IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Warrant Officer One (WO1) **GRAHAM H. SMITH** United States Army, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 18-0211/AR Crim. App. Dkt. No. 20160150

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

RULES

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UNITED STATES, Appellee v. Warrant Officer One (WO1) **GRAHAM H. SMITH** United States Army, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 20160150 USCA Dkt. No. 18-0211/AR

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

ISSUES PRESENTED

I.

THE MILITARY JUDGE ABUSED HER DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM APPELLANT'S CELLULAR TELEPHONE BECAUSE ACCESS TO THE CONTENTS OF THE IPHONE WOULD NOT HAVE BEEN AVAILABLE BUT FOR THE GOVERNMENT'S ILLEGAL SEARCH AND THE GOOD FAITH DOCTRINE WOULD BE INAPPLICABLE UNDER THE CIRCUMSTANCES.

II.

WHETHER THE ARMY COURT ERRED IN DETERMINING THE INSUFFICIENT NEXUS ISSUE WAIVED BECAUSE THERE WAS NO DELIBERATE DECISION NOT TO PRESENT A GROUND FOR POTENTIAL RELIEF BUT INSTEAD ONLY A FAILURE TO SUCCINCTLY ARTICULATE THE GROUNDS UPON WHICH RELIEF WAS SOUGHT.

STATEMENT OF THE CASE

On July 26, 2018, this Court granted appellant's petition for review. On September 24, 2018, appellant filed his final brief with this Court. The government responded on October 24, 2018. On November 5, 2018, this Court granted appellant's motion to extend time to reply. This is appellant's reply.

ARGUMENT

I.

THE MILITARY JUDGE ABUSED HER DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM APPELLANT'S CELLULAR TELEPHONE BECAUSE ACCESS TO THE CONTENTS OF THE IPHONE WOULD NOT HAVE BEEN AVAILABLE BUT FOR THE GOVERNMENT'S ILLEGAL SEARCH AND THE GOOD FAITH DOCTRINE WOULD BE INAPPLICABLE UNDER THE CIRCUMSTANCES.

1. Investigator Kesler's affidavit was facially deficient.

The government argues, "Though the affidavit failed to show a specific factual nexus between the items to be seized and appellant's offense, it was not facially deficient." (Gov't Br. 14). This Court has held that "in order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized." *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). While a nexus may be "inferred from the facts and circumstances of a particular case," *Id*., the government's concession that the

military magistrate did not have a substantial basis for concluding probable cause existed to search appellant's residence for all internet capable electronic devices necessarily means the affidavit was facially deficient because neither the facts stated therein nor any inferences drawn therefrom supported a finding of probable cause.

2. Special Agent Pugliese's search exceed the authorized scope.

With respect to the search authorization, the government argues that the magistrate "tailored her authorization to allow for the search of only the type of evidence that would result from appellant's observed 'Peeping Tom' offenses." (Gov't Br. 14). Thus admittedly, Special Agent (SA) Pugliese did not have authority to search for a file on the laptop that would unlock the phone, and he exceeded the scope of the authorization by doing so.

In discussing whether SA Pugliese knowingly exceeded the scope of the search authorization the government states, "The laboratory request also instructed SA Pugliese to 'Please conduct any further examination that you deem is necessary.'" (Gov't Br. 15). The government further asserts that SA Pugliese did not "interpret that to mean he could search for anything on the device, but that he could search for what was 'necessary based on [his] understanding of what [he was] looking for.'" (Gov't Br. 15). However, these assertions ignore the language of the search authorization, which governed the scope of the search, not SA

Pugliese's subjective belief about whether anything he found on the laptop was "necessary." Since the search authorization was, as the government has conceded, "tailored" to allow only for a search for specific evidence, SA Pugliese's search for the "key" to unlock the phone was outside the scope of the authorization. To hold otherwise would mean that a laboratory conducting a forensic examination of a digital device can search for anything so long as they "deem it necessary."

The government acknowledges that the "possibility of the connection between appellant's iPhone and his other devices was the (flawed but stated) basis for the military magistrate's probable cause determination," and argues that searching for the file that connected the laptop to the iPhone "was not outside the scope of the authorization considering that the connection between the devices was the very basis for the scope of the search authorization." (Gov't Br. 15-16). Respectfully, the government confuses the *reason* for the search for other digital devices with the *scope* of the search of a sized device, which was for the items listed in the search authorization. The authorization permitted investigators to search for "pictures, videos, emails, documents, and texts related to other sexual misconduct." (JA 109). The file obtained from appellant's laptop that permitted SA Pugliese to unlock appellant's iPhone was not a picture, video, email, document, or text related to other sexual misconduct, and SA Pugliese therefore exceeded the scope of the search authorization in looking for it.

3. *Hoffmann*, not *Carter*, should control when determining the applicability of the good faith exception to the exclusionary rule.

The government urges this Court to apply its holding in *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001), to the facts of this case to conclude that, even though the issuing magistrate did not have a substantial basis for a finding of probable cause, the officer executing the authorization nevertheless relied in good faith on the issuance of the search authorization. In other words, the government argues that this Court should interpret the "substantial basis" requirement to mean that as long as a law enforcement officer has a substantial basis for believing probable cause exists, the good faith exception applies even in the absence of probable cause. Appellant acknowledges that this Court in *Carter* concluded that "'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," and noted that the second prong of Military Rule of Evidence (Mil. R. Evid.) 311(c)(3) 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 422. However, in *United States v. Hoffmann*, 75 M.J. 120 (C.A.A.F. 2016), this Court held the good faith exception does not apply where the individual issuing the search authorization does not have a substantial basis for determining the existence of probable cause. *Id*. at 128. Further, this Court in *Nieto* declined to resolve the tension between

Carter and *Hoffmann* because the government there failed to meet its burden to establish the good faith doctrine was applicable.

Appellant submits that *Hoffmann* is the correct statement of the law. The good faith exception to the warrant requirement is contained in Mil. R. Evid. 311(c)(3). The rule has three prongs, *all of which* must be satisfied for the good faith exception to apply:

> (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 shall be determined on an objective standard.

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

The fundamental holding of *Carter* was that subparagraph (B) could be satisfied through the application of subparagraph (C). *Hoffmann* recognized that subparagraph (B) requires that the issuing magistrate have probable cause. The holding in *Hoffmann* is consistent with the plain language of Mil. R. Evid. 311(c)(3) and the rule's presentation of the three prongs in the conjunctive. Here, just as in *Nieto*, the issuing magistrate did not have a substantial basis for

determining probable cause. Thus, for the same reason, the agents seeking and executing the warrant did not reasonably rely on the issuance of the warrant because they *lacked probable cause in seeking it*.

The government asserts appellant's argument is circular, that Investigator Kesler's reliance on the magistrate's probable cause determination was unreasonable because it was based on his own unsupported opinion. The government further asserts, "if that were true and they could grade their own work, it would obviate the need for a magistrate to make probable cause determinations." (Gov't Br. 23). Respectfully, the same could be said for using Mil. R. Evid. 311(c)(3)(C) to satisfy the requirement of Mil. R. Evid. 311(c)(3)(B). In other words, the agent should not get a pass for not doing his work because the magistrate failed to do hers; permitting the agent to rely on the magistrate's failure to hold him to the probable cause standard also obviates the need for a magistrate.

Appellant notes that this very issue—the tension between the holdings of *Carter* and *Hoffmann*—is currently pending before this Court in another case. *United States v. Perkins*, USCA Dkt. No. 18-0365/MC, was certified to this Court by the Judge Advocate General of the Navy to consider whether *Carter*, or the plain language of Mil. R. Evid. 311 as applied in *Hoffmann*, controls when analyzing the application of the good faith exception to the exclusionary rule. In *United States v. Perkins*, 78 M.J. 550 (N-M. Ct. Crim. App. 2018), the Navy-

Marine Corps Court of Criminal Appeals [hereinafter Navy Court] discussed the holdings of *Carter* and *Hoffmann,* and concluded that while *Hoffmann* was decided later and was, in the Navy Court's view, an accurate statement of the law, it was nevertheless bound by *Carter* because it was "reluctant to assume that the CAAF ha[d] tacitly reversed its own precedent." *Perkins*, 78 M.J. at 561.

The Navy Court went on to suggest that *Carter* should be reconsidered because it "represents an unwarranted departure from the rule's plain language," and "misapprehends the Drafters' Analysis and ignores the case law the drafters relied on when they adapted the good faith exception to military practice." *Perkins*, 78 M.J. at 562. Ultimately, the Navy Court suggested "the CAAF resolve the tension between *Carter* and *Hoffmann* in favor of *Hoffmann* and the plain language of Mil. R. Evid. 311(c)(3)." *Id*. at 565. The Navy Court's logic is also applicable to the instant case, and appellant urges this Court to apply the plain language of Mil. R. Evid. 311(c)(3) when analyzing the application of the good faith exception.

Additionally, the government's brief cites a number of cases from the federal circuits in which the good faith exception applied despite the lack of a nexus between the offense and the place to be searched or the items to be seized. All of these cases are factually distinguishable and none were decided under the rubric of Mil. R. Evid. 311(c)(3).

II.

THE ARMY COURT ERRED IN DEEMING THE INSUFFICIENT NEXUS ISSUE WAIVED SINCE THERE WAS NO DELIBERATE DECISION NOT TO PRESENT A GROUND FOR POTENTIAL RELIEF BUT INSTEAD ONLY A FAILURE TO SUCCINCTLY ARTICULATE THE GROUNDS UPON WHICH RELIEF WAS SOUGHT.

The government has conceded the Army Court of Criminal Appeals [hereinafter Army Court] erred in concluding this issue was waived. (Gov't Br. 31). The government goes on to argue, however, that although the error was merely forfeited, the military judge did not commit plain error in denying appellant's motion to suppress. (Gov't Br. 32). The government cites a number of examples where this Court found plain or obvious error and argues that any error by the military judge in this case was not plain and obvious because the military judge "did not misapply the law or ignore key facts that make the error plain." (Gov't Br. 32-34). The government argues, "Though appellant's failure to raise the nexus between his laptop and iPhone as an additional ground for suppression did not waive the issue, it was not plain and obvious such that the military judge should have raised it absent a defense motion." (Gov't Br. 35).

Notably, however, the government fails to discuss this Court's holding in *Nieto* and its effect in the context of plain error. Appellant's court-martial predated *Nieto* and its holding 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." *Nieto*, 76 M.J. at 106.

This Court in *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011), cited Judge Ryan's concurring opinion in *United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008) for the following proposition:

> [A]pplying the plain error rule retroactively requires the Court to pretend (1) that the new rule had existed at the time of trial, (2) that had counsel known about the new rule, he would not have forfeited the objection, and (3) that the military judge, despite the new rule, would not have followed it.

In *Harcrow*, Judge Ryan wrote separately to state that the appellant was entitled to avail himself of the plain error doctrine "only because [Supreme Court precedent] announced a 'new rule' while his case was on direct review – not because the military judge in this case did anything wrong." *Harcrow*, 66 M.J. at 160. Judge Ryan further stated:

> This case illustrates the curious outcome flowing from the confluence of the retroactivity rule and the plain error doctrine. Such a posture requires us to accept, and act upon, three fictions: (1) that *Crawford* had been decided at the time of Appellant's trial; (2) that, had Appellant's trial counsel known about *Crawford*, he would not have forfeited his objection to the lab reports; and (3) that the military judge would have, despite *Crawford*, erroneously allowed the reports to be admitted. It is apparent that it is at least a misnomer to suggest that the military judge committed error at trial here.

Id. (citations omitted).

Just as in *Harcrow* and *McMurrin*, this Court is required to accept: (1) *Nieto* was decided after appellant's court-martial; (2) had appellant known about the holding in *Nieto* and its applicability to search and seizure, he would not have forfeited the right to raise the issue in his suppression motion; and (3) the military judge would have, despite *Nieto*, denied appellant's suppression motion. Appellant agrees with Judge Ryan that it is somewhat of a misnomer to call this an "error." Nevertheless, the legal landscape has changed. Whether there was plain error is determined by the state of the law at the time of appeal. *Harcrow*, 66 M.J. at 159. *Nieto's* holding thus applies to this case, and since there was not a sufficient nexus between the offense and appellant's laptop, the evidence should have been suppressed.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Smith, Crim. App. Dkt. No. 20160150, USCA Dkt. No. 18-0211/AR, was electronically filed with the Court and submitted to the Government Appellate Division on 9 November 2018.

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