16 January 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF IN SUPPORT OF CERTIFIED ISSUES
v.	)	
	)	Crim. App. No. 39397
Staff Sergeant (E-5), JASON M. BLACKBURN, USAF, *Appellant.*	)	USCA Dkt. No. 20-0071/AF

UNITED STATES' BRIEF IN SUPPORT OF CERTIFIED ISSUES

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

ISSUES CERTIFIED

I.

WHETHER UNDER MILITARY RULE OF EVIDENCE 311(D)(2)(A), APPELLEE WAIVED A BASIS FOR SUPPRESSION THAT HE DID NOT RAISE AT TRIAL?

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO SUPPRESS DIGITAL EVIDENCE PURSUANT TO THE GOOD FAITH EXCEPTION?

III.

WHETHER THE MILITARY JUDGE PROPERLY DENIED THE MOTION TO SUPPRESS DIGITAL EVIDENCE PURSUANT TO MILITARY RULE OF EVIDENCE 311(A)(3), A DETERMINATION NOT

REVIEWED BY THE AIR FORCE COURT OF CRIMINAL APPEALS?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter "AFCCA") reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866(c) (2016). (JA at 1-32.) This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

STATEMENT OF THE CASE

A general court-martial composed of officer members found Appellee guilty, contrary to his pleas, of one charge and specification of sexual abuse of a child and one charge and specification of indecent recording in violation of Articles 120(b) and 120c, UCMJ, 10 U.S.C. §§ 920(b), 920c.[1] (JA at 45-46, 197-99.) The court-martial sentenced Appellee to a bad-conduct discharge, confinement for five years, total forfeiture of pay and allowances, and reduction to the grade of E-1. (JA at 183.) The convening authority deferred the forfeitures until taking action, where he approved the adjudged sentence but waived the mandatory forfeitures. (JA at 37.)

On 22 August 2019, a three-member panel of AFCCA issued an unpublished

[1] The military judge found Appellee not guilty of Charge III, brought under Article 134, UCMJ, 10 U.S.C. § 934, prior to findings.

2-1 opinion in Appellee's case. United States v. Blackburn, ACM 39397, 2019 CCA LEXIS 336 (A.F. Ct. Crim. App. 22 Aug. 2019) (unpub. op.) (JA at 1-32.) Holding that the military judge abused his discretion by denying Appellee's motion to suppress, the majority: (1) set aside the finding of guilty for the indecent recording charge and specification under Article 120c and the sentence; (2) affirmed the remaining charge and specification; (3) and authorized a rehearing. (JA at 26, 27.) Judge Lewis issued a separate opinion concurring in part and dissenting in part and in the result where he found that the military judge did not abuse his discretion when he denied Appellee's motion to suppress. (JA at 28-32.)

On 23 September 2019, the government moved for reconsideration of AFCCA's decision and also requested reconsideration en banc. (JA at 33.) On 18 October 2019, AFCCA judges declined to vote on whether the court should reconsider the opinion en banc, and the deciding three judge panel voted 3-0 against panel reconsideration. (JA at 33.) Therefore, on 18 October 2019, AFCCA denied the government's motion to reconsider and request for reconsideration en banc. (JA at 33.)

STATEMENT OF FACTS

The investigation in Appellee's case was initiated on 20 April 2016, when ES, Appellee's 12 year old stepdaughter, called LS, her stepmother, to tell her that she had found a camera recording her while she was undressing in the bathroom

before a shower. (JA at 63.) ES told LS that the camera belonged to her stepfather, Appellee. (JA at 63) Upon learning this, LS contacted military authorities, and the Air Force Office of Investigations (AFOSI) initiated an investigation. (JA at 64.)

Upon being notified of LS' report, AFOSI called all agents "together to come in" that evening because the allegation required "all hands on deck." (JA at 97.) That same night, but prior to obtaining search authorization,[2] Appellee's wife and ES' biological mother, MB, was interviewed by AFOSI and explained that the family "had three computers in their home that they used regularly. [Appellee] possibly had a laptop that he used as well. All family members used the computers in their house. [Appellee] also had his own computer that he built himself." (JA at 66.) MB went so far as to describe Appellee as having a "passion for computers." (JA at 66.) MB also informed AFOSI in the same interview that Appellee had told her that he had placed the camcorder so that the lens "faced the portion of the bathroom where the sinks and shower were located." (JA at 18.) In addition, MB described Appellee as being "tech savvy." (JA at 19, 21.)

[2] The record demonstrates that MB was interviewed on 20 April 2016, on the night AFOSI received the allegation. (JA at 65 at ¶ 2-4.) The search authorization was not obtained and executed until 21 April 2016. (JA at 67 at ¶ 2-6.) The fact that it was not obtained until 21 April 2016 is further demonstrated on the AF IMT 1176, where Colonel SAK limited her authorization to search to be within "3 days from 21 Apr 16." (JA at 71.)

On 21 April 2016, AFOSI interviewed ES who explained she saw the partially concealed camcorder with its lens exposed and pointing towards the shower while she was undressing. (JA at 66, 185.) ES also explained that she "knew it was recording because a red light was on and the screen said 'recording.'" (JA at 66, 185.) Upon inspecting the camcorder, ES discovered an 11 minute video of her in the bathroom. (JA at 66, 185.)

ES also gave AFOSI additional information regarding Appellee. She first explained that Appellee would "often" enter the bathroom while she was showering and that it only occurred on nights when her mother was gone. (JA at 66, 186.) ES also stated that, sometime in February or March 2016, Appellee "aimed a camera at her over the curtain rod while she was in the shower." (JA at 66, 186.) In addition, ES told AFOSI that Appellee had recently requested nude photographs of her because "he was going to miss her once he was deployed and the photographs would remind him of her." (JA at 67, 186.)

Based upon the information collected, AFOSI decided to seek authorization to search Appellee's residence for "any and all cameras or electronic media to include hard drives, SD cards, compact discs, computers and tablet computers that could contain evidence of child pornography." (JA at 73, 67.) But before contacting a military magistrate, the AFOSI agents had "a discussion … on what should be searched in [Appellee]'s house" before seeking the search authorization.

(JA at 98.) TSgt DD was one of the special agents present for this discussion and the one who sought the search authorization from Colonel SAK, the military magistrate. (JA at 71-73, 106-08.)

In his affidavit to Colonel SAK, TSgt DD informed her that he was investigating the offense of "Article 134, Child Pornography" because ES discovered Appellee's camcorder recording her while she undressed in the bathroom. (JA at 71, 72.) In addition, TSgt DD further explained that ES had previously caught Appellee aim "a camera at her over [the] curtain rod while she was in the shower," and had asked her "to provide him a photograph of herself without clothes, because he was deploying and was going to miss her." (JA at 72-73.) Based upon this information, Colonel SAK authorized the search on 21 April 2016. (JA at 71.)

The authorization permitted the search of Appellee's residence to seize "any cameras or electronic media to include hard drives, SD cards, compact discs, computers and tablet computers that could contain evidence of child pornography." (JA at 67, 71.) That same day, AFOSI executed the search of Appellee's home and seized, among other things, two camcorders, one external hard drive, seven hard drives, three digital cameras, one thumb drive, three laptop computers, one tablet, one SD card, and two tower computers. (JA 67-68.) During a digital forensic examination of one of Appellee's tower computers, the government discovered six

videos of ES in the bathroom that showed her partially clothed or naked. (*See* JA 4, 51, 87, 189.)

Prior to trial on the merits, Appellee moved the military judge to suppress evidence seized pursuant to an authorized search of his electronic devices. (JA at 48-85.) Among other points, Appellee argued a lack of probable cause and that the good faith exception to the exclusionary rule should not apply to the search and seizure in his case. (JA at 48-85.)

Appellee did not argue a lack of probable cause based on false statements being intentionally or recklessly included in the affidavit under Mil. R. Evid. 311(a)(4)(B). Specifically, with respect to the good faith exception, Appellee argued that the military judge could not "use the good faith exception if the magistrate didn't have a substantial basis for probable cause," and that the agents did not act in good faith. (JA 156; *see also* JA at 59-60.) At no point did Appellee argue that the good faith exception could not apply because law enforcement recklessly omitted or misstated information in the affidavit.

During the motions hearing, when the military magistrate was asked why she authorized Appellee's computer to be searched and seized, Colonel SAK testified as follows: "So I felt like that was warranted because, one [there] [were] a few instances. Like when [Appellee] held the camera over the shower curtain he, I think, told her that it wasn't recording, that it was just a joke, but there are multiple

times when this camera came into play." (JA at 118-19.) And when asked if she felt that Appellee had "backed up some of that media," she responded "Oh, absolutely." (JA at 119.) Colonel SAK further elaborated on this point: "I think most of us in this day and age usually back up anything that we save if it's of value, you know, we plan to look at it again because you just never know, so it seems reasonable someone would back up their data." (JA at 119; *see also* JA at 125 62 ("[B]ased on my personal knowledge of electronic devices in general and including camcorders, I would expect that someone would back up videos or pictures taken on a camcorder, just as a rule.")).

After holding a hearing on the motion to suppress, the military judge issued a written opinion that he also gave orally on the record. (JA at 172-86, 188-97.) In his conclusions of law, applying United States v. Nieto, 76 M.J. 101 (C.A.A.F. 2017), the military judge determined that "the military magistrate had no substantial basis for finding probable cause" because of a lack of nexus between the camcorder and computer. (JA at 177-78, 195-96.) He also concluded that "the inevitable discovery doctrine does not apply in this case." (JA at 177-78, 195-96.) However, the military judge found that "all of the elements of the good faith exception have been satisfied" and concluded his ruling by reasoning as follows:

> Finally, the court notes that this was a very close call, and recognizes that the court's ruling may appear inconsistent with the holding of the CAAF in Nieto. However, given the Supreme Court's favorable approach to the deference

> provided to magistrates and the warrant process, and the fact that this court has found no bad faith or illegality on the part or actions of the participants involved in the search authorization process that would justify the deterrent remedy of exclusion, the good faith exception to the exclusionary rule justifies greater consideration and analysis.

(JA at 179-80; 197.) As a result, the military judge denied the motion to suppress. (JA at 180, 197.)

SUMMARY OF THE ARGUMENT

AFCCA erred when it failed to apply waiver as required by Mil. R. Evid. 311(d)(2)(A), as interpreted by this Court in United States v. Robinson, 77 M.J. 303, 307 (C.A.A.F. 2018), and reaffirmed in United States v. Smith, 78 M.J. 325, 326 (C.A.A.F. 2019), and United States v. Perkins, 78 M.J. 381, 389-90 (C.A.A.F. 2019). At trial, Appellee did not raise an argument that the good faith exception could not apply due to alleged false or reckless information in the affidavit that was presented to the magistrate. Despite this, the lower court sua sponte created this issue, which the government had no opportunity to rebut, and used it as a basis to find the good faith exception could not apply in Appellee's case. This was error. Thus, this Court should reverse AFCCA's decision, apply the waiver doctrine, and affirm the military judge's decision.

In addition, AFCCA also erred in its review of the military judge's decision by improperly applying the abuse of discretion standard. In doing so, it made

clearly erroneous findings of fact and incorrect conclusions of law that directly led it to determine that the good faith exception did not apply. Simply put, the lower court did not conduct a proper review of the military judge's ruling to deny Appellee's motion to suppress under the good faith exception. After conducting its own review, this Court should find that the military judge did not abuse his discretion in admitting the evidence and uphold his decision.

Finally, AFCCA failed to review the military judge's determination under Mil. R. Evid. 311(a)(3) for an abuse of discretion before setting aside Appellee's indecent recording conviction. The military judge properly determined that the case did not warrant the sanction of exclusion under Mil. R. Evid. 311(a)(3), because in this case, the deterrent benefit of excluding the evidence would not outweigh the costs to the justice system. AFCCA erred by finding the evidence should have been excluded without conducting the required analysis under Mil. R. Evid. 311(a)(3). Therefore, this Court should reverse the lower court's decision and affirm Appellee's indecent recording conviction.

ARGUMENT

I.

UNDER MIL. R. EVID. 311(D)(2)(A), APPELLEE WAIVED THE BASIS FOR SUPPRESSION UPON WHICH THE LOWER COURT GRANTED RELIEF.

Standard of Review

Issues of waiver are reviewed de novo. United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002) (citation omitted).

Law & Analysis

The issue of whether TSgt DD's affidavit was intentionally false or made with a reckless disregard for the truth was waived at trial as a basis for relief. Mil. R. Evid. 311(d)(2)(A) (stating that the failure to object to the admission of evidence obtained from searches and seizures "constitutes a waiver of the … objection."). Despite this, and the fact that Appellee did not raise the issue on appeal, the AFCCA majority created this basis and used it to find the military judge abused his discretion. (JA at 15-26.) Specifically, AFCCA found that the three prongs of Mil. R. Evid. 311(c)(3)'s good faith exception were not met because the lower court disagreed with the military judge's finding that "TSgt DD did not recklessly omit or misstate any information." (JA at 24.) It found that TSgt DD's affidavit recklessly omitted or misstated information by "injecting a reference to child pornography," by for not disclosing knowledge of whether

[Appellee] owned any computers, had ever downloaded anything from the camcorder … onto another device, knew any details as to the capacity of the camcorder, knew what type of media it relied on to store images, or if or how those images could be downloaded." (JA 23, 25.)

However, at trial, Appellee did not challenge the affidavit for containing "false statements" as required by rule. Mil. R. Evid. 311(d)(4)(B) ("[T]he defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth."). Therefore, any question as to whether TSgt DD's affidavit was false or reckless was waived and could not serve as a basis for determining that the military judge abused his discretion.

In United States v. Robinson, 77 M.J. 303, 307 (C.A.A.F. 2018), this Court held that Mil. R. Evid. 311(d)(2)(A) "unambiguously establishes that failure to object is waiver" and that "[w]hen there is waiver of an issue, that issue is extinguished and may not be raised on appeal." There, the appellant attempted to object to the scope of his consent to search for the first time on appeal under different bases than his objection at trial. Id. Similarly, in United States v. Smith, this Court reiterated its holding in Robinson and found the appellant had waived the argument being raised on appeal because it was not argued at trial. Smith, 78 M.J. 325 (C.A.A.F. 2019). At trial, the appellant moved for suppression because

of the unlawful seizure of his iPhone and a lack of probable cause to justify the search. Id. However, on appeal, the appellant "challenged for the first time the search of his iPhone because it was opened using the connection to his laptop computer." This Court found the appellant had waived the issue and declined to review it. Id. at 326.

Finally, in United States v. Perkins, 78 M.J. 381, 389-90 (C.A.A.F. 2019), this Court further cemented its interpretation of Mil. R. Evid. 311(d)(2)(A)'s waiver provision. There, this Court declined to consider the appellant's argument that the magistrate was "simply a rubber stamp" because it was raised for the first time on appeal. The Court stated that "[u]nder Mil. R. Evid. 311(d)(2)(A), arguments for suppression of evidence under Mil. R. Evid. 311 that are not made at trial are waived." Id. at 390. More specifically, the Court stated that an accused must make "'particularized objection[s]' to the admission of evidence, otherwise the issue is waived and may not be raised on appeal." Id. (citations omitted). The Court reasoned that "a particularized objection is necessary so that the government has the opportunity to present relevant evidence that might be reviewed on appeal." Id. (citation omitted).

This Court's reasoning in Perkins—that the government must have the opportunity to respond to particularized objections—is especially pertinent to Appellee's case, where he made no allegation at trial or on appeal that a

deliberately false or reckless statement was presented to a military magistrate. In fact, Mil. R. Evid. 311(d)(4)(B) outlines the process for an accused to raise such an objection and for the government to present relevant evidence in response. The rule provides for the defense to request a hearing to object to the admission of evidence obtained pursuant to a search authorization if it can make "a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the [magistrate]" under Mil. R. Evid. 311(d)(4)(B). "At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth." If the defense has satisfied its initial burden, the rule then allows the government to prove, "with the false information set aside, that the remaining information presented to the [magistrate] is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion must be granted unless the search is otherwise lawful under these rules." Mil. R. Evid. 311(d)(4)(B).

Here, the facts warrant a finding of waiver as explained in Robinson, Smith, and Perkins. Indeed, Appellee's case is factually similar to Perkins where the appellant attempted to raise an additional challenge to the good-faith exception that was not raised at trial. In Perkins, the appellant argued at trial that "the second and

third requirements of the good faith exception in Mil. R. Evid. 311(c)(3)(B) and (C)" were not satisfied. Perkins, 78 M.J. at 387. Later, the appellant alternatively argued for the first time on appeal that United States v. Leon, 768 U.S. 897 (1984), also precluded application of the good faith exception because the magistrate wholly abandoned his judicial role and was simply a rubber stamp. Id. at 387, 389.

As previously discussed, the Court found that the appellant had waived this argument. The Court effectively found that an objection to one aspect of the good faith exception is insufficient to preserve an objection to another. Rather, an appellant must make a "particularized objection" at trial to be able to raise it again on appeal. Id. at 390.

Here, Appellee did not preserve the particular objection to the good faith exception that AFCCA relied upon to overturn the military judge's decision. At trial, Appellee argued that the military judge could not "use the good faith exception if the magistrate didn't have a substantial basis for probable cause,"[3] and that the agents did not act in good faith because of their "willingness to basically seize anything that they found regardless of whether it fell within the terms of the search authorization." (JA 156; *see also* JA at 59-60.) At no point did Appellee argue that the good faith exception could not apply because law enforcement provided the magistrate with an affidavit that "recklessly omitted or misstated

[3] This argument no longer has merit pursuant to Perkins, 78 M.J. at 387-88.

information," as AFCCA found. (JA at 23, 25.) Therefore, the issue was waived and the lower court should have declined to "address this argument on the merits." Perkins, 78 M.J. 390; United States v. Stringer, 37 M.J. 120, 125 (C.A.A.F. 1993) (In view of the absence of a particularized objection at trial … we will consider this issue waived.")

The sound policy reasons for waiver that were identified in Perkins are also applicable here. Because Appellee never objected on the basis of Mil. R. Evid. 311(d)(4)(B) that the "information in the affidavit [was] false or provided recklessly" at trial, the government never had "the opportunity to present relevant evidence [as allowed by Mil. R. Evid. 311(d)(4)(B),] that might be reviewed on appeal."[4] Perkins, 78 M.J. 390. In addition, the government was unable to present relevant evidence at trial to rebut any inference that TSgt DD "knowingly and intentionally or with reckless disregard for the truth" presented a false statement to Colonel SAK. As discussed in more detail below, AFOSI knew that Appellee used a camcorder to film ES nude in the bathroom, owned computers and had made numerous attempts to obtain nude images of ES, which already showed TSgt DD

[4] Also, because Appellee did not allege that law enforcement used a "false or reckless affidavit" in his assignments of error and reply to AFCCA, the United States did not have the opportunity or reason to address the issue in its answer brief. And although trial defense counsel did argue a lack of probable cause to search for evidence of child pornography, he did not claim that referencing child pornography was a "reckless misstatement" that ultimately that misled the magistrate or defeated the good faith exception.

did not recklessly omit or misstate information in his affidavit. However, had a "particularized objection" under Mil. R. Evid. 311(d)(4)(B) been made, the government would have had the opportunity to present additional evidence to directly defend against an allegation of false or reckless statements. Instead, the government was unable to present "relevant evidence that might be reviewed on appeal." Perkins, 78 M.J. at 390. Thus, under the reasoning set forth in Perkins, Appellee waived this issue, and AFCCA should not have overturned Appellee's indecent recording conviction on a basis for suppression that it created on appeal. (JA at 23.)

WHEREFORE, the United States respectfully requests this Honorable Court find Appellee waived this issue and reverse AFCCA's decision.

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN DETERMINING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DID NOT APPLY.

Standard of Review

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion. United States v. Nieto, 76 M.J. 101, 105 (C.A.A.F. 2017). "[I]n reviewing a ruling on a motion to suppress, [appellate courts] consider the evidence in the light most favorable to the prevailing party." United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (internal quotation marks omitted)

(citations omitted). "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017) (quoting United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Erikson, 76 M.J. at 234 (quoting United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)) (internal quotation marks omitted) (citations omitted).

Law

"[E]ven if [a] warrant was not based upon probable cause, the evidence [may] be admitted under the 'good faith' exception to the warrant requirement." United States v. Henley, 53 M.J. 488, 491 (C.A.A.F. 2000). For courts-martial, the good faith exception was enumerated in Mil. R. Evid. 311(c)(3), which provides:

> 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.

In United States v. Leon, the Supreme Court listed four circumstances where the "good faith" exception would not apply: (1) where the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false"; (2) where the magistrate "wholly abandoned his judicial role"; (3) where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where the warrant is so "facially deficient 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." Leon, 468 U.S. at 923. Mil. R. Evid. 311(c)(3)'s second prong addresses the first and third exceptions in Leon while the third prong addresses the second and fourth exceptions. United States v. Carter, 54 M.J. 414, 421 (C.A.A.F. 2001).

The test for the second requirement of the good faith exception, Mil. R. Evid. 311(c)(3)(B), was explained by this Court in Carter, 54 M.J. at 421. There, the Court explained that a strict reading of Mil. R. Evid. 311(c)(3)(B) would result in the good faith exception never being met "in any situation in which a court concluded that probable cause did not exist." United States v. Perkins, 78 M.J. 381, 387 (C.A.A.F. 2019). Therefore, "to prevent Mil. R. Evid. 311(c)(3)(B) from

becoming a nullity," this Court determined that the second prong tests whether "the magistrate authorizing the search had a substantial basis, in 'the eyes of a reasonable law enforcement official executing the search authorization,' for concluding that probable cause existed." Id. (quoting Carter, 54 M.J. at 422). Put another way, the substantial basis "element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization." Carter, 54 M.J. at 422. In this context, the second prong of Mil. R. Evid. 311(b)(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." Id.

The third requirement under Mil. R. Evid. 311(c)(3)(C) may be met based on a plain reading of the rule. Perkins, 78 M.J. at 388-89. However, "law enforcement agents do not act in good faith if they 'know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective.'" Id. (quoting Carter, 54 M.J. at 421).

Analysis

A. *The majority erred in its analysis of the good faith exception*

The majority erred in concluding that the military judge abused his discretion by applying the good faith exception to the exclusionary rule. First, it failed to properly apply the abuse of discretion standard. Second, the lower court

made clearly erroneous findings that were material to its analysis. Third, AFCCA erred when it imputed bad faith to AFOSI for the use of the term "child pornography" in the affidavit accompanying the request for search authorization. These errors materially affected the majority's review of the good faith exception and warrant reversal.

The majority also erred in its application of the law. Its decision demonstrates its misapprehension of the law, because it erred in its analysis of the second prong of the good faith exception under Mil. R. Evid. 311(c)(3). The lower court concluded that the second prong of the good faith exception was not met because "the magistrate had no substantial basis for probable cause." (JA at 23.) However, the second prong cannot be read literally when analyzing a search and seizure for good faith. Perkins, 78 M.J. at 388. The actual test for the second prong is not whether the magistrate actually had a "substantial basis for probable cause," but whether the "law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause." Perkins, 78 M.J. at 387 (quoting Carter, 54 M.J. at 422). Here, AFCCA read the provision literally despite this Court's warning that to do so would make it "a nullity," and led it to reach erroneous conclusions in reliance upon an incorrect application of the law. Perkins, 78 M.J. at 387.

1. The majority failed to properly apply the abuse of discretion standard

The majority failed to give due deference to the military judge's decision when it reviewed his ruling on the good faith exception.[5] In its opinion, the majority stated that it understood and seemingly agreed with the military judge's acknowledgement that the decision was a "very close call." (JA at 23.) Coming out on different sides of a "very close call" does not equate to making a legal conclusion that is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Macomber, 67 M.J. at 218. The majority did not adhere to "the Supreme Court's guidance to require that resolution of doubtful or marginal cases should be largely determined by the preference for warrants and that '[c]lose calls will be resolved in favor of sustaining the magistrate's decision.'" Macomber, 67 M.J. at 218 (citations omitted). AFCCA also failed to recognize that "[t]he military judge was in the best position to observe [TSgt DD,] the person presenting information that supplemented the affidavit, assess credibility, and determine whether [any] misstatement constituted a reckless disregard for the truth." United States v. Clayton, 68 M.J. 419, 425-26 (C.A.A.F. 2010.) Thus, the majority failed to properly apply the abuse of discretion standard.

[5] Although not part of this appeal to this Court, the United States does not concede that there was no probable cause to search the computer where the incriminating videos of ES were found.

Further, although it stated that the military judge abused his discretion, the majority did not identify how its disagreement was "more than a mere difference of opinion" or how the military judge's conclusions were found to be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Id. The opinion simply stated that it did "not agree" or "disagreed" with the military judge. (JA at 23, 24.) Specifically, the lower court merely disagreed with the military judge that TSgt DD had not "recklessly omit[ted] or misstate[d] any information"[6] (JA at 24.) The court did not identify what findings of fact by the military judge were "clearly erroneous" or unsupported by the record. Erikson, 76 M.J. at 234. It only stated its disagreement. However, a mere disagreement with the military judge's factual finding is not sufficient to find an abuse of discretion, it must be "clearly erroneous." Erikson, 76 M.J. at 234. It is also evident that the majority did not review this finding "in the light most favorable to the party prevailing." Macomber, 67 M.J. at 219. Simply put, the opinion did not properly apply the abuse of discretion standard when reviewing the military judge's ruling, which was not outside the "range of choices reasonably arising from the applicable facts and the law." United States v. Irizarry, 72 M.J. 100, 103 (C.A.A.F. 2013) (quoting

[6] The majority also failed to consider the fact that Appellee's failure to claim TSgt DD was reckless or intentionally misstated information gave the government no opportunity to develop the record in rebuttal.

citation omitted). AFCCA's misapplication of the abuse of discretion standard led them to erroneously overturn Appellee's conviction.

2. The majority made and then relied upon clearly erroneous findings in its review of the military judge's ruling on the good faith exception

AFCCA made two clearly erroneous findings that supported its disagreement with the military judge's conclusion that "TSgt DD did not recklessly omit or misstate any information" to the magistrate. (JA at 24.) In doing so, the majority found that TSgt DD recklessly omitted and misstated information in his affidavit, and therefore the good faith exception could not apply. (JA at 25.) "To show reckless disregard for truth, the defense must offer evidence that affiant in fact entertained serious doubts about the truth of his allegations or had obvious reasons to doubt the veracity of the allegations." United States v. Cravens, 56 M.J. 370, 374-75 (C.A.A.F. 2002). Here, neither basis to find TSgt DD had a reckless disregard for truth was present. In addition, the majority did explain how any reckless disregard for the truth actually misled Colonel SAK, as required by Leon. 468 U.S. at 923.

Moreover, Appellee never offered evidence at trial or on appeal to prove that TSgt DD acted in bad faith. Mil. R. Evid. 311(d)(4)(B) required Appellee to establish "by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth." However, Appellee never did so. Yet AFCCA sua sponte made its finding of bad faith by relying on a point

that was not litigated at trial and is not supported by the record.[7] This led to the unsupported findings in the majority's analysis that require its decision to be reversed.

a. AFCCA erroneously concluded that AFOSI had no evidence that ES had been recorded naked

The court first justified its disagreement with the military judge by finding "[n]one of the information available to the AFOSI agents supported a conclusion that the images captured on the camcorder depicted ES naked." (JA at 23.) However, AFOSI had ample evidence to meet the low threshold to support probable cause. The record shows that, prior to seeking search authorization from Colonel SAK, AFOSI had evidence that Appellee admitted to pointing the camera lens towards where "the shower [was] located." In addition, AFOSI knew that ES was already "undressing when she noticed the camera." (JA at 65 at ¶ 2-4.) In fact, ES told her stepmother, LS, that "the camera recorded her as she took a shower." (JA at 64 at ¶ 2-2.) At the very least, the record supports a finding that ES may have been undressed while the camera was recording her. (JA at 65 at ¶ 2-4) Indeed, ES confirmed that the camera was recording her during this incident. (JA at 65 at ¶ 2-4) Therefore, AFOSI possessed more than enough information to

[7] The subsequently discussed errors also demonstrate why the majority erred by failing to apply waiver to the issue of whether TSgt DD recklessly omitted or misstated information in his affidavit.

present to the magistrate the belief that Appellee had obtained naked images of ES. *Cf.* United States v. Leedy, 65 M.J. 208 (C.A.A.F. 2007) ("[T]he 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").

Further, AFOSI also knew that Appellee desired nude pictures of ES. On a prior occasion, Appellee "aimed a camera at [ES] over the curtain rod while she was in the shower" and naked. (JA at 72 at ¶ 6.) Appellee had also revealed his desire to have naked images of ES when he previously requested that she send nude images of herself to him. (JA at 73 at ¶ 6.) When considering these facts together "in the light most favorable to the party prevailing," AFOSI had sufficient evidence to support a conclusion that Appellee wanted to obtain images of ES naked, that he had attempted to do so, and that he had likely succeeded. Macomber, 67 M.J. at 219. Based on the information known to AFOSI, there is no reason to believe that TSgt DD "entertained serious doubts about the truth of his allegations or had obvious reasons to doubt the veracity of the allegations." Cravens, 56 M.J. at 374-75. Rather, it was reasonable for AFOSI to conclude that images on the camcorder would depict ES naked.

b. AFCCA erroneously concluded AFOSI had no evidence Appellee owned a computer

Second, the majority's erred when it found that the failure to provide a nexus between the camcorder and computer "was not inadvertent" because TSgt DD had

no knowledge of whether Appellee owned any computers. (JA at 23.) However, this is demonstrably incorrect when viewing "the evidence in the light most favorable to the prevailing party." Macomber, 67 M.J. at 219. The record shows that on the night AFOSI was notified of ES' allegation, all agents were brought in to begin investigating the case, and that they interviewed MB, ES' mother, who stated Appellee owned several computers that were located in the home. (JA at 65-67, 71, 97, 106.) And before seeking search authorization, the agents jointly discussed the facts of the investigation known up to that point before calling Colonel SAK to seek search authorization. (JA at 97-98, 100, 102, 104.) These facts do not support a finding that TSgt DD "entertained serious doubts about the truth of his allegations or had obvious reasons to doubt the veracity of the allegations" to show reckless disregard for the truth. Cravens, 56 M.J. at 374-75. Thus, the lower court erred in finding AFOSI had no knowledge of whether Appellee owned computers, which undermines its conclusion that TSgt DD provided reckless or intentionally false information to the magistrate.

3. AFCCA's incorrectly concluded that TSgt DD acted in bad faith by using the term "child pornography" in his affidavit

The majority took issue with TSgt DD's use of the term "child pornography" in his affidavit to the magistrate: "Injecting a reference to child pornography into the request for search authorization at best skewed the facts that were known at the time, and at worst amounted to a reckless misstatement of those facts." (JA at 24.)

However, AFOSI was allowed to reasonably infer that the recordings ES described could show an "intent to manufacture child pornography," as it described in the affidavit. The lower court interpreted TSgt DD's affidavit in a hyper technical manner and applied strict legal definitions, which this Court has warned against: "A grudging or negative attitude by reviewing courts towards warrants, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hyper technical, rather than a commonsense, manner." Macomber, 67 M.J. at 218 (quoting Illinois v. Gates, 462 U.S. 213, 283 (1983)). Neither TSgt DD nor Colonel SAK were required to cite the most legally accurate offense. Gates, 462 U.S. at 238 ("[T]he issuing magistrate is simply to make a practical, commonsense 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."); *see also* United States v. Meek, 366 F.3d 705, 713 (9th Cir. 2004) (determining the affidavit's citation to the offense of sexual exploitation of a child by means of producing, creating or replicating child pornography rather than the correct offense of committing a lewd act on a child under 14 years "[was] not fatal to the warrant's validity"); United States v. Koyomejian, 970 F.2d 536, 548 (9th Cir. 1992) (Kozinski, J., concurring) ("I am aware of no constitutional requirement that an applicant for a warrant

specify, and the judge determine, the precise statute violated; all authority is to the contrary.")

Further, it was not as if AFOSI mislead the magistrate as to whether a crime had even been committed. Even if the evidence was insufficient to establish that the videos of ES constitute child pornography, there was still sufficient evidence that Appellee had committed the crime of indecent recording under Article 120c, UCMJ.

At the most, TSgt DD's affidavit contained a legal error by categorizing the offense as one related to child pornography under Article 134, UCMJ, 10 U.S.C. § 934, instead of indecent recording under Article 120c, UCMJ, 10 U.S.C. § 920c. But "a flaw in legal reasoning is not a determinative factor in deciding whether a law enforcement agent acted in good faith." Perkins, 78 M.J. at 389. And a legal error in failing to recognize a more appropriate UCMJ article is not the same as recklessly omitting or misstating facts. Even if TSgt DD's use of the term "child pornography" is found to be legally deficient, it was still not in bad faith when considering he was not legally trained and was acting in a commonsense manner based on the facts known to him at that time. And at that time, TSgt DD knew Appellee took affirmative steps to obtain nude images of ES by both surreptitiously recording her and directly requesting them from her.

At the very least, it was reasonable to infer that such videos could show Appellee's intent to commit the crime of production of child pornography or support a charge of attempted production of child pornography. Even if the camcorder did not succeed in capturing ES naked, non-nude images can still be evidence of intent or an attempt to manufacture child pornography under Article 80, UCMJ, 10 U.S.C. § 880. United States v. Newsom, 402 F.3d 780, 783 (7th Cir. 2005) (finding a video that was not necessarily "pornographic" but showed a minor naked to reasonably support a search for child pornography because of the reasonably inference that it was "an ominous hint of what might be found in [the appellant]'s home").

Moreover, TSgt DD's affidavit did not misleadingly state that Appellee in fact possessed child pornography. TSgt DD was not required to ensure with a high degree of certainty that Appellee indeed possessed child pornography or even that it was more likely than not. Bethea, 61 M.J. at 187. Instead, there only needed to be "a fair probability that contraband or evidence of a crime" would be found. Leedy, 65 M.J. at 213 (quoting Gates, 462 U.S. at 238) (emphasis added). Based on the information known at that time, AFOSI had sufficient information to reasonably believe that any images could at least constitute evidence showing an attempt or "intent to manufacture child pornography." TSgt DD's reference to child pornography was not reckless or intentionally false considering he was not a

"legal technician[]." Leedy, 65 M.J. at 213 (recognizing probable cause should be "based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."). Therefore, TSgt DD did not "entertain[] serious doubts about the truth of his allegations or had obvious reasons to doubt the veracity of the allegations." Cravens, 56 M.J. at 374-75.

In short, the majority erred when disagreed with the military judge's finding of no bad faith on AFOSI's part. It failed to review the record "in the light most favorable" to the government, Macomber, 67 M.J. at 219, and did not give sufficient deference to the military judge's in-person assessment of the AFOSI agents' credibility, Clayton, 68 M.J. at 425-26. The lower court also did not explain how AFOSI "entertained serious doubts about the truth of [their] allegations or had obvious reasons to doubt the veracity of the allegations." Cravens, 56 M.J. at 374-75. Therefore, the majority erred when it concluded that the affidavit's reference to child pornography constituted a reckless omission or misstatement of the facts.

But even assuming that TSgt DD recklessly omitted or misstated information for the reasons AFCCA stated, the affidavit still had to actually mislead Colonel SAK to preclude a finding of good faith. Leon, 468 U.S. at 923. Here, AFCCA never explained how Colonel SAK was "misled" by the reference to child pornography. Leon, 468 U.S. at 923. At no point did Colonel SAK testify

that the term "child pornography" had any bearing on her decision to authorize the search. Indeed, TSgt DD did not discuss child pornography in detail with Colonel SAK. (JA at 123.) Further, as recognized by Judge Lewis' dissent, Colonel SAK "was trained by the legal office on her magistrate duties and over a two-year period participated in two search authorizations per month with law enforcement and judge advocates." (JA 30.) Moreover, she "recalled [Appellee]'s alleged actions with ES correctly," and "had the impression that [Appellee]'s behavior with ES spanned a period of time, that more than one incident involving a recording device occurred, and that [Appellee] asked ES to send him pictures of her unclothed." (JA at 30.) The record does not support a finding that Colonel SAK, an experienced magistrate who articulated the facts to support her decision, was misled by a reference to "child pornography." Therefore, the majority's decision should be reversed.

B. *The military judge's application of the good faith exception was not an abuse of discretion*

In reviewing the military judge's decision, this Court should find the military judge did not abuse his discretion when he determined that the three requirements of the good faith exception under Mil. R. Evid. 311(c)(3) were met. Therefore, this Court should reverse the lower court's decision and affirm the military judge's ruling on the motion to suppress.

1. The first requirement for the good faith exception under Mil. R. Evid. 311(c)(3)(A)

Under the first requirement of Mil. R. Evid. 311(c)(3), that Colonel SAK was a military magistrate "competent to issue the authorization" is uncontroverted. (JA at 117.) Therefore, the first requirement was met.

2. The second requirement for the good faith exception under Mil. R. Evid. 311(c)(3)(B)

Here, AFOSI held "an objectively reasonable belief that [Colonel SAK] had a 'substantial basis' for determining the existence of probable cause." Carter, 54 M.J. at 422. As previously discussed, AFOSI had reason to believe Appellee had captured images of ES while nude. In addition, law enforcement reasonably inferred that Appellee moved videos from his camcorder onto his computer. Based on his own personal experience with the type of camera ES described, TSgt DD inferred that files of video recordings "would be uploaded to a computer" because people typically "don't use them to watch what they recorded." (JA at 108.) This inference, based on personal experience, made it reasonable for him to believe Colonel SAK had a substantial basis to determine probable cause existed. *See* United States v. Flanders, 468 F.3d 269, 271-72 (5th Cir. 2006) (finding probable cause to search the appellant's home computer where the evidence showed he took a "digital photograph of [a] child naked" with a camera).

Colonel SAK was "entitled to draw reasonable inferences about where evidence [was] likely to be found given 'the nature of the evidence and the type of offense.'" United States v. Anderson, 450 F.3d 294, 303 (7th Cir. 2006) (quoting citation omitted). The fact that Colonel SAK independently inferred that Appellee would move files from a camcorder to a computer further supports it was a reasonable conclusion because she reached it "based on [her] personal knowledge of electronic devices in general and including camcorders." (JA at 125; *see also* JA at 119-20); s*ee* Mil. R. Evid. 311(d)(4)(A) ("the evidence relevant to the motion [to suppress] is limited to evidence concerning the information actually presented or otherwise known by the authorizing officer.") (emphasis added). Indeed, Colonel SAK's reliance on her own knowledge and experience was proper considering "the law does not require [magistrates] to pretend they are babes in the woods. In evaluating search [authorization] applications, [magistrates] may consider what 'is or should be common knowledge.'" United States v. Miller, 78 M.J. 835, 842-43 (Army Ct. Crim. App. 2019) (quoting United States v. Reichling, 781 F.3d 883, 887 (7th Cir. 2015)).

The reasoning of Nieto does not undermine the reasonableness of AFOSI's and the magistrate's inference that Appellee transferred the camcorder's files to his computer. First, Nieto had not been decided at the time the search was conducted and could not have guided AFOSI, the military magistrate, or the judge advocate

that advised her.[8] Second, the facts that undercut a finding of probable cause in Nieto are not present here. Unlike Nieto, where the agent "did not know whether the files on the cell phone were transferable to the laptop," 76 M.J. at 104, a commonsense understanding of camcorders reasonably supported the belief that the camcorder files were transferrable to a computer. In addition, the agent in Nieto "did not know whether [the appellant] took [the alleged] photographs," 78 M.J. at 104, whereas here AFOSI knew Appellee had recorded ES while she was nude in the bathroom and had at least attempted to obtain such images on previous occasions.

Moreover, TSgt DD and Colonel SAK's understanding of camcorders was not "technologically outdated" like the agent's description of how servicemembers store images on smart phones. Nieto, 78 M.J. at 107. Finally, the agent in Nieto could not credibly establish that the appellant owned the laptop in question, but here the record shows AFOSI learned of the computer from MB, Appellee's wife.[9] Thus, Nieto is inapposite to Appellee's case.

[8] The search was authorized on 21 April 2016 (JA at 71) while Nieto was decided approximately 10 months later on 21 February 2017. 76 M.J. 101.
[9] AFOSI did not include information about Appellee's computers in the affidavit. However, "in assessing an officer's good faith in executing a search warrant" courts "may consider facts known to the officer, but inadvertently omitted from a warrant affidavit." United States v. Thomas, 908 F.3d 68, 70 (4th Cir. 2018).

At the time AFOSI conducted the search, the inference shared by AFOSI and Colonel SAK has been consistently upheld by federal courts to be reasonable. These federal courts have found that the use of a camera to commit a crime is sufficient to establish probable cause to search for digital images on a computer. *See* United States v. Carroll, 750 F.3d 700, 707 (7th Cir. 2014) ("The information before the issuing judge was that Carroll was a professional photographer in 2007 who utilized a digital camera. Thus, it was a fair inference that he used a computer in 2007 to augment and store the digital photographs that he took."); Flanders, 468 F.3d at 271-72 (finding probable cause to search the appellant's home computer where the evidence showed he took a "digital photograph of [a] child naked" with a camera).

Furthermore, the belief that evidence would be found on Appellee's computer did not require absolute certainty or even that something will be "more likely than not," but rather that a reasonable person "could believe that the search may reveal evidence of a crime." United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005); Anderson, 450 F.3d at 303 ("Probable cause does not require direct evidence linking a crime to a particular place.") (citation omitted); United States v. Peacock, 761 F.2d 1313, 1315 (9th Cir. 1985) ("[A]n issuing judge need not determine … that [evidence] will more likely than not be found where the search takes place").

Under the circumstances of this case, the inference that Appellee may have moved images from his camcorder to his computer could be properly based on common experience. Peacock, 761 F.2d at 1315 (The magistrate "need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit."). Given what TSgt DD generally understood about camcorders at the time of the search, it would have seemed reasonable under existing federal law to search Appellee's computer for the videos he recorded of ES. Therefore, it follows that AFOSI's belief that Colonel SAK had a substantial basis to find probable cause to search Appellee's computer was objectively reasonable.

Finally, neither of Leon's exceptions to a finding of good faith under the second prong of Mil. R. Evid. 311(c)(3) is applicable. Carter, 54 M.J. at 421. As discussed above, TSgt DD did not "in fact entertain[] serious doubts about the truth of his allegations or had obvious reasons to doubt the veracity of the allegations." Cravens, 56 M.J. at 374-75. And because Colonel SAK's testimony shows she based her probable cause determination on her commonsense and personal experience, there is no evidence that she was "misled by information" in the affidavit. Leon, 468 U.S. at 923.

In addition, the affidavit[10] was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," Id., because it set

[10] JA at 72-73.

out that: (1) Appellee had attempted to film ES nude in the bathroom with a camcorder; (2) ES was undressing when she discovered the camcorder; (3) ES saw the camcorder had recorded her in the bathroom; (4) Appellee had raised a camcorder above a curtain rod and pointed it at ES while she was nude in the shower; and (5) Appellee had asked ES for nude pictures prior to the night ES found the camcorder in the bathroom. Flanders, 468 F.3d 269, 271-72 (finding probable cause to search the appellant's home computer where the evidence showed he took a "digital photograph of [a] child naked" with a camera). Therefore, the military judge did not abuse his discretion when he found AFOSI "had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause" under the second prong of Mil. R. Evid. 311(c)(3). Carter, 54 M.J. at 422.

3. The third requirement for the good faith exception under Mil. R. Evid. 311(c)(3)

Finally, the third requirement under Mil. R. Evid. 311(c)(3)(C) was satisfied because AFOSI acted "reasonably and with good faith" when relying on the issuance of the search authorization. Under the third prong, "law enforcement agents do not act in good faith if they know that the magistrate merely rubber stamped their request, or when the warrant is facially defective." Perkins, 78 M.J. at 389 (quoting Carter, 54 M.J. at 421) (internal quotation marks omitted). Here, there is no evidence that TSgt DD "knew" Colonel SAK merely rubber stamped

his request. Instead, his testimony indicates that he knew Colonel SAK did not rubber stamp his request because she made her decision after being briefed on the facts and circumstances with the benefit of legal advice from an attorney. (JA at 107.) In addition, "the search authorization was not facially defective because it identified the place to search ([Appellee's] home) and described in detail what to look for." Perkins, 78 M.J. at 389; Carter, 54 M.J. at 420 (defining a facially deficient warrant as one that "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.'") (quoting citation omitted). Thus, the third and final prong of Mil. R. Evid. 311(c)(3) was met, and the military judge did not abuse his discretion in applying the good faith exception to the exclusionary rule.

WHEREFORE, the United States respectfully requests this Honorable Court to reverse the majority's decision, uphold the military judge's application of the good faith exception, and affirm Appellee's indecent recording conviction.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION UNDER MIL. R. EVID. 311(A)(3) WHEN HE DETERMINED EXCLUSION WAS UNWARRANTED.

Standard of Review

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion. United States v. Nieto, 76 M.J. 101, 105 (C.A.A.F. 2017). "[I]n reviewing a ruling on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party." United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (internal quotation marks omitted) (citations omitted). "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017) (quoting United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Erikson, 76 M.J. at 234 (quoting United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000)) (internal quotation marks omitted) (citations omitted).

Law & Analysis

The military judge did abuse his discretion when he concluded that exclusion was not warranted under Mil. R. Evid. 311(a)(3).[11] Before a motion to suppress may be granted, the military judge must find that the "exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." Mil. R. Evid. 311(a)(3). This Court and the CCAs have recognized the requirement of conducting a Mil. R. Evid. 311(a)(3) analysis in recent decisions. *See e.g.*, United States v. Eppes, 77 M.J. 339, 349 (C.A.A.F. 2018); United States v. Armendariz, 79 M.J. 535, 552-555 (N-M Ct. Crim. App. 22 May 2019); United States v. Miller, 78 M.J. 835, 843 n.10 (Army Ct. Crim. App. 10 May 2019); United States v. Lopez, 78 M.J. 799 (Army Ct. Crim. App. 25 Mar. 2019), *review granted on other grounds*, 2019 CAAF LEXIS 523 (C.A.A.F. 2019).

In Eppes, this Court explained when the exclusionary rule was appropriate:

> "[A]dmittedly drastic and socially costly," the exclusionary rule should only be applied where "needed to

[11] Although Mil. R. Evid. 311(a)(3) was added pursuant to Executive Order (EO) 13730 of 20 May 2016, after the search at issue in Appellee's case, the EO did not limit its applicability to searches occurring after its effective date. In addition, it does not violate the Ex Post Facto Clause because it does not "'alter[] the definition of an offense or increase its punishment.'" United States v. Henry, 76 M.J. 595, 603 (A.F. Ct. Crim. App. 2017) (quoting Collins v. Youngblood, 497 U.S. 37, 49 (1990)) (brackets in original). Therefore, Mil. R. Evid. 311(a)(3) applied to Appellee's suppression motion brought under Mil. R. Evid. 311 at his trial, which was held between 28 August 2017 and 2 September 2017.

> deter police from violations of constitutional and statutory protections." The exclusionary "rule's sole purpose ... is to deter future Fourth Amendment violations." As such, its use is limited "to situations in which this purpose is thought most efficaciously served." "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh [the rule's] heavy costs."

77 M.J. at 349 (internal citations omitted). The Court then found that the facts presented in Eppes did not warrant exclusion: "where the Fourth Amendment violation was likely not the result of deliberate misconduct in need of deterrence, any marginal deterrent benefit to be gained [was] far outweighed by the heavy costs exclusion would have—namely placing the Government in a worse position than it would have been had the illegality not occurred." Eppes, 77 M.J. at 349 (citation omitted).

Here, the military judge found, pursuant to Mil. R. Evid. 311(a)(3), that there was no justifiable deterrence in applying the exclusionary rule "given the Supreme Court's favorable approach to the deference provided to magistrates and the warrant process, and the fact that this Court has found no bad faith or illegality on the part or action of the participants involved in the search authorization process." (JA at 197.) However, AFCCA neither reviewed this determination by the military judge nor conducted its own analysis under Mil. R. Evid. 311(a)(3) before determining the evidence should have been suppressed and overturning Appellee's indecent recording conviction. (JA at 26.) This was error.

As discussed above, TSgt DD and AFOSI knew Appellee possessed a computer upon which the incriminating evidence was later found, and their pursuit of evidence to show Appellee's "intent to manufacture child pornography" was at worst a mistake of law. Even if there was insufficient evidence to suggest the images of ES constituted child pornography, there was ample evidence that Appellee had committed the crime of indecent recording under Article 120c, UCMJ. And given the number of cases from federal circuits that have found the inference that a person would transfer files from a camera to a computer to be reasonable, it was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous for the military judge to find "no bad faith or illegality" on the part of AFOSI. (JA at 197.) There is insufficient evidence to show that law enforcement acted with "'deliberate,' 'reckless,' or 'grossly negligent' disregard" for Appellee's rights. United States v. Davis, 564 U.S. 229, 237 (2011) ("When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs.").

Instead, the evidence shows that law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful by first obtaining a search authorization. United States v. Koerth, 312 F.3d 862 (7th Cir. 2002) ("An officer's decision to obtain a warrant is prima facie evidence that he or she was acting in good faith.") (citing Leon, 468 at 921 n.21). Upon receiving the report,

AFOSI called all agents in for duty, interviewed four witnesses regarding the allegation, and discussed the ongoing investigation with a base judge advocate. (JA at 64-67.) Next, the agents discussed the information gathered to decide how to seek search authorization. (JA at 97-98, 100, 102, 104.) After taking these steps, AFOSI contacted the magistrate, with a judge advocate participating, to obtain lawful authorization to search Appellee's home. The record demonstrates that AFOSI "[was] not trying to ignore or subvert the Fourth Amendment; in fact, they were protecting the right to privacy by obtaining a search warrant rather than making a warrantless" search and seizure. United States v. Fogg, 52 M.J. 144, 149 (C.A.A.F. 1999). The evidence does not support a finding that law enforcement deliberately attempted to avoid the requirements of the Fourth Amendment.

In short, the conduct in this case does not warrant application of the exclusionary rule due to the low deterrent effect compared with the heavy costs to society and the justice system. *Cf.* United States v. Wicks, 73 M.J. 93, 104-05 (C.A.A.F. 2014) (finding exclusion was warranted where law enforcement's searches: (1) far exceeded what was supported by probable cause; (2) were conducted without a search authorization; and (3) were done "while the issue of Appellee's Fourth Amendment rights was being litigated before the military judge.") There is no evidence of willful law enforcement misconduct. And as AFCCA recognized, probable cause was a "very close call" and the agents acted

without the benefit of Nieto as a guide. (JA at 23; *see also* JA at 18 n.10 (acknowledging the military judge's finding that it was a "very close call")). Moreover, TSgt DD and Colonel SAK's inference—that Appellee would transfer files from his camcorder to his computer—ultimately proved to be true.

Any Fourth Amendment violation "was likely not the result of deliberate misconduct in need of deterrence." Eppes, 77 M.J. at 349. AFOSI's knowledge that Appellee owned computers would have only strengthened their application for a search authorization; therefore, omitting this information from the affidavit could not have been done in bad faith. And in the absence of any bad faith, the deterrent effect of exclusion is low and any "rationale [for exclusion] loses most of its force." Id. On the other hand, the societal cost of suppression is substantial, which would require "ignor[ing] reliable, trustworthy evidence bearing on [Appellee's] guilt." Id. The evidence at issue was compelling proof that Appellee indecently recorded a child while naked, which is a serious crime deserving of punishment from society's perspective.

On balance, the benefit of deterrence would not prevent future Fourth Amendment violations and, as a result, fails to outweigh the rules "heavy cost." Based on the facts before him, the military judge properly determined that law enforcement's actions did not "justify the deterrent remedy of exclusion." AFOSI's conduct was not "sufficiently deliberate that exclusion can meaningfully

deter it, [nor] sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 555 U.S. 135, 145 (2009). The military judge's decision was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Erikson, 76 M.J. at 234. Accordingly, the military judge did not abuse his discretion when he found application of the exclusionary rule to be inappropriate, and denied Appellee's motion to suppress.

WHEREFORE, the United States respectfully requests this Honorable Court find the military judge did not abuse his discretion under Mil. R. Evid. 311(a)(3), reverse the lower court's decision, and affirm Appellee's indecent recording conviction.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court reverse the lower court's decision and affirm Appellee's conviction under Article 120c, UCMJ.

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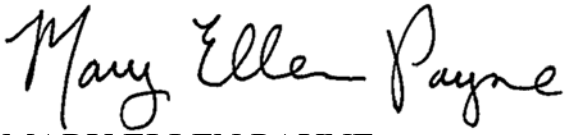

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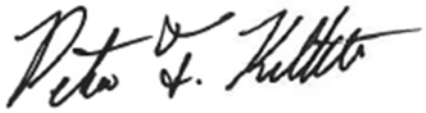
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 January 2020.



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COMPLIANCE WITH RULE 24(d)

1. This answer complies with the type-volume limitation of Rule 24(c) because:

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/s/_____

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Dated: 16 January 2020