IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *v.* Staff Sergeant (E-5) **JARED D. BAVENDER,** United States Air Force, *Appellant.*	**REPLY BRIEF** USCA Dkt. No. 20-0019/AF Crim App. No. 39390

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

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INDEX

TABLE OF AUTHORITIES

Page(s)

U.S. SUPREME COURT CASES

U.S. COURT OF APPEALS FOR THE ARMED FORCES

FEDERAL CIRCUITS

RULES

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Staff Sergeant Jared D. Bavender, the Appellant, hereby replies to the government's brief, filed on March 23, 2020.

ARGUMENT

THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE LOCATED ON APPELLANT'S DIGITAL MEDIA?

Law & Analysis

A. Appellant Has Not Waived Review Under Mil. R. Evid. 311(d)(4)(B)

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)).

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).

While Mil. R. Evid. 311(d)(2)(A) states that the failure to object to the admission of evidence obtained from searches and seizures "constitutes a waiver of the … objection" Appellant did object the admission of evidence resulting from the search of his electronic devices. (JA at 133, 80.) Specifically, Appellant clearly objected to the sufficiency of the probable cause affidavit because it omitted known material facts. (JA at 84.) During motions argument trial defense counsel specifically articulates two bases for his motion to suppress 1) that "what is in that affidavit [does] not [meet the definition] … of child pornography," and 2) that "the substantive descriptions that Staff Sergeant Bavender gave that didn't support a finding of probable cause were not put in the affidavit." (JA at 84.) The military judge was clearly on notice that the basis of the motion to suppress included not

just the sufficiency of what *was* in the affidavit, but also the omission of facts that *were not* in the affidavit as law enforcement "cherry-picked facts that were hooked to the government's position." Id.

Law enforcement, in preparing their affidavit for the search authorization, entirely omitted SSgt Bavender's lawful descriptions of the images he believed to be "illegal" and submitted an affidavit with the bare conclusory statement that SSgt Bavender had stated he viewed "child pornography". (JA at 160-62.) No descriptions of the alleged child pornography were provided whatsoever. Id. When trial defense counsel noted that they were "focusing [their] argument on essentially … an affidavit that did not establish probable cause" they were transitioning away from the issue raised by the military judge about whether the magistrate properly understood the definition of "child pornography" and not conceding or waiving the underlying argument that the affidavit did not establish probable cause because it contained material omissions. (JA at 86.)

As articulated by trial defense counsel the issue was centrally whether the government had even established probable cause to believe that a crime had been committed, let alone whether evidence of that crime would be located at a particular place to be searched at the

time of the search. (JA at 87.) Trial defense counsel aptly argued that law enforcement clearly knew the relevant definitions when repeatedly asking for descriptions of the images, but "when they didn't hear the answers they wanted to hear" they left those descriptions out of the affidavit. (JA at 88.) Trial defense counsel was consistent that the basis of his objection to the search warrant affidavit was that "facts were omitted in this case." (JA at 90.)

Trial defense counsel's written motion also clearly addresses as the basis for the objection the omission of material facts involving Appellant's description of the supposed contraband images. (JA at 133.) While trial defense counsel did not specifically cite M.R.E. 311(d)(4) he did cite M.R.E. 311 generally and it was clear from the focus of his argument that the concern was the improper omission of material facts.

During trial defense counsel's cross examination of SA Lippert during the motions hearing he established that no other information outside the contents of the affidavit itself was provided to the magistrate, and that all substantive portions of the Appellant's interrogation were recorded. (JA at 70, 72.) The recorded interrogation documenting all the detailed questions that law enforcement asked

about the nature of the suspected images had already been offered to the Court at Attachment 3 to the motion. The search authorities and supporting affidavit that omitted all of those material statements was offered to the Court as Attachment 8 to the written motion. (JA at 138.) There was no need to question SA Lippert further about the details of her questioning during the interrogation as the judge could review the video first-hand, nor was there any need to question SA Lippert about what she omitted from her affidavit as the military judge could review that document in its original form as well.

Questioning SA Lippert in an effort to get her to admit "recklessness" or "knowing misconduct" would likely have been futile and all the evidence necessary to establish the recklessness of the omissions in the affidavit could be found in the contents of the interrogation and the lack of detail in the affidavit itself. This obvious omission could only have been reckless or intentional under the circumstances and formed the basis for trial defense counsel's argument. If the prosecution wished to rebut the inference that the omission must have been knowing or reckless, they were clearly on notice that the omissions were a key issue in the motion to suppress and could have questioned SA Lippert further.

Although Appellee now argues that the issue is waived the government made no such argument before the CCA and the CCA analyzed the omissions with reference to M.R.E 311(d)(4) without any concern that the issues had been waived or had not been properly raised. (JA at 6-8.)

B. The Military Judge Abused His Discretion in Failing to Suppress the Search

1. SA Lippert's Affidavit Did Not Support Probable Cause

There is nothing in the affidavit establishing that the images in question are contraband or illegal. Although SA Lippert goes into detail about some images to establish how the Appellant knew they depicted minors, the affidavit provides no information beyond a generalized description of nude minors found on "nudist websites." (JA at 160-61.) These limited facts do not support a conclusion that the images are illegal or are otherwise evidence of a crime. Not all images of nude minors are illegal to possesses or view. The determination that the images were in fact "child pornography" or "illegal" were for the magistrate to make and not for law enforcement to presupposes or mischaracterize.

At the time law enforcement went to the magistrate requesting

search authorization, the only information they had was from the Appellant himself. And from that information, they had no evidence that Appellant had actually viewed child pornography, as defined my the U.C.M.J. The Government brief repeatedly cites the supposed admission by Appellant that he "without a shadow of a doubt" viewed "illegal child pornography." (Govt. Brief at 25, 35.) However, Appellant never made that statement. What Appellant said was that he believed he had viewed "underage porn" and he did not use the more legal and technical term "child pornography." (Transcript (Tr.) at 33.)[1] The issue

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[1] This brief cites to the transcript of the Appellant's interrogation, ordered by the Court, and generated by the Government. However, Appellant would note several substantive discrepancies in the transcript for the Courts attention. The following sections show the language in the transcript in brackets, and the true quote as reflected in the video-recorded interrogation in italics, followed by both relevant citations. "not thinking that anything illegal would come up, that 18 and 19 *year old* [young] girls would come up." (Tr. at 2, ln. 7-9; JA at 130 17:45:26.) "*With nudist* [Within these] websites they've got every age there." (Tr. at 2, ln. 15-16; JA at 130 17:48:21.) "And how many of the pictures that you did view had actual *maybe sexual contact or acts* [--]*?*" (Tr. at 5, ln. 12-13; JA at 130 17:54:21.) "It's really dedicated to porn stars*, female* [being] porn stars, so I've never seen anything on *any of* those websites where I thought that, you know, 'This is illegal pornography.'" (Tr. at 7, ln. 12-15; JA at 130 17:57:43.) "I'll *turn my room upside-down* [tear every website down] and see if I can find that old thumb drive…." (Tr, at 22, ln. 9-10; JA at 130 18:25:16.) "One came up on *a nudist* [this] website, and I had seen this image before." (Tr. at 26, ln. 8-9; JA at 130 18:30:38.) "The nudist stuff, *well* [what] I certainly took as pornographic…." (Tr. at 29, ln. 15-16; JA at 130

of whether the images were in fact pornographic or lascivious should have been left to the magistrate based on facts provided in the affidavit, and not bare assertions.

2. SA Lippert Made Knowing Material Omissions

The Appellee incredibly claims that "Appellant's descriptions of … the images he viewed – were not material." (Govt. Brief at 23.) The content of the alleged contraband images could not have been more relevant and material. Clearly SA Lippert believed the descriptions of the images to be material as she asked for those descriptions numerous times in various different ways. The law enforcement agents clearly knew the legal definition of "child pornography" and sought to ensure during the interview that the evidence they gathered met that definition. The only source of evidence at the time was the Appellant's own words. To now argue that those words and the descriptions of the images he provided are not material strains belief.

Appellant has satisfied his burden that the omission of the

18:36:03.) Several other errors and inconsistencies are present within the transcript but are of less significance to the issue before the court. Appellant would ask that the Court consider the video-recorded transcript as the authoritative source evidence where inconsistencies are noted.

description of the images must have been knowing, or with a reckless disregard for the truth. The amount of time spent on the descriptions of the images during Appellant's interrogation, and the conspicuous absent of any descriptive details about the alleged contraband images can support no other conclusion. Certainly if the appellant had described in detail images of sexual acts between minors, law enforcement would have included those descriptions in the affidavit. The only reason that the Appellant's descriptions of the images are omitted from the affidavit is that the descriptions simply do not meet the definition of "child pornography."

Although the military judge was provided the complete recording of the interrogation prior to ruling on the motion to suppress, he made several findings of fact which are not supported by the evidence. The findings of fact state that the "Accused repeatedly confessed that he viewed child pornography." (JA at 176.) However, Appellant never used the phrase "child pornography" in his interrogation and focused and what he believed to be "illegal" images. At no point did law enforcement attempt to explain the legal definition of "child pornography" or what would constitute an "illegal" image during the interrogation. The findings of facts also state that the "Accused stated

sex acts were depicted in the videos he viewed." Id. However, Appellant was also clear that any videos depicting sex acts did not contain minors. (Tr. at 6-7.) The finding of fact also misquotes the Appellant as saying "holy s___, that's illegal child pornography." (JA at 176.) The interrogation video clearly shows that what Appellant actually said is "that's not legal" putting the focus squarely on whether the Appellant properly understands the difference between legal and illegal images.

Clearly the Appellant did not understand this difference as noted by the Preliminary Hearing Officer (PHO) himself who stated that, "contrary to the Accused's understanding (given his statements to AFOSI and supervisors), not all naked images of a child constitute child pornography." (JA at 41.) The PHO also noted that the Accused "believed … that any images of young looking individuals engages in sexual acts were not minors, but instead young-looking adults." (JA at 42.) The military judge conflates this distinction in his analysis when he notes that Appellant "described images that he had viewed, including nude or partially nude children" and that the "affidavit included a description of an image of a nude underage female posed next to a nude adult male…." (JA at 180). However, the military judge fails to acknowledge that not all images of nude minors are illegal and

simply because an image depicts a nude minor posed next to a nude adult does not mean that the image is lascivious or otherwise meets the definition of "child pornography."

The Government contends that the description of at least one image provided by the Appellant would meet the definition of child pornography as it depicted "a nude teenage girl 'obviously' staring down at a little boys genitalia…." (Govt. Brief at 25.) However, this statement must be taken in context. The Appellant had already explained that the image described was found on a nudist website dedicated to the idea of the nudist lifestyle with images taken of families at nudist camps or nudist beaches, and the people in these images were "posing as if they had clothes on" and "everyone else in the picture was just looking at the camera" and the image was not intended to illicit a sexual response in the viewer. (Tr. at 4-6.) In this context the fact that one of the underage individuals was "obviously" looking at or in the direction of another underage individual's genitalia does not transform the image into one containing "lascivious exhibition" of the genitals.

3. SA Lippert's Affidavit Contained False Statements and Conclusory Allegations

SA Lippert knowingly or recklessly presented her affidavit to the magistrate as if she had no information about the content of the images SSgt Bavender said he viewed and downloaded. She included facts as to the age of those depicted and how SSgt Bavender masturbated to the images, which insinuated that the images he viewed were sexually explicit. Then, SA VL asserted as fact the legal conclusion that SSgt Bavender had viewed child pornography. See *United States v. Gallo,* 55 M.J. 418, 421-22 (C.A.A.F. 2001). ("Certainly, conclusory statements should not be in an affidavit….").

The affidavit was sought hours after the interview ended. The facts were fresh in SA Lippert's mind when she wrote the affidavit. Failing to include enough facts to paint an accurate picture of what SSgt Bavender said during his interview was either intentional or reckless under these circumstances. M.R.E. 311 requires the government to paint an accurate picture to the magistrate. Every fact does not necessarily need to be included, but the facts selected for inclusion must not mislead the magistrate. M.R.E 311(d)(4)(B).

4. Appellant's "Admissions" Did Not Support Probable Cause to Search for Child Pornography.

Appellant's statements only amounted to "admissions" to otherwise legal conduct. The images Appellant described viewing were not lascivious, and despite the Appellant's belief that the photographs were illegal simply because they contained images of nude minors, he was clearly mistaken. Using the lawful images to support probable cause while failing to provide the magistrate with enough information to make a determination about whether the images were in fact legal or illegal constituted failure on the part of law enforcement and fell below the standard needed to establish probable cause.

5. AFCCA Misapplied Applicable Precedent

The appropriate application of *United States v. Leedy* in this context would include the Appellant's detailed description of what these "illegal" images portrayed, and what he viewed after using search terms such as "young nude girls" on the internet. *Leedy*, 65 M.J. 208 (C.A.A.F. 2007). In the context of his description of the images there was not a substantial basis to believe a crime had been committed or that evidence of such a crime would be contained on the electronic devices. As the Air Force Court noted, there was no reason

not to take "Appellant's words at face value." (JA at 7.)

The Air Force Court also relies on the language in *Mason* establishing that the "Fourth Amendment is not violated if the affidavit *would still show probable cause* after such ... omission is ... corrected." *United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (quoting *Gallo*, 55 M.J. at 421). In applying *Mason*, the Government argues that "Appellant's [lawful] descriptions would not outweigh the fact that he affirmatory searched for 'illegal' images of females aged 13-17 years multiple time…." (Govt. Brief at 34.) However, whether the images were in fact illegal is precisely the question for the magistrate to determine in light of all the evidence. To presuppose illegality simply because an untrained suspect used the term "illegal" while completely ignoring the actual contents of the interrogation would be a miscarriage of justice.

C. The Good Faith Exception Does Not Apply

Law and Analysis

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." *United States v. Nieto*, 76 M.J.

101, 108 (C.A.A.F. 2017).

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."

United States v. Carter, 54 M.J. 414, 419-20 (C.A.A.F. 2001) (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984). "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. 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. *Leon*, 468 U.S. at 914. "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. "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." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). "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 U.S. 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.")).

As previously argued in the Appellant's Brief there was no substantial basis to establish probable cause, and SA Lippert knowingly or recklessly omitted information from the affidavit and misstated the evidence. In this case, SA Lippert prepared the search authorization affidavit that contained the knowing or reckless omissions and misstatement, and was also the same agent who later sent the electronic devices for digital forensic search and analysis based on said authorization. (JA at 47-48.) 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. It cannot be objectively reasonable for a law enforcement official to recklessly omit or misstate information to obtain a search authorization, and then reasonably and in good faith rely on the issuance of that search authorization or believe the magistrate had a substantial basis to authorize the search authorization.

D. Mil. R. Evid. 311(a)(3) Supports Application of the Exclusionary Rule

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).

SA Lippert knew that the descriptions of the images the Appellant provided did not meet the definition of a criminal offense. She nevertheless chose to exclude those descriptions from the affidavit and make the bald assertion that Appellant had "confessed" to viewing child pornography.

The exclusion of the results of this unlawful search is necessary to send the appropriate message to law enforcement, that their sworn affidavits cannot "cherry pick" facts or statements from an interrogation, while intentionally omitting others, in order to paint a false or misleading picture of the state of the evidence before a military judge. Based on the facts of this case, failure to exclude the results of this unlawful search would effectively reward law enforcement for self-serving affidavits that knowingly or recklessly mischaracterize the evidence.

WHEREFORE, this Court should find the military judge abused his discretion when he denied the defense motion to suppress evidence located on Appellant's digital media and, accordingly, set aside the findings and sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and transmitted by electronic means with the consent of the counsel being served to usaf.pentagon.af-ja.mbx.afloa-jajg-filng-workflow@mail.mil on April 7, 2020.

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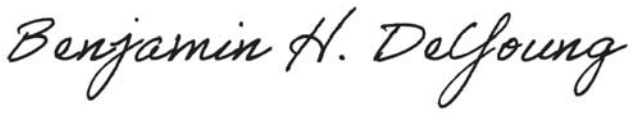
CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because the principal brief contains 4,437 words, and 20 pages.

2. 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 Century Schoolbook 14-point typeface.



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