IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON
	)	BEHALF OF APPELLEE
	)	
v.	)	
	)	
Warrant Officer One (W01)	)	Crim. App. Dkt. No. 20160150
GRAHAM H. SMITH	)	
United States Army,	)	USCA Dkt. No. 18-0211/AR
Appellant	)	

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

On March 9, 2016, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of other sexual misconduct in violation of Article 120c, Uniform Code of Military Justice, 10 U.S.C. § 920c (2012). (R. at 328). The military judge sentenced appellant to confinement for two months and a dishonorable discharge. (R. at 401). The convening authority approved the adjudged sentence. (Action).

On February 28, 2018, the Army Court affirmed the findings and sentence. (JA 1-9). Appellant petitioned this Court for review on May 17, 2018. This Court granted appellant's petition on July 26, 2018.

Statement of Facts

On 15 July 2014, JW was shopping in the Fort Rucker Commissary when she observed appellant attempting to film/photograph under her skirt with his cellular phone. (JA 112-113). JW yelled for the help of other shoppers, calling appellant a "pervert" as he attempted to exit the Commissary. (JA 112-115).

Master Sergeant Clarke blocked appellant from leaving the Commissary and seized his iPhone. (JA 150, 153). Master Sergeant Clarke turned appellant's iPhone over to military police when they arrived at the Commissary. (JA 153).

Investigator (INV) William Kesler, a military police officer, called Major (MAJ) Jennifer Farmer, a military magistrate, to request authorization to search the iPhone. (JA 22, 77). Investigator Kesler explained to the military magistrate that JW noticed appellant taking pictures under her skirt with his iPhone while she was in the Commissary. (JA 23, 76-77). Investigator Kesler told MAJ Farmer appellant's phone "was an Apple phone, smartphone" and then "explained based on his computer experience and training with the military police . . . the phone could also be used with the Cloud technology." (JA 23-24). Investigator Kesler explained that through the iCloud, pictures and data could automatically synchronize across the internet and other electronic devices. (JA 78). Investigator Kesler requested a search authorization of appellant's iPhone and other electronic devices that could have synced with the iPhone. (JA 23-24, 78).

Major Farmer provided a verbal authorization (which she later memorialized on paper) to seize and search appellant's iPhone and the electronic devices at his house that could be linked to his iPhone through the iCloud (JA 24-25, 31, 79-80). In his affidavit to support the request to search, INV Kesler wrote:

> Based on the technology and capability built in to Apple products, known as the "iCloud" we have reason to believe

> any pictures taken with [appellant's] iPhone have been synchronized wirelessly with the iCloud allowing them to be synchronized with all Apple products linked to Smith's Apple account. In addition those items can be accessed by the internet to be viewed and/or distributed to other parties electronically.

(JA 233). Investigator Kesler understood that he was authorized to look for "up-skirt" pictures of JW wherever videos or images could be stored, but not permitted to search or seize "items that could not contain transferred data." (JA 80, 88).

During a briefing with the military magistrate, INV Kesler discussed the basis for the follow-on search request for other electronic devices, explaining based upon his experience and knowledge of Apple technology, appellant's iPhone had the capability to be automatically linked to the iCloud. (JA 78-79). He opined that photographs or videos of JW could be accessed by other Apple devices and maintained or further distributed. (JA 78, 101). Investigator Kesler explained that non-Apple electronic devices could also access the iCloud. (JA 37). Based upon this information, the military magistrate provided authorization to search for any electronic devices that could access the iCloud and sync images from appellant's iPhone. (JA 65). Investigator Kesler searched appellant's residence and seized three computers, an iPad, and a digital camera. (JA 221).

A month later in August 2012, Special Agent (SA) Howell of Fort Rucker Criminal Investigation Command (CID) assumed the case from INV Kesler. (JA

91). The evidence was in CID's custody, but had not yet been searched. (JA 91). Special Agent Howell sought out MAJ Farmer for a new authorization to clarify that law enforcement could actually search the seized electronics because he believed the first authorization permitted only their seizure. (JA 63-64, 92-93). After receiving a second search authorization from the military magistrate and clarifying its scope, SA Howell sent the devices to Fort Benning's CID office for a digital forensic examination (DFE). (JA 95, 104).

Special Agent Pugliese, Fort Benning CID, conducted the DFE of appellant's iPhone. (JA 157). Special Agent Pugliese searched the devices for "pictures, video, emails, documents, and texts related to other sexual misconduct," in accordance with the forensic laboratory examination request. (JA 109). The request also instructed him, "Please conduct any further examination that you deem is necessary," which he interpreted to mean "necessary based on [his] understanding of what [he was] looking for." (R. at 151).

Appellant's iPhone was password-protected and locked before it was searched. (JA 165). The first time an iPhone and computer are connected, the user is asked if he wants the iPhone to trust that computer. (R. at 123). Once the devices are set to trust each other, a file is created that allows communication between them. (R. at 123). Special Agent Pugliese accessed appellant's iPhone using the file from appellant's computer "that the computer uses to communicate

with the phone." (JA 108). By exploiting the connection between the devices, Special Agent Pugliese was able to unlock appellant's iPhone. (JA 165).

No evidence of criminal activity was recovered from the electronic devices seized from appellant's home. (JA 108). However, a search of appellant's iPhone yielded eight "up-skirt" videos of JW and an unknown female. (JA 157).

Before trial, appellant moved to suppress the evidence found on his iPhone, presenting two specific grounds for suppression: (1) MSG Clarke unlawfully seized appellant's iPhone at the commissary, and (2) the search authorization and subsequent search of appellant's phone was not supported by probable cause. (JA 200-203, 237). "At no time during the initial suppression hearing, did appellant challenge the search of the iPhone because it was opened by a computer illegally seized from appellant's residence." (JA 4). The military judge initially granted appellant's motion to suppress because the government failed to meet its burden, but reconsidered pursuant to a government motion. (JA 56, 358). At the second suppression hearing, appellant again failed to challenge the search of his iPhone because it was opened using the connection to his laptop computer. (JA 4, R. 165-167). Upon reconsideration, the military judge reversed her initial ruling on the defense motion to suppress and denied it. (R. at 169, App. Ex. XXXIII).

At trial, JW testified that while she was shopping, she saw appellant "crouching behind [her] with his cellphone under the hem of [her] dress." (JA 113,

123). She testified that she believed he was attempting to take a picture up her skirt. (JA 113). An eyewitness to appellant's actions corroborated JW's testimony. The eyewitness testified that she also observed appellant crouched behind JW, holding his cellular phone and a shopping basket (JA 134-135).

At trial, the Government offered Prosecution Exhibit 2, a disc containing the videos taken from appellant's phone. (JA 116-117). Due to technical problems with the disc, the Government offered Prosecution Exhibit 5, a copy of Prosecution Exhibit 2. (JA 167). Prosecution Exhibit 5 is a disc containing all eight of the videos retrieved from appellant's cellular phone, which show appellant, JW and the unnamed victim of Specification 2. (JA 116-117, 161-163).

Summary of Argument

The military judge did not abuse her discretion in denying the defense motion to suppress and applying the good faith doctrine. A military magistrate authorized the search and seizure of appellant's iPhone and other electronic devices at his home capable of syncing with iCloud technology or the iPhone. Though the magistrate's belief that the devices could be auto-syncing with the iPhone or iCloud was not a sufficient factual nexus to establish probable cause to seize the other devices, law enforcement's belief that there was a substantial basis to determine probable cause was not entirely unreasonable. Law enforcement officials executed the search authorization in good faith and for that reason, the

military judge declined to impose the exclusionary rule. Employing the exclusionary rule would not have deterred any particular police misconduct; it would only have punished police in their investigation for a military magistrate's incorrect probable cause determination.

Appellant did not properly raise the issue of law enforcement using his laptop to unlock his iPhone as a ground for suppression of evidence found on his iPhone. That failure constitutes forfeiture of the issue, not waiver as the Army Court opined. But evaluating the forfeiture under a plain error analysis, it is clear the military judge did not commit plain error. The issue of law enforcement unlocking appellant's iPhone with his laptop was neither plain nor obvious, especially as appellant never raised it for the military judge's consideration. In the absence of any military case law to suggest the military judge should have identified that particular suppression argument, any perceived error was neither plain nor obvious.

I.
THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM APPELLANT'S CELLULAR TELEPHONE BECAUSE THE GOOD FAITH DOCTRINE APPLIED UNDER THE CIRCUMSTANCES.

Standard of Review

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion. *United States v. Hoffman,* 75 M.J. 120, 124 (C.A.A.F. 2016). "In reviewing a ruling on a motion to suppress, [the Court] consider[s] the evidence in the light most favorable to the prevailing party." *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)(citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)(internal quotations omitted)).

"When the defense makes an appropriate [suppression] motion or objection, the prosecution has the burden of proving by a preponderance of the evidence . . . that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search [or] seize . . ." Mil. R. Evid. 311(d)(5)(A); *See also United States v. Nieto*, 76 M.J. 101, 108 (C.A.A.F. 2017)). However, in cases where officers acted pursuant to a warrant, the Supreme Court has made clear that good faith is *presumed*. *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982); *See also United States v. Leon*, 468 U.S. 897, 922; *See also United States v. Clark*, 638 F.3d 89, 100 (2nd Cir. 2011)("The burden is on the

government to demonstrate the objective reasonableness of the officers' good faith reliance on an invalidated warrant," but "[i]n assessing whether it has carried that burden, we are mindful that, in *Leon*, the Supreme Court strongly signaled that most searches conducted pursuant to a warrant would likely fall within its protection.").

Law and Analysis

A. The Military Judge did not abuse her discretion when she applied the Good Faith Doctrine and declined to employ the Exclusionary Rule.

The Fourth Amendment does not expressly "preclude the use of evidence obtained in violation of its commands." *Leon*, 468 U.S. at 906. The exclusionary rule "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *Id.* (internal quotations omitted). The exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916.

In *Leon*, the Supreme Court held that the exclusionary rule should be modified to permit the introduction of evidence obtained by law enforcement officials acting with the reasonable good faith belief that a search or seizure pursuant to a facially valid warrant was in accordance with the Fourth Amendment. *Id.* at 909. The Supreme Court concluded that, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable

reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 923. The Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id. at 919.

The President promulgated the good faith doctrine in Mil. R. Evid. 311 (b)(3), stating 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 shall be determined on an objective standard.

Mil. R. Evid. 311 (b)(3)(A)-(C).

This Court adopted the same analysis the Supreme Court applied in *Leon*:

> Mil. R. Evid. 311(b)(3) does not establish a more stringent rule than *Leon* did for civilian courts. The first prong (a search warrant or search authorization issued by competent authority) is identical to the civilian rule. The second prong addresses the first and third exceptions noted in *Leon*, i.e., the affidavit must not be intentionally or recklessly false, and it must be more than a 'bare bones' recital of conclusions. It must contain sufficient information to permit the individual executing the warrant or authorization to reasonably believe that there is probable cause. The third prong addresses the second and fourth exceptions in *Leon*, i.e., objective good faith cannot exist when the police know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective.

United States v. Carter, 54 M.J. 414, 421 (C.A.A.F. 2001). And thus, there are four circumstances where the good faith doctrine would not apply:

> (1) False or reckless affidavit--Where the magistrate 'was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth';
>
> (2) Lack of judicial review-- Where the magistrate 'wholly abandoned his judicial role' or was a mere rubber stamp for the police;
>
> (3) Facially deficient affidavit--Where the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable';

> (4)Facially deficient warrant--Where the warrant is 'so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.'

Id. at 419-420 (quoting *Leon,* 468 U.S. at 922-923).

1. None of the four circumstances contemplated in *Leon* that would negate good faith exist.

None of the aforementioned four circumstances are present. The military magistrate was neither misled by law enforcement nor was her determination of probable cause informed by false information. The military magistrate did not abandon her judicial role. She had a long conversation with INV Kesler and another with SA Howell. Investigator Kesler and SA Howell explained to the military magistrate how appellant could have automatically uploaded photos or videos from his iPhone to an iCloud account or other electronic device linked to his Apple account. She made a probable cause determination based upon those considerations and knowledge of the technological capabilities of the electronic devices to be seized and further instructed law enforcement to ensure they understood the scope of the search she was permitting.

There is nothing facially deficient about the affidavit presented to MAJ Farmer. While the affidavit may have contained INV Kesler's subjective inferences, law enforcement officers are charged with providing their inferences and the information available to inform a magistrate. In addition to his knowledge

of iPhones and their capabilities to automatically sync with other devices and the iCloud, INV Kesler shared with the military magistrate facts gathered from JW and other eyewitnesses who saw appellant crouching behind JW and fumbling with his phone as he attempted to leave the Commissary. 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.

Finally, there was nothing facially deficient about the search authorization the military magistrate gave to the executing officers. The authorization specified the electronic devices that could be seized and 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. There was no reason for a law enforcement officer to question the military magistrate or the search authorization she provided.

The military judge provided a carefully drafted ruling with extensive factual findings and a discussion specifically addressing appellant's two stated grounds for suppression. (App. Ex. XXXIII, p.4-7).[1] She acknowledges the search authorization's flaws, but specifically found that it was not "a bare bones

[1] Noticeably absent from the military judge's factual findings and discussion are observations about law enforcement's use of the link between appellant's laptop and his iPhone to unlock his iPhone. Because appellant did not raise this ground for suppression, the military judge never had the opportunity to decide this matter appellant now raises for the first time on appeal.

affidavit." (App. Ex. XXXIII, p.6). The military judge's ruling addressed each of the four circumstances under which good faith would not apply and ultimately determined, "the good faith exception exists," as "[t]his is not a case about police misconduct." (App. Ex. XXXIII, p.6). Her well-reasoned ruling denying the defense motion to suppress considered facts supported by the record and correctly applied the law. She did not abuse her discretion.

2. Law Enforcement Acted within the Scope of a Facially Valid Search Authorization.

Appellant argues that SA Pugliese knowingly exceeded the scope of the military magistrate's search authorization. (Appellant's Br. 16). But SA Pugliese believed all of the devices sent to him for DFE were lawfully seized pursuant to the military magistrate's authorization. He believed he had authority to search for "pictures, video, emails, documents, and texts related to other sexual misconduct." (JA 109). The laboratory request also instructed SA Pugliese to "Please conduct any further examination that you deem is necessary." (R. at 151). He 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." (R. at 151).

Special Agent Pugliese had a search authorization to search for "up-skirt" videos or photos on several devices that was based upon the iPhone's auto-syncing capabilities. 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 to search appellant's other devices besides his iPhone. Searching for the file that connected appellant's laptop to his 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.

Even though appellant's laptop was not seized pursuant to a proper determination of probable cause, it was seized by INV Kesler in good faith. Special Agent Pugliese believed he was using a technological key found on a lawfully seized device to unlock a lawfully seized iPhone. That does not rise to the level of police misconduct that the exclusionary rule was designed to deter. His actions do not negate proper application of the good faith doctrine.

B. The Military Magistrate did not properly determine Probable Cause, but there was a Substantial Basis to determine Probable Cause reasonably relied upon by law enforcement.

The analysis for determining whether a military judge has abused her discretion in denying a motion to suppress begins "by examining whether the magistrate had a 'substantial basis' for determining that probable cause existed." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). "A substantial basis exists 'when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location." *United States v. Nieto*, 76 M.J. 101, 105

(C.A.A.F. 2017) (quoting *United States v. Rogers*, 67 M.J. 162, 165 (C.A.A.F. 2009). Reasonable minds can differ as to whether an affidavit establishes probable cause, but where a neutral, detached magistrate has made that determination, extreme deference is afforded her determination. *Leon*, 468 U.S. at 14.

"[I]n 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." *Nieto*, 76 M.J. at 106. Whether a sufficient nexus exists focuses on whether there is a fair probability that evidence of a crime will be found in a particular place. *Id.* A sufficient nexus can be inferred from the facts and circumstances of a case. *Id.*

In *United States v. Nieto*, this Court found there was an insufficient nexus between appellant's misconduct and his laptop to conclude that probable cause existed. 76 M.J. 101 (2017). Nieto had been observed using his cellular phone to record Soldiers using the latrine without their consent. *Id.* at 103. CID agents sought authorization to seize and search any laptop or phone from appellant's bunk. *Id.* at 104. A laptop seized from appellant's bunk revealed "a number of incriminating videos and pictures, which led to additional criminal charges." *Id.* at 105. "[T]he affidavits accompanying the search authorization did not reference a laptop or data transfers from Appellant's cell phone." *Id.* at 107. This Court found the "affidavit provided no basis, substantial or otherwise, for the military magistrate to conclude that probable cause existed to seize the laptop." *Id.*

In the instant case the magistrate did not develop a sufficient nexus to determine probable cause to search appellant's laptop (and other devices recovered from his home), but she also did not make impermissible generalizations about appellant. In *Nieto,* a special agent informed the military magistrate about his:

> knowledge in reference to Soldiers using their cell phones to photograph things, ... and that those phones are normally downloaded, the photos they take, if they're taking scene photos or photos of their friends or whatever while they're out on--on missions or on the FOB, they'll back those up to their laptops so that when they get to the--a place where they can get Internet, they can post those or send those home to family or whatever.

Id. at 104. The military magistrate relied upon a generalized profile about how deployed soldiers use their phones.

In the instant case, the inference made by the military magistrate was a recognition of the technological capabilities of iPhones and the likelihood of an iPhone being connected to other electronic devices under an Apple account. While that recognition does not establish a sufficient factual nexus to determine probable cause, it is articulated in the affidavit such that a reasonable law enforcement officer would have relied on it.

This Court has applied the good faith doctrine, "[e]ven if [the magistrate's] probable cause determination had lacked a substantial basis." *United States v. Monroe*, 52 M.J. 326, 332 (C.A.A.F. 2000). In *Monroe,* the good faith doctrine was "fully applicable" because "[s]uppression is particularly inappropriate when an

officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id*. (internal quotations omitted). Notably absent from the court's good faith analysis is any mention of the magistrate's erroneous "substantial basis." Instead, the application of the good faith doctrine focuses on the law enforcement agent acting in objective good faith and seeking legal advice before executing his search. *Id.*

1. Substantial Basis under the *Leon* Good Faith Doctrine is different from Substantial Basis under the *Gates* test.

In *United States v. Gates*, the Supreme Court "reaffirm[ed] the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations." 462 U.S. 213, 238 (1983). Reiterating the strong preference for warrant-based searches, seizures and arrests, the Court held that "so long as the magistrate had a 'substantial basis for . . .[concluding]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Id.* at 236 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). The Court explained that "the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238 (internal quotations omitted). The focus under the *Gates* analysis are the facts supporting the determination made by the issuing magistrate.

In *United States v, Leon,* the Supreme Court established the good faith doctrine. 468 U.S. 897 (1984). Recognizing that the "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," the Court reasoned that exclusion of evidence cannot properly deter "an officer acting with objective good faith [who] has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 916, 920. Further, "a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search," as long as "the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant. . . [is] objectively reasonable." *Id.* at 922.

The second prong of good faith under Mil. R. Evid. 311, "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 (emphasis added). The second prong reads the same as the test for reviewing probable cause under *Gates*, but "substantial basis" in the context of good faith means something different. *Carter,* 54 M.J. at 421. To interpret "substantial basis" under the good faith doctrine to mean the same thing as "substantial basis" under the *Gates* test would construe the elements of good faith in a way that "would effectively abolish the good faith exception in military practice," as "[a]ny search that failed the *Gates* test for reviewing probable cause . .

. would also fail the test for good faith . . . ." *Id.* at 422. *United States v. Hoffman* exemplifies the concern that the two "substantial basis" determinations can become confused.

In *Hoffman*, this Court did not provide an analysis of the good faith doctrine, referring to the Court's earlier discussion of how the magistrate had not properly determined probable cause. 75 M.J. 120 (2016). This Court determined it did not need to address the good faith doctrine because the magistrate had no substantial basis for concluding there was probable cause. *Id*. at 128. The *Hoffman* Court determined the facts did not establish a nexus between appellant's actions and the evidence sought in the search authorization, but that is not the "substantial basis" contemplated by the good faith doctrine. If the magistrate had been right about his substantial basis to find probable cause, the Court would never even reach the good faith doctrine or have need to employ it. *Hoffman* conflated discussion of substantial basis under good faith with substantial basis under the *Gates* standard for reviewing probable cause. *See Carter*, 54 M.J. at 414.

Hoffman contradicts the analysis in *Carter*[2] and also the Supreme Court's opinions in *Leon* and *Herring*. An insufficient determination of probable cause is

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[2] In *Nieto*, this Court recognized "the tension between [its] discussion of the good faith doctrine in *Hoffman*, 75 M.J. at 127-28, and *Carter*, 54 M.J. at 419-22." 76 M.J. at 108 n.6. The Court declined to address the seemingly contradictory opinions and instead "le[ft] for another day resolution of this tension. . . ." *Id.*

not the same as an unreasonable reliance on that determination. Appellate courts reviewing substantial basis under the good faith doctrine must focus on law enforcement's reasonable reliance on the determination of the magistrate, not the flawed determination of the magistrate.

2. Appellant's Argument about INV Kesler Confuses the meaning of Substantial Basis within the Framework of the Good Faith Doctrine.

Appellant argues that because there was not a proper nexus established by INV Kesler's affidavit, his "reliance on the warrant was not objectively reasonable, thus the good faith exception is inapplicable." (Appellant's Br. 14). But this argument demonstrates the confusion over the meaning of "substantial basis" within the framework of the good faith doctrine. Investigator Kesler's failure to provide enough of a factual basis to establish a sufficient nexus between appellant's offense and the electronic devices in his home speaks to the *military magistrate's* lack of substantial basis under the *Gates* test. It does not mean that INV Kesler did not reasonably rely on her substantial basis for probable cause when he executed the search and seizure of those devices.

Though the inference that appellant's laptop and iPhone would be linked is not enough to establish a sufficient nexus for probable cause to seize the laptop, coupled with the facts known, an inference can provide enough of a basis for a reasonable law enforcement officer to trust in the magistrate's erroneous determination of probable cause. *See United States v. Carpenter,* 360 F.3d 591

(6th Cir. 2004); *See also United States v. Carpenter*, 341 F.3d 666 (8th Cir. 2003). It is not entirely unreasonable that a law enforcement officer would believe the magistrate permissibly considered the likelihood that appellant's iPhone would be linked to the iCloud and other devices, especially considering that it was linked to appellant's laptop, just as predicted in the supporting affidavit.

Appellant argues "Investigator Kesler's reliance on MAJ Farmer's determination that there was probable cause is unreasonable because her determination was based on his unsupported opinion." (Appellant's Br. 15). Appellant's logic is circular: Because INV Kesler provided a deficient affidavit, the military magistrate's probable cause determination was incorrect, and INV Kesler should have known that and not relied upon it because he should have known his affidavit was deficient? Appellant's argument presumes that law enforcement officials are legal experts empowered to determine when their own affidavits are deficient. If that were true and they could grade their own work, it would obviate the need for a magistrate to make probable cause determinations.

Appellant charges a law enforcement officer with determining whether his own affidavit establishes probable cause and then calls him unreasonable for relying on the word of a military magistrate who determined that it did. The exclusionary rule was not created to deter the errors of magistrates and judges but to regulate the behavior of law enforcement officials. Law enforcement officials

cannot both be required to respect the probable cause determination of a magistrate and then challenge it when they disagree.

In the military, this problematic position is further exacerbated by the ranks of CID agents and military police investigators in contrast to the judge advocate officers who serve as military magistrates. When a field grade officer magistrate is wrong about her determination of probable cause, a military judge cannot charge a junior enlisted investigator without a law degree to challenge her legal determination or punish him for executing her search authorization.

C. Federal Circuit Courts have applied the Good Faith Doctrine in the absence of a Substantial Basis to find Probable Cause.

Many courts have applied the good faith doctrine though a magistrate lacked a factual nexus linking the subject to the location to be searched, the evidence to the location, or the illegal activity to the location. If they did not apply good faith despite a magistrate's lack of a substantial basis, the doctrine would never apply.

1. The Second Circuit - *United States v. Clark*: Missing nexus between the Subject and the Location

In *United States v. Clark*, the Second Circuit found there was no substantial basis to find probable cause to search every unit of an apartment complex, yet still found the good faith doctrine applied. 638 F.3d 89 (2nd Cir. 2011). The court reasoned that substantial basis to find probable cause could not be found where "an unspecified number of residential units [were] not linked to the defendant or [to] his criminal activities." *Id.* at 99. Despite those two missing nexuses, the court

properly found that despite the magistrate's lack of a substantial basis for probable cause, the exclusionary rule did not demand suppression of all physical evidence. *Id.* at 99 (citing *Herring v. United States*, 555 U.S. 135 (2009)).

The court analyzed the good faith of the officers who executed the warrant and determined that none of the four scenarios existed that forfeit the presumption of good faith. *Id.* at 100. Correctly turning to the standard set forth by the Supreme Court, the Second Circuit found the police who executed the warrant had done nothing "so 'flagrant' or 'culpable' in violating Fourth Amendment rights as to compel suppression." *Id.* at 104 (quoting *Herring*, 555 U.S. 135). While the facts did not establish probable cause to support the warrant, the application was "not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 105 (quoting *Leon*, 468 U.S. at 923).

2. The Fourth Circuit - *United States v. Lalor*: Missing nexus between the Location and the Evidence

In *Lalor*, the Fourth Circuit reviewed a search warrant issued by a magistrate which authorized the search of the appellant's residence for "cocaine, narcotics, narcotic paraphernalia, U.S. currency, related objects and personal papers." 996 F.2d 1578, 1579 (4th Cir. 1993). It was based on information from two informants who told police that "Jamaican John" sold cocaine in a particular area off a parkway. *Id.* at 1580. One informant told police he had purchased cocaine from Jamaican John on numerous occasions and knew John lived in a particular

apartment. *Id.* at 1580. The court found the affidavit was "devoid of any basis from which a magistrate could infer that evidence of drug activity would be found at [appellant's residence]." *Id.* at 1582. There was a factual basis to link (1) John and drug dealing, (2) John and cocaine, and (3) John and the apartment to be searched, but there was no link between (4) cocaine and John's apartment.

Despite finding the warrant application "deficient because it fails to establish a nexus between the drug activity and the location that was searched," the court found "the warrant is not so lacking in probable cause that the officers' reliance upon it was objectively unreasonable." *Id.* at 1583. The court reasoned that two judicial officers—the magistrate and the trial judge—had concluded the affidavit was sufficient to establish probable cause, which evidenced the reasonableness of the officers' reliance on the warrant. *Id.* The Fourth Circuit applied the good faith doctrine, reiterating "evidence obtained from an invalidated search warrant will be suppressed only if 'the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* (quoting *Leon,* 468 U.S. at 926).

3. The Sixth Circuit - *United States v. Carpenter*: Missing nexus between the Location and the Illegal Activity

The Sixth Circuit also applied the good faith doctrine where an affidavit to support a search warrant failed to provide "the required nexus between [appellants'] residence and evidence of marijuana manufacturing," to support a

judge's conclusion that probable cause existed to search the home. *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004). The court found the "judge lacked a substantial basis to determine that probable cause existed to search [appellants'] residence." *Id.* at 595.

Just as this Court reasoned in *Carter*, the Sixth Circuit recognized the obvious: if lack of a substantial basis prevented application of the good faith doctrine, "the exception would be devoid of substance." *Id.* Citing to the third exception to good faith articulated in *Leon*, the Sixth Circuit concluded an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," is a much less demanding showing than "substantial basis." *Id.* The Sixth Circuit recognized that an affidavit did not establish probable cause where it read "that the officer's training and experience led him to believe that evidence would be located [in a safe deposit box]," but decided that the inference still established "a minimally sufficient nexus between the illegal activity and the place to be searched to support an officer's good-faith belief in the warrant's validity." *Id.* (referring to *United States v. Schultz*, 14 F.3d 1093, 1098 (6th Cir. 1994)).

4. The Eighth Circuit - *United States v. Carpenter*: Missing nexus between the Location and the Evidence

The Eighth Circuit found that while an affidavit containing several infirmities did not support probable cause, "the cumulative effect of the

information set forth in the affidavit provide[d] an adequate basis for finding [an officer's] reliance was reasonable." *United States v. Carpenter*, 341 F.3d 666, 670 (8th Cir. 2003). The affidavit supporting a search for drugs failed to explain how the informant knew the subject possessed drugs, simply asserting the informant knew. *Id.* at 667. The affidavit also failed to "present facts to indicate the existence of a nexus between [the subject's] residence and the suspected contraband." *Id.* at 671. The search had instead relied on a law enforcement officer's verification of the subject's address and inference that drug contraband would be found there. *Id*.

The Eighth Circuit did "not endorse such an inference without a factual basis to form the nexus between the residence and the drugs," but concluded it was not "entirely unreasonable for [an officer] to believe the inference to be permissible." *Id.* at 672.

Just as in each of these federal circuit court cases, INV Kesler's affidavit was not so lacking to render his official belief in the determination of probable cause "entirely unreasonable." *See Leon*, 468 U.S. at 923. In evaluating the third exception to the good faith doctrine set forth in *Leon,* the Eighth Circuit aptly stated, "[e]ntirely unreasonable" is not a phrase often used by the Supreme Court," and "nothing in *Leon* or the Court's subsequent opinions . . .would justify our dilution of the court's particularly strong choice of words." *Id.* at 670. This

standard does not require law enforcement officers to be legal experts who correct magistrates when they err. It means that under no circumstances could an average law enforcement officer have reasonably believed in the magistrate's determination of probable cause.

That standard is not even approached in this case so employing the exclusionary rule would not further its purpose of deterring police misconduct. Thus, the military judge did not abuse her discretion in applying the good faith doctrine and declining to employ the exclusionary rule (perhaps more aptly called the exceptional exclusionary remedy).

II.
THE ARMY COURT OF CRIMINAL APPEALS ERRED IN DEEMING THE INSUFFICIENT NEXUS ISSUE WAIVED BUT THE ISSUE WAS FORFEITED AND THERE WAS NO PLAIN ERROR.

Standard of Review

Whether an accused has waived an issue is a question of law reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017)(citations omitted).

Law and Analysis

A. Failure to state a particular grounds for suppression constitutes forfeiture, not waiver.

"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). This Court reviews forfeited issues for plain error, *Id.,* but does not review waived issues because a valid waiver leaves no error to correct on appeal. *Ahern,* 76 M.J. at 197 (citations omitted).

Appellant specified two grounds for his motion to suppress the eight videos found on his iPhone: (1) the senior NCO unlawfully seized his phone, and (2) the search authorization and subsequent search of appellant's phone was unlawful because the magistrate did not have sufficient probable cause to issue the search authorization. (JA 200-202; App. Ex. XXXIII, p.4). "At no time during the initial suppression hearing, did appellant challenge the search of the iPhone because it was opened by a computer illegally seized from appellant's residence." (JA 4). The military judge initially granted appellant's motion to suppress because the government failed to meet its burden, (JA 235), but reconsidered upon request by the government. (JA 358). Upon reconsideration, appellant again failed to challenge the search of his iPhone because it was opened using the connection to his laptop computer. (JA 4).

On appeal to the CCA, appellant asserted his new theory for the first time: since his iPhone was locked and not otherwise accessible but for a computer illegally seized from his home, the eight videos obtained from the iPhone were fruit of an illegal search and should therefore have been suppressed. (JA 5). The CCA found appellant's failure to raise this theory of suppression to the military judge constitutes waiver. (JA 6). Alternatively, the court found that "by failing to articulate this specific ground for relief, the burden never shifted to the government." (JA 6). The government disagrees.

A military judge may require the defense to state specifically the grounds upon which the defense moves to suppress evidence. Mil. R. Evid. 311(d)(3). In that circumstance, the burden upon the prosecution to establish the admissibility of the evidence extends only to the grounds upon which the defense moved to suppress it. Mil. R. Evid. 311(d)(5)(C). Military Rule of Evidence 311 states that a failure to object or to move to suppress constitutes "waiver." Mil. R. Evid. 311(d)(2). However, this Court has found that there are instances where the plain language of a military rule for court-martial or rule of evidence reads "waiver" but may be interpreted as a "forfeiture."

In *United States v. Andrews,* this Court interpreted R.C.M. 919(c) to mean that a defense counsel's mere failure to object to improper closing argument constitutes forfeiture, though the rule reads "waiver." 77 M.J. 393, 401 (C.A.A.F.

2018). In the instant case, appellant failed to articulate a ground for suppression, which is not itself a constitutional right, but a remedy that may be appropriate when the constitutional right against unreasonable search and seizure is violated. "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right." *United States v. Sweeney*, 70 M.J. 296, 303-304 (C.A.A.F. 2011)(citations omitted). Where appellant moves to suppress evidence under M.R.E. 311 but fails to articulate a possible ground upon which to suppress the evidence, this forfeits (but does not waive) the issue.

The government concedes the CCA erred in its opinion by deeming appellant's new ground for suppression was waived. However, treating appellant's omitted suppression ground as a forfeiture demands that it be scrutinized under a plain error analysis, which leads to the same outcome reached by the CCA.

B. The military judge did not commit plain error when she denied appellant's motion to suppress.

"Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Andrews*, 77 M.J. at 401 (citations omitted).

Plain and obvious error is exemplified in *United States v. Sweeney*, where a military judge (absent defense objection) admitted into evidence a testimonial urinalysis specimen custody document. 70 M.J. at 304. The certification was "a

formal, affidavit-like statement of evidence that. . . indicated that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated." *Id.* This Court reasoned that such a certification "plainly and obviously violated the Confrontation Clause," because the declarant was not subject to cross-examination and it had "no purpose but to function as an affidavit." *Id.; See also United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008)(finding plain and obvious error where a military judge admitted into evidence drug laboratory reports in violation of the Confrontation Clause).

This Court has found plain and obvious error where a military judge instructed members that assault consummated by a battery was a lesser included offense of abusive sexual contact because assault consummated by a battery clearly failed the well-established elements test. *United States v. Armstrong*, 77 M.J. 465, 472-473 (C.A.A.F. 2018).

Also deemed plain error was a military judge's instruction to a panel that they could consider evidence of any of four specifications of charged conduct "for its bearing on any matter to which it is relevant in relation to those same offenses, including appellant's propensity or predisposition to engage in sexual assault," in violation of the Court's holding in *United States v. Hills*. *United States v. Guardado*, 77 M.J. 90, 93 (C.A.A.F. 2017). Based on the state of the law at the time of the appeal (post *Hills*), the instructional error was plain and obvious. *Id.*

The government does not concede that the military judge's decision to deny appellant's suppression motion is error for the reasons stated in the first granted issue. But to the extent that this Court disagrees, any error by the military judge was not plain and obvious. In stark contrast to the examples provided, the military judge did not misapply the law or ignore key facts that make the error plain. The examples of plain and obvious error provided are all duties of a military judge that the military judge failed to perform in the above cited cases, such as properly identifying and instructing on lesser included offenses, and protecting against confrontation clause violations and convictions based upon improper propensity evidence. In contrast, a military judge does not have an affirmative duty to creatively fashion appellant's grounds for suppression, especially considering that a military judge may not know the facts that would be the basis for such an argument. As the CCA noted, by failing to articulate this specific ground for suppression, it was never even brought to the attention of the military judge and she never made a decision on the issue. (JA 5, FN 3, JA 6).

There is nothing plain and obvious about the argument that the digital connection between appellant's laptop and his iPhone was not lawful for law enforcement officers to exploit in order to unlock the lawfully seized iPhone. There is no clearly established military case law that would cause the military judge to address such an issue, absent a motion by appellant spelling out why the

use of the connection between the two devices was unlawful. It is not clear that the seizure of the laptop was unlawful under the good faith doctrine (as obviated by this Court's consideration of that very issue). It is also not plain or obvious that it is unlawful for law enforcement to use a piece of technology to unlock another piece of technology when they are under the belief they have the legal authority to search both devices. 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 defense motion.

Absent plain error, this Court should affirm the findings and sentence as adjudged.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence as adjudged.

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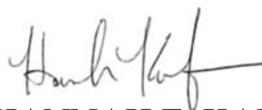

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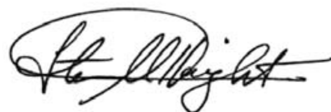

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I certify that the foregoing was transmitted by electronic means to the Court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on Mr. Bryan DePowell, civilian appellate defense counsel, and the Defense Appellate Division, on October __24__, 2018.

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