parameters of the search, due to all this new information that we had at the time." (J.A. 71, 117.)

The investigating agents acted in good-faith at all times by seeking, and complying with the parameters of, a valid search authorization to search

Appellant's home for evidence of extortion. Their compliance with the search authorization's terms demonstrates their good faith.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below, and reaffirm *Carter*.

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