IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellant

v.

JASON M. BLACKBURN
Staff Sergeant (E-5),
United States Air Force,
Appellee

USCA Dkt. No. 20-0071/AF

Crim. App. Dkt. No. ACM 39397

ANSWER TO APPELLANT'S BRIEF IN SUPPORT OF CERTIFIED ISSUE

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UNITED STATES, *Appellant* v. **JASON M. BLACKBURN,** Staff Sergeant (E-5), United States Air Force, *Appellee*	**APPELLEE'S ANSWER TO UNITED STATES' BRIEF IN SUPPORT OF CERTIFIED ISSUE** Crim. App. Dkt. No. 39397 USCA Dkt. No. 20-0071/AF

Pursuant to Rule 19 of this Court's Rules of Practice and Procedure, Appellee hereby files his Answer to Appellant's Brief in Support of the Certified Issues, filed on January 16, 2020.

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 (CCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court jurisdiction to review this case is pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Statement of the Case

Appellee generally accepts Appellant's statement of the case.

Statement of Facts

On October 23, 2016, Technical Sergeant (TSgt) Derek Day, formerly of the Air Force Office of Special Investigations (OSI), received information from the Base Defense Operations Center that there was an allegation that a military member videotaped his stepdaughter, E.S., while she was in the shower. (Joint Appendix (JA) at 105-106.) TSgt Day interviewed E.S.'s biological father, Mr. Johnny Sword, and listened to the OSI interview of E.S. where E.S. alleged SSgt Blackburn previously requested a nude photograph of E.S. (JA at 106-107.) There is no indication TSgt Day asked E.S. or Mr. Sword if the video involved any sexual acts

or asked her to describe what kind of activities were occurring in the video besides E.S. in the bathroom. TSgt Day understood that E.S. found a small camcorder with a flip out screen, which was recording in the bathroom. (JA at 108.) TSgt Day testified that, "typically with devices such as that people don't use them to watch what they recorded, for purposes of maybe reviewing to make sure they captured the actual image. Typically, in my own personal experience with a camera like that, it would be uploaded to a computer." (JA at 108.) However, TSgt Day had not received any specialized training with regard to computer crimes or child pornography other than the basic OSI training on electronic storage regarding the typical practices of child pornographers. (JA at 108, 111.)

TSgt Day sought authorization to conduct a search of SSgt Blackburn's electronic devices. He approached the military magistrate, Colonel Susan Airola-Skully, and briefed her on the reasons why a search should be authorized. (JA at 110.) TSgt Day testified that he believed all the information he verbally shared with Col Airola-Skully was included in a written affidavit that TSgt Day had provided to Col Airola-Skully. *Id.* Col Airola-Skully concurred with TSgt Day. (JA at 122.)

In the search affidavit he provided to Col Airola-Skully, TSgt Day stated,

> Based on my experience, training and the facts listed above, I believe evidence proving [SSgt Blackburn's] intent to manufacture child pornography is located within his residence. Therefore, I respectfully request authorization to search and seize 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 within

SSgt Blackburn's house. (JA at 73.) During the subsequent search, over 300 items were seized, including two camcorders, one external hard drive, seven hard drives, three digital cameras, one thumb drive, three laptop computers, one tablet, one SD card, two tower computers, and a bag with sixteen screws and a rechargeable battery. (JA at 67-68, 77, 83.) Of the over 300 items seized, TSgt Day collected over 200 of the items. (JA at 67-68.)

TSgt Day did not brief Col Airola-Skully regarding any technical specifications of the camcorder E.S. described, to include the memory capacity of the camcorder or if there were any files on the camcorder. (JA at 110-11.) Additionally, TSgt Day did not provide any information to Col Airola-Skully as to whether files on the camera were transferable to a computer or that SSgt Backburn had actually connected that camcorder to a computer. (JA at 111.) TSgt Day did not brief Col Airola-Skully as to whether any child pornography was known to be on SSgt Blackburn's computer, or whether he had visited any child pornography websites. (JA at 111.) Finally, TSgt Day did not recall mentioning to Col Airola-Skully his belief that individuals typically do not watch videos on camera, or that files on cameras can be transferred to computers. (JA at 115.)

Col Airola-Skully testified she authorized the broad scope of electronic devices due to her understanding SSgt Blackburn had asked for photos in the past

and held a camera over the shower curtain. (JA at 119.) Col Airola-Skully also believed that, based on her personal preference, people generally back up files thought to be valuable. (JA at 119.) However, Col Airola-Skully acknowledged she did not have any technical communications training with regard to the backing up or transferring files. (JA at 125.)

On August 14, 2017, the defense submitted a motion to suppress the evidence obtained during the search of SSgt Blackburn's home. (JA at 48.)

The military judge agreed with the defense that the search affidavit was deficient. (JA at 168, 188.) He explained the affidavit did not

> directly tie the camcorder to any other digital media belonging to [SSgt Blackburn], nor was there evidence presented to the magistrate to suggest [SSgt Blackburn] was involved in the viewing or transmitting of child pornography beyond the allegation that he may have videotaped his 12 year old step daughter while she was naked in the bathroom.

(JA at 168, 189.) The judge additionally asserted the facts in SSgt Blackburn's case were "very similar" to those in *United States v. Nieto* due to the lack of a "particularized nexus between the camcorder and the accused's laptop or other electronic media devices." (JA at 177, 195) (citing 76 M.J. 101 (C.A.A.F. 2017)). Further, the affidavit in SSgt Blackburn's case "provided even less of a generalized profile than the agent in the *Nieto* case." (JA at 177, 195.) Therefore, the military judge ruled "the military magistrate had no substantial basis for finding probable

cause even after according the military magistrate great deference." (JA at 177, 195.)

However, the military judge found that even though the military magistrate "did not have a substantial basis for determining the existence of probable cause, all the elements of the good faith exception have been satisfied." (JA at 179, 197.) The military judge based his assessment on the following: (1) "the magistrate had the authority to issue the search authorization"; (2) the request for the search authorization was supported by an affidavit which was detailed, balanced, and not bare bones; and (3) the military magistrate applied "common sense belief and understanding regarding the likelihood of an individual transferring data from a camcorder to another media device." (JA at 178, 197.) The military judge further concluded that the agents executing the authorization had a reasonable belief the military magistrate had a substantial basis for finding probable cause "given that the *Nieto* case was only published approximately two months prior to the execution of this search." (JA at 179.)

Summary of the Argument

With respect to Issue I, the government contends that, pursuant to Mil. R. Evid. 311(c)(3)(B), SSgt Blackburn waived the basis for suppression upon which the CCA granted relief. (Appellant's Brief at 11.) This contention is erroneous for at least two reasons. First, trial defense explicitly raised the issue during motions

practice when he argued the identification of child pornography as the alleged crime was inflammatory and the agents were not aware of any information which met the elements of the offense. Further, trial defense counsel argued TSgt Day's lack of knowledge as to the technical specifications of the camcorder, and specifically if files could be transferred from the camcorder to other electronic devices, did not meet the requirements for meeting a substantial basis. These two arguments were the basis of the CCA's decision that the good faith exception did not apply. Finally, should this Court find the basis of suppression was waived, under Article 66(c), Congress provides the CCAs "with the authority and the responsibility to affirm only such findings and sentence as it finds correct and determines, on the basis of the entire record, should be approved[.]'" *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Therefore, the CCA could exercise its "awesome, plenary, de novo power" to find the good faith exclusion did not apply.

Turning to Issue II, the government contends the CCA erred in determining the good faith exception to the exclusionary rule did not apply. (Appellant's Brief at 22.) The government's assertion in incorrect, as the CCA correctly held that the good faith exception did not apply where TSgt Day recklessly omitted or misstated information. The CCA based their decision on three main points. The first is the lack of information provided to the magistrate as to whether E.S. was captured in a nude state by the camcorder. The second is the lack of information provided to the

magistrate regarding the technical specifications of the camcorder. This included TSgt Day having no knowledge as to whether files could be transferred from the camcorder to other electronic devices and whether SSgt Blackburn was known to do so. The third was the misstatement of the alleged crime as the intent to manufacture child pornography where there was no evidence of E.S. being captured by the camcorder in a nude state.

In its review of the military judge's ruling, the CCA properly applied the abuse of discretion standard. The CCA found the military judge's decision that the good faith exception applied to be clearly erroneous and methodically identified the information TSgt Day recklessly omitted and misstated, to include TSgt Day's lack of knowledge as to whether SSgt Blackburn had or was capable of transferring files from the camcorder to an electronic device. (JA at 25-28.)

With respect to Issue III, the government asserts the military judge did not abuse his discretion when he determined exclusion was unwarranted. (Appellant's Brief at 40.) This argument is erroneous because in addition to the search authorization lacking probable cause and not meeting the good faith exception, AFOSI broadly exceeded the search authorization. The search, which resulted in the seizure of over 300 items from SSgt Blackburn's home, included AFOSI taking possession of items which were not "any cameras or electronic media to include hard drives, SD cards, compact discs, computers and tablet computers that could contain

evidence of child pornography." These items included plastic bags, lanyards, batteries, fans, vents, and a used condom. This, in conjunction with TSgt Day's reckless misstatements and omissions, warrant the suppression of the items seized.

Appellee respectfully requests this Court affirm the ruling of the CCA and remand the case for further proceedings in a summary disposition.

Argument

I.

UNDER MIL. R. EVID. 311(D)(2)(A), APPELLEE DID NOT WAIVE THE BASIS FOR SUPPRESSION UPON WHICH THE LOWER COURT GRANTED RELIEF.

Standard of Review

Whether an accused has waived an issue is a question of law this Court reviews *de novo*. See *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)).

Law and Analysis

Mil. R. Evid. 103 states "A party may claim error in a ruling to admit or exclude evidence only if the error materially prejudices a substantial right of the party and if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context…" Mil. R. Evid. 103 "does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make

the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'" *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014) (quoting *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005)). The application of this rule "should be applied in a practical rather than formulaic manner." *United States v. Reynoso*, 66 M.J. 208, 210 (C.A.A.F. 2007).

In moving to suppress the search of SSgt Blackburn's home, trial defense counsel explicitly argued the good faith exception did not apply. In the written motion, for example, trial defense counsel explained "The good-faith exception does not apply because the government cannot establish by a preponderance of the evidence that the military magistrate had a substantial basis for determining probable cause existed." (JA at 57.) Counsel further wrote that "The OSI agents knew they had no evidence connecting SSgt Blackburn's camcorder to his computer, yet they sought a search authorization for it anyway. They then seized every single electronic in his house." (JA at 60.) Trial defense counsel then continued this argument during motions practice, contending that the agents acted outside of good faith, violating broad scope of warrant by collecting items such as lanyards, fans, and a used condom. (JA at 155.) Notably, trial defense counsel's argument was sufficient to notify the military judge that the agents' purported omission of particular facts was an issue in controversy, as the military judge concluded: "There is no evidence that the magistrate was 'misled by information in the affidavit' or that TSgt Day provided

false information or showed a reckless disregard for the truth" and "There was no evidence that TSgt Day intentionally or recklessly omitted or misstated any information." (JA at 196-97.) Consequently, the defense satisfied its obligation under Mil. R. Evid. 311(d)(2)(A).

The CCA found the good faith exception did not apply, based in part on evidence of the intent to manufacture child pornography being the items to be searched for. (JA at 24.) Trial defense counsel specifically argued this position, stating one of the major flaws of the search affidavit was identification of child pornography as what was to be searched for. Trial defense counsel asserted that the use of child pornography as the identified offense was improper in SSgt Blackburn's case:

> This affidavit has no explanation of general profile evidence, which would explain how or why people accused of such a crime might back their files up to their computer. There's no explanation in this affidavit how Sergeant Blackburn might fit such a profile. It contains no indication that Sergeant Blackburn ever accessed a website containing child pornography or child erotica, that he was somehow subscribed to a group disseminating such material or that he has ever indicated an interest in child pornography or child erotica. There is no image in this affidavit that was actually described as child pornography. No image in this affidavit that was described as child erotica. And in fact, with the exception of a request for a nude photo that was not given, which is a critical point, sir, there are actually no nude images described in this affidavit that actually exist.

(JA at 148.) Trial defense went further during arguments to explain:

> The government did not charge possession, viewing, or production of child pornography. And, sir, if you look at that evidence, you look at

> what's in the affidavit, none of that is sexually explicit conduct that would merit child pornography, that label. The mere fact that OSI decides to slap that on an affidavit does not make this a child pornography case…

(JA at 158.) While not specifically in reference to the good faith exclusion, trial defense clearly argued that the affidavit used language which intentionally confused the allegation and misled the magistrate. While the government argues the trial counsel were not on notice of this line of argument, trial counsel specifically responded, furthering the argument that the search was for child pornography, stating:

> They acted in good faith, they acted on what they thought was a valid search authorization given by the magistrate, they didn't overstep their bounds, and they went and seized exactly what they were looking for because that search authorization goes to any devices that could be used -- electronic devices -- to store child pornography because that's what they had in this case.

(JA at 132.)

Further, trial defense counsel argued TSgt Day's lack of knowledge as to the technical specifications of the camcorder, and specifically if files could be transferred from the camcorder to other electronic devices, did not meet the requirements for meeting a substantial basis. (JA at 150, 153,-54, 160.) This issue of whether files could even be transferred from the camcorder were consistently addressed throughout the witness testimony, including by the military judge. (JA at 111, 115, 124, 145.)

If this Court finds the objection to be waived, under Article 66(c), Congress provides the CCAs "with the authority and the responsibility to affirm only such findings and sentence as it finds correct and determines, on the basis of the entire record, should be approved, which [has been] described as an 'awesome, plenary, de novo power[.]'" *Quiroz*, 55 M.J. at 338. "A clearer carte blanche to do justice would be difficult to express. . . . If the Court of Military Review, in the interest of justice, determines that a certain finding or sentence should not be approved -- by reason of the receipt of improper testimony or otherwise -- the court need not approve such finding or sentence." *United States v. Claxton*, 32 M.J. 159, 162 (C.A.A.F. 1991). In *United States v. Adams*, this Court found "[The CCA] was required to independently review the record of trial, including the extensive litigation in the record regarding Appellant's pretrial statement." 59 M.J. 367, 372 (C.A.A.F. 2004). In *Claxton*, trial defense counsel did not object to testimony as to the lack of rehabilitative potential of the appellant, which can amount to waiver. *Id*. However, the CCA did not apply the waiver doctrine, instead utilizing its Article 66(c) plenary review authority, which this Court upheld. *Id*. Even if this Court finds trial defense counsel waived the good faith argument, under Article 66(c), the CCA has the authority exercise its "awesome, plenary, de novo power" to find the good faith exclusion did not apply, choosing to set aside a finding it found to be incorrect.

WHEREFORE, Appellee respectfully requests that this Court affirm the ruling of the CCA and remand for further proceedings in a summary disposition.

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY DETERMINED THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIED.

Standard of Review

The military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party. *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001). The military judge's findings of fact are reviewed for clear error, and the conclusions of law are reviewed *de novo*. *United States v. Leedy*, 56 M.J. 208, 212 (C.A.A.F. 2007). In reviewing probable-cause determinations, this Court examines whether a military magistrate had a substantial basis for concluding that probable cause existed. *Nieto*, 76 M.J. at 105 (quoting *United States v. Rogers*, 67 M.J. 162, 164-65 (C.A.A.F. 2009). If the military magistrate did not have a substantial basis for concluding that probable cause existed, "the Government has the burden of establishing [good faith and inevitable discovery] doctrines by a preponderance of the evidence." *Nieto*, 76 M.J. at 108.

Law

The probable cause standard is practical and non-technical. *Illinois v. Gates*, 462 U.S. 213, 231 (1982). "The duty of the reviewing court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit. . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238. However, "probable cause is founded not on the determinative features of any particular piece of evidence provided an issuing magistrate -- nor even solely based upon the affidavit presented to a magistrate by an investigator wishing search authorization -- but rather upon the overall effect or weight of all factors *presented* to the magistrate." *Leedy*, 65 M.J. at 213-14 (emphasis added). *Leedy* further explains that while there are no specific tests for finding substantial basis for probable cause, case law looks to two analyses: "first, we examine the facts known to the magistrate at the time of his decision, and second, we analyze the manner in which the facts became known to the magistrate." *Id.*

In *Nieto*, this Court held "in order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized." 76 M.J. at 106. A nexus "may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept." *Id*. This Court

found that, in a time in which a cell phone has the ability to "serve both as the instrumentality of the crime and as a storage device for the fruit of that crime," generalized knowledge about how individuals "normally" store information on cellular phones "was technologically outdated and was of little value in making a probable cause determination." *Id.* at 107. Consequently, this Court held that "[i]n order to identify a substantial basis for concluding probable cause" exists to believe a laptop was linked to a crime involving a cell phone, that there needs to be "at a minimum . . . some additional showing" such as evidence that an appellant "actually downloaded images (illicit or otherwise) from his cell phone to his laptop, stored images on his laptop, or transmitted images from his laptop." *Id*.

Under Mil. R. Evid. 311(c), four exceptions are enumerated for the admission of evidence obtained from an unlawful search and seizure: (1) impeachment, (2) inevitable discovery, (3) good faith, and (4) reliance on statute. Under Mil. R. Evid. 311(c)(3), "The good-faith doctrine applies if: (1) the seizure resulted from a search and seizure authorization issued, in relevant part, by a military magistrate; (2) the military magistrate had a substantial basis for determining probable cause existed; and (3) law enforcement reasonably and in good faith relied on the authorization." *Nieto*, 76 M.J. at 107 (quoting Mil. R. Evid. 311(c)(3)). The Supreme Court has identified situations where the "good faith" exception does 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"; and
>
> (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."

Carter, 54 M.J. at 419-20 (quoting *Leon*, 468 U.S. at 923); (JA at 20.) "The second prong [of Mil. R. Evid. 311(c)(3)] 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." *Id.* at 421.

"'Substantial basis' as an element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization." *Id.* at 422; (JA at 22-23). This is satisfied "if 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." *United States v. Perkins*, 78 M.J. 381, 387 (C.A.A.F. 2019) (Citation omitted).

While the decision of the magistrate with regard to probable cause is given deference, it is not boundless. *United States v. Leon*, 468 U.S. 897, 914 (1984). "It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." *Id.* at 914. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 at 239. "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant 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." *Leon*, 468 at 923.

However, "it is 'somewhat disingenuous' to find good faith based on a 'paltry showing' of probable cause, 'particularly where the affiant is also one of the executing officers.'" *United States v. Pavulak*, 700 F.3d 651, 665 (3d Cir. 2012) (citing *United States v. Zimmerman*, 277 F.3d 426, 438 (3d Cir. 2002)) (*see United States v. Cordero-Rosario*, 786 F.3d 64, 72-73 (1st Cir. 2015) (Where an agent provided information that did not establish a nexus existed to meet probable cause, "the police cannot be said to be acting reasonably in then relying on a warrant that reflects those very same glaring deficiencies. And that is especially so when the

deficiencies arise from the failure of the agent conducting the search to provide the required supporting information in the affidavit.")).

Analysis

As a predicate matter, the military judge and the CCA found the military magistrate had "no substantial basis to establish probable cause." (JA at 23, 25, 195.) These findings were based on *Nieto*, as at the time of the search, TSgt Day only knew that the specific video E.S. identified was located on a camcorder with a flip out screen, while Col Airola-Skully was not made aware of any of the camcorder's specifications. (JA at 108, 110-11.) TSgt Day and Col Airola-Skully had no information regarding whether the video of E.S. was transferred to any other device, let alone if the file could be transferred. (JA at 111.) This information was based solely on TSgt Day and Col Airola-Skully's general understanding of their transferability of files, which was not discussed during the meeting to assess whether probable cause existed. (JA at 115, 125.) The facts which led to the authorization of the search by Col Airola-Skully are in stark contrast to the ruling in *Nieto*, which stated "there need[s] to be some additional showing, such as the fact that Appellant actually downloaded" items from one device to another, before there is a substantial basis to search. 76 M.J. at 107.

Moreover, E.S. did not allege there was any evidence of criminal behavior by SSgt Blackburn on any electronics other than the camcorder. She stated the only

device used in her presence while she was undressed was a camcorder. (JA at 107.) She did not make any reference to seeing SSgt Blackburn transfer files, and instead explained SSgt Blackburn showed her there were no files on the camcorder after the incident where he held the camera over the shower curtain. (JA at 98.) None of E.S.'s statements provided any nexus to criminal behavior by SSgt Blackburn on any electronics besides a camcorder. Therefore, the military judge and CCA found probable cause did not exist to authorize the search of SSgt Blackburn's residence for "electronic media to include hard drives, SD cards, compact discs, computers and tablet computers that could contain evidence." (JA at 23, 195.)

A. The CCA correctly determined the good faith exception did not apply when TSgt Day recklessly omitted or misstated information.

The government alleges the CCA "erred in concluding that the military judge abused his discretion by applying the good faith exception to the exclusionary rule" due to a failure to properly apply the abuse of discretion standard, erroneous findings, and attributing bad faith to AFOSI for the use of the term "child pornography" in the search affidavit. (Appellant's Brief at 20-21.) This assessment is incorrect as the CCA gave due deference to the military judge but found his analysis of the good faith exclusionary rule to be clearly erroneous. (JA at 23-26.) The CCA further found the military judge's ruling to be erroneous, methodically identifying information recklessly omitted and misstated by AFOSI. (JA at 23-26.) Finally, the CCA concluded that TSgt Day acted recklessly by using the term "child

pornography" in his affidavit, where he lacked any information which inferred any elements of the crime of producing child pornography. (JA at 24.)

1. The CCA properly applied the abuse of discretion standard.

The government asserts the CCA "failed to give due deference to the military judge's decision when it reviewed his ruling on the good faith exception." (Appellant's Brief at 22.) This conclusion is erroneous, as the CCA found the military judge's decision to be clearly erroneous with reference to the application of the good faith exclusionary rule. (JA at 25-26). In its analysis of the three exceptions, the CCA clearly references Mil. R. Evid. 311(c)(3)(B) when stating it considered the "restatement of this element adopted initially in *Carter* and reaffirmed in *Perkins II*, whether the 'magistrate authorizing the search had a substantial basis, in the eyes of a reasonable law enforcement official executing the search authorization.'" (JA at 23-24.) The CCA did not erroneously apply *Perkins*.

While the government argues that the CCA stated they believed the issue to be a "close call," that is an incorrect interpretation of the CCA's language. (Appellant's Brief at 22). The CCA stated, "We understand that the military judge struggled with the analysis of the good faith exception after *Nieto*, and acknowledged it was a 'very close call.'" (JA at 23.) However, this language merely recognizes that the military judge described his decision as a "close call," not in reference to the CCA's decision. (JA at 23, 199.) The CCA clearly stated, "We do

not agree with the military judge's finding that all of the elements of the good faith exception to the exclusionary rule were met." (JA at 23.)

The CCA methodically identified the information TSgt Day recklessly misstated. This included identifying that AFOSI did not have any information at the time of the authorization that SSgt Blackburn had captured any images of E.S. nude, in either video and photographic formats. (JA at 24.) Further, the CCA addressed significant concerns with the use of child pornography as the basis for the search, due to the inflammatory nature of the offense. (JA at 24.) In addition to these concerns, the CCA speaks to TSgt Day's lack of knowledge that SSgt Blackburn "had ever downloaded anything from the camcorder ES reported seeing 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 at 25-26.) This, in conjunction with no knowledge that SSgt Blackburn possessed any nude images of E.S., does not allow TSgt Day to in good faith rely on the belief of the magistrate. (JA at 25-26.)

In order for the CCA to give deference to the military judge, the military judge must provide some analysis of the conclusion. The military judge merely stated, "There was no evidence that TSgt Day intentionally or recklessly omitted or misstated any information." (JA at 197.) He went on to discuss Col Airola-Skully's common sense and beliefs on the transferability of files between electronic devices.

(JA at 197.) The military judge does not address trial defense counsel's argument of the inflammatory nature of the term child pornography in a voyeurism case. He did not address the magistrate's lack of information on the technological specifications of the camcorder. Without any analysis by the military judge, the CCA was unable to evaluate the accuracy of the military judge's finding as to whether TSgt Day omitted or misstated any information.

2. The CCA was correct in its findings in its review of the military judge's ruling on the good faith exception.

The government alleges the CCA made two clearly erroneous findings, that AFOSI had no evidence E.S. had been recorded naked and SSgt Blackburn owned a computer, in determining the military judge erred in concluding "TSgt [Day] did not recklessly omit or misstate any information to the magistrate." (Appellant's Brief at 24.) The government's assertion is incorrect, as the CCA systematically identified information recklessly omitted and misstated by AFOSI. (JA at 23-26.)

Further, the government is mistaken in the requirements for applying the good faith exception, relying on *United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002) and Mil. R. Evid. 311(d)(4)(B). (Appellant's Brief at 24.) However, *Cravens* and Mil. R. Evid. 311(d)(4)(B) apply in circumstances where an accused is challenging probable cause based on false statements. The argument that "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'"

would be applicable if SSgt Blackburn had contested the legality of the search under Mil. R. Evid. 311(d)(4)(B). (Appellant's Brief at 24.) However, the basis of the suppression motion was Mil. R. Evid. 311(d)(4)(A), stating "The digital evidence found on SSgt Blackburn's computer should be suppressed because the search was not supported by probable cause and the search authorization was overbroad." (JA at 57.) Under the good faith exception, the "affidavit must not be intentionally or recklessly false . . . It must contain sufficient information to permit the individual executing the warrant or authorization to reasonably believe that there is probable cause." *Carter*, 54 M.J. at 421; (JA at 24.).

a. The CCA properly concluded that AFOSI had no evidence that ES had been recorded naked.

The CCA explained that based on the testimony of TSgt Day that "[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 24.) The language used by TSgt Day and SA Davis was "undressed," not naked. TSgt Day identified her as undressing, stating "she was undressing to get in the shower." (JA 106.) TSgt Day answered that the trial defense counsel was correct when specifically asked "So you had no evidence at that time that she was actually captured nude on that recording, correct?" (JA at 112.) When further asked "E.S. did not say that she saw a recording of herself on that camcorder nude, correct?" (JA at 114.) TSgt Day responded "Not that I recall." (JA at 114.)

When Special Agent (SA) Mark Davis was asked whether E.S. said she was nude at the time, he stated "I don't believe so." (JA at 100.) Further, the AFOSI interview notes for Mrs. Melissa Blackburn, E.S.'s mother, stated "[E.S.] said she was about to take a shower and began undressing when she noticed a video camera. [E.S.] pulled up her pants, picked up the video camera and noticed it was recording." (JA at 65.) The language provided by TSgt Day, SA Davis, and Mrs. Blackburn does not indicate E.S. was ever captured nude by the camcorder, nor ever could have been.

During SA Davis's testimony, he was further questioned. "Now, with regard to the second incident of the camcorder coming over the shower curtain, that was not actually recorded, correct?" (JA at 101.) SA Davis stated, "To my knowledge, no." (JA at 101.) He further explained, "[E.S.] said when -- after the shower, after, she was able to view the camcorder. When [SSgt] Blackburn showed her the camcorder, there was not a video on there." (JA at 101.) TSgt Day even stated that SSgt Blackburn asserted this to be a joke, which coincided with Mrs. Blackburn's statement to AFOSI that "In the past, [SSgt Blackburn] played jokes on his family members." (JA at 114, 65.)

Finally, when questioned with regard to SSgt Blackburn's request that E.S. send him a nude photo, TSgt Day testified that it was to his knowledge that E.S. never provided him a photo. (JA at 112.)

At the time of the search authorization request, TSgt Day had no evidence SSgt Blackburn was in possession of any nude images of E.S. Each witness testified E.S. was undressing but did not have affirmative information as to whether she was nude. (JA at 101, 112.) Based on the testimony of TSgt Day and SA Davis, the CCA properly concluded that AFOSI had no evidence that ES had been recorded naked.

b. Whether AFOSI had evidence Appellee owned a computer is irrelevant, as the information was not presented to the magistrate.

Throughout the government's brief, it relies on information that TSgt Day was aware of at the time of the briefing but did not provide to Col Airola-Skully. (Appellant's Brief at 27.) While AFOSI and TSgt Day may have been aware that SSgt Blackburn owned a computer and other electronic devices, this information cannot not be considered when determining whether the good faith exception applies. *Leon* states "Reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause.'" 468 U.S. at 915 (citation omitted); *see also United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988) ("The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate."); *United States v. Bynum*, 293 F.3d 192, 212 (4th Cir. 2002) ("In sum, the government cannot establish an officer's objective good faith under *Leon* by producing evidence of facts known to the officer but not disclosed to the magistrate..

. . the officer [must] be able to entertain a reasonable belief that the magistrate had a substantial basis for finding probable cause. Whether that belief is reasonable can depend only upon the facts presented to the magistrate.")

The government cannot rely on facts known by investigators but not relayed to the magistrate. Therefore, while the CCA erred by stating that AFOSI had no knowledge of whether SSgt Blackburn owned a computer, this information is irrelevant in the analysis of whether the good faith exception applied. Furthermore, the CCA went on to state that "[AFOSI] had no evidence that if he did [own a computer], [SSgt Blackburn] routinely connected the camcorder to the computer or could have linked the camcorder or any SD card found in the camcorder to [SSgt Blackburn]'s computer." (JA at 23.) Therefore, the CCA identified that even if AFOSI or TSgt Day were aware of any computers owned by SSgt Blackburn, that still would not have been sufficient information to establish a good faith exception to the exclusionary rule, as there was no information regarding the transferability of files.

3. The CCA correctly concluded that TSgt Day acted recklessly by using the term "child pornography" in his affidavit.

The government asserts "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." (Appellant's Brief at 28.) However, the CCA found TSgt Day recklessly misstated information in part "because the search authorization

in this case was based on an assertion that under the facts and circumstances it was reasonable to believe evidence of child pornography would be found in [SSgt Blackburn]'s home." (JA at 24.) None of the statements made by E.S. contain any facts which relate to child pornography, which was the crime alleged in the search authorization. (JA at 72-73.) Article 134 of the UCMJ defines child pornography as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." Article 134, UCMJ, 10 U.S.C. § 934. Conversely, the authorization merely alleges that SSgt Blackburn recorded E.S. in the bathroom, with no reference to any sexually explicit conduct. (JA at 72-73.)

While this Court has warned that "courts should not invalidate warrants by interpreting affidavits in a hyper technical, rather than a commonsense, manner," the connotations of "child pornography," specifically production, are substantially different than confusion between offenses such as assault or battery. *United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F. 2009) (quoting *Gates*, 462 at 283). The CCA explained "[i]njecting 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.) The phrase "child pornography" is a succinct phrase that would evoke a visceral reaction from the magistrate. Child pornography suggests a tie to the illicit market for visual

depictions of children engaging in sexually explicit conduct, and asserting to the magistrate that SSgt Blackburn was either intending to or actually producing child pornography exaggerated his criminality greatly.

B. The military judge abused his discretion in finding the good faith exclusion did apply.

The government asserts "AFOSI held 'an objectively reasonable belief that [Colonel SAK] had a 'substantial basis' for determining the existence of probable cause.'" (Appellant's Brief at 33) (citing *Carter*, 54 M.J. at 422.) Under Mil. R. Evid. 311(c)(3)(B), "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." *Carter*, 54 M.J. at 421. "It must contain sufficient information to permit the individual executing the warrant or authorization to reasonably believe that there is probable cause." *Id*. While the government returns to the argument that AFOSI had reason to believe SSgt Blackburn captured nude images of E.S., SA Davis and TSgt Day both testified the word nude was not used and varying references to E.S. in a state of undress were used by E.S. and others interviewed by AFOSI. (JA at 100, 106, 112, 114.)

The government contends, "a commonsense understanding of camcorders reasonably supported the belief that the camcorder files were transferrable to a computer." (Appellant's Brief at 35.) In each of the government's references to reasonable inferences, however, they lack an important piece of information which

is necessary to determine if it was even possible for SSgt Blackburn to transfer the files to any other electronic devices. As explained above, at no point prior to requesting the search were the agents aware of the type of camcorder referenced by E.S. All SA Davis could confirm was that it was a small camcorder with a "flip out screen." (JA at 104.) At the time the search affidavit was approved, AFOSI and the magistrate were unaware of whether it was a digital camcorder which would allow for the inference that it could be connected to the computer. Without this information, both the magistrate and the agents could not have a reasonable belief or personal experience that the camcorder could be connected to any other electronic devices, the sole basis of the search. In *Nieto*, this Court found the agent's understanding of how files were stored to be "technologically outdated." 76 M.J. at 107. However, in this case, the adequacy of the agent's knowledge cannot be determined, as he possessed virtually no knowledge as to the specifications of the camcorder. In each of the cases the government references, the key difference with the case at hand is the lack of detail as to whether the camera was digital. "*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)." (Appellant's Brief at 33) (emphasis added). "*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.')" (Appellant's Brief at 41.) (emphasis added).

The government argues that "The fact that [Col Airola-Skully] 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)" (Appellant's Brief at 34.) This inference is identified as being based on "electronic devices." But Col Airola-Skully cannot make this inference when she does not know whether any digital devices were actually used, let alone whether such devices were capable of transferring files.

Col Airola-Skully was misled by information in the affidavit for two main reasons. First, as described above, the agents sought authority to search for "evidence of [SSgt Blackburn]'s intent to manufacture child pornography" without any nexus to child pornography. (JA at 73). At the time of the meeting with Col Airola-Skully, TSgt Day was aware he had no affirmative information that SSgt Blackburn possessed nude images of E.S. (JA at 112, 144-15.) Where TSgt Day allowed Col Airola-Skully to believe SSgt Blackburn possessed nude images of E.S. specifically, or any child pornography, he misled the magistrate.

Second, TSgt Day recklessly made several unfounded assumptions which misled the magistrate. (JA at 72-73). TSgt Day was aware at the time of his meeting with Col Airola-Skully that he did not know any technical specifications of the camcorder. Without that detail, any inferences and common knowledge he shared with the magistrate or heard expressed by the magistrate misled Col Airola-Skully.

Where the agent provided information that did not meet probable cause, and then conducted the search, "the police cannot be said to be acting reasonably in then relying on a warrant that reflects those very same glaring deficiencies." *Cordero-Rosario*, 786 F.3d at 72-73. At the time TSgt Day requested search authorization from Col Airola-Skully, he did not know the technical specifications of the camcorder, and therefore could not assert the camcorder could be connected to any of the additional devices he was requesting authorization to seize. He did not know whether E.S. had been recorded in a nude state, but he did know two of the three incidents he referenced in the search affidavit did not result in SSgt Blackburn obtaining a nude image of her. (JA at 101, 112, 114). TSgt Day did not have any basis that there were any images which were sexually explicit. However, even knowingly lacking all of this information, TSgt Day requested the authority not just to seize the camcorder, but 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 71.) After obtaining the authorization, TSgt

Day and two additional agents searched SSgt Blackburn's housing seizing over 300 items, of which TSgt Day personally seized over 200 items. (JA at 67-68.) Here, as TSgt Day was the agent who briefed the magistrate, drafted the affidavit, obtained the authorization, and conducted the search, the CCA concluded "It cannot be objectively reasonable for a law enforcement official to recklessly omit or misstate the information to obtain a search authorization, and then reasonably and with good faith rely on the issuance of that search authorization or belief the magistrate had a substantial basis to authorize the search authorization." (JA at 26).

WHEREFORE, Appellee respectfully requests that this Court affirm the ruling of the CCA and remand for further proceedings in a summary disposition.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 311(A)(3) WHEN HE DETERMINED EXCLUSION WAS UNWARRANTED.

Standard of Review

The military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion, viewing the evidence in the light most favorable to the prevailing party. *Carter*, 54 M.J. at 418. The military judge's findings of fact are reviewed for clear error, and the conclusions of law are reviewed *de novo*. *Leedy*, 56 M.J. at 212.

Law and Analysis

"[S]uppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring v. United States*, 555 U.S. 135, 137 (2009). "Whether the final result should be suppression is based on the deterrence benefits of exclusion which "var[ies] with the culpability of the law enforcement conduct" at issue. *Id.* at 143. "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis v. United States*, 564 U.S. 229, 238 (2011). "If a military magistrate did not have a substantial basis to find probable cause in a specific case, this Court ordinarily applies the exclusionary rule." *Nieto*, 76 M.J. at 106 (citing *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016)). "While 'technical' or 'de minimis' violations of a search warrant's terms do not warrant suppression of evidence, generally the search and seizure conducted under a warrant must conform to the warrant or some well-recognized exception." *United States v. Cote*, 72 M.J. 41, 42 (C.A.A.F. 2013)(citation omitted).

In SSgt Blackburn's case, the search authorization was exceeded by the agents executing it. The authorization was limited to "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 71.) However, AFOSI collected over 300 items of which TSgt Day collected over 200 of the items. (JA at 67-68.) Of the items seized, many were not covered by the authorization to include: one blue plastic resealable bag; one blue plastic resealable bag; one white lanyard; two Energizer Ultimate Lithium AA batteries; one black Nikon lens, one black Nikon lens cover, one black Nikon lithium battery pack, one black nylon Nikon neck strap; one black fan screen; one black vent screen; one black power cord and one used, translucent tan condom. (JA at 67-68.) Additionally, AFOSI collected items which were identified as belonging to another individual, such as the iPod with the name "Josef Blackburn" engraved into it. (JA at 67.) Josef Blackburn is SSgt Blackburn's brother, who lived in the same home as SSgt Blackburn. (JA at 65.) In the affidavit drafted by TSgt Day, in conjunction with the authorization, he only requested the authority to seize electronic devices that "could contain evidence of child pornography." (JA at 72.) However, the agents, knowing they were limited to electronics elected to seized items clearly not covered by the authorization. These items were illegally seized and indicate that even when given an overly broad search authorization for items that did not have a nexus to the camcorder, the agents, particularly TSgt Day, who personally seized the condom, continued to act outside of the bounds of what they were illegally authorized to do.

Unlike the circumstances in *United States v. Fogg*, where the agents were found to be "protecting the right to privacy by obtaining a search warrant," the agents here, even when given substantial time to formulate facts they believed would support a search authorization, still drafted an authorization which they knowingly exceeded. 52 M.J. 144, 151 (C.A.A.F. 1999). This was not a circumstance where the agents had limited time to obtain the search authorization. In fact, prior to the search, agents interviewed four individuals, including E.S., Mr. Sword, Mrs. Sword, and Mrs. Blackburn over a two day period. (JA at 64-65.) However, even with this time, the agents did not get the necessary information demonstrate a nexus between the camcorder and the electronic items to be seized. When interviewing E.S. and Mrs. Blackburn, for example, the agents did not determine if the camcorder was digital. The agent did not determine if the camcorder could be connected to a computer. TSgt Day did not determine if E.S. was nude in front of the camera. TSgt Day did not take the final step to obtain necessary information to determine whether there was a nexus between the items. This type of recklessness towards the necessary facts of a case should not be rewarded.

Further, to not suppress this evidence would dramatically expand the concept of probable cause, emboldening investigators to seize and search any electronic item in a person's house, regardless of whether the item holds some nexus to the alleged crime, merely because the person allegedly used a separate electronic device in or

for an alleged crime. Under that logic, U.S. citizens categorically lose their Fourth Amendment protections for all of their electronic devices merely because they are accused of using one electronic item in the commission of an alleged crime; this cannot be the standard. By suppressing this evidence, this Court would send a strong but appropriate and ultimately common-sense message to law enforcement: if you want to seize and search electronic devices, ensure there is some demonstrable nexus to the alleged crime. [1]

WHEREFORE, Appellee respectfully requests that this Court affirm the ruling of the CCA and remand for further proceedings in a summary disposition.

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[1] The government would have this Court believe that the CCA ignored the basis for the government's requested reconsideration or otherwise did not follow the law. This assumption conflicts with *United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 1992) ("In the absence of evidence to the contrary, judges of the Courts of Criminal Appeals are presumed to know the law and to follow it.") The record contains no contrary evidence to rebut this presumption.

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on February, 14 2019, pursuant to this Court's order dated December 17, 2019 and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) & 37

This answer complies with the type-volume limitation of Rule 24(c) because this brief contains 9,105 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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