23 March 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39390
Staff Sergeant (E-5), JARED D. BAVENDER, USAF, *Appellee.*	)	USCA Dkt. No. 20-0019/AF

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

ISSUE GRANTED

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

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2012). (JA at 1-37.) This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

On 7 August 2016, Appellant attended a motivational conference where a speaker told attendees that they could not "move forward with living a good life without having integrity." (JA at 172.) Inspired by this message, Appellant called his supervisor "to confess to the 'illegal' acts of viewing pictures of child pornography," and expressed a desire to speak with his first sergeant, Master Sergeant (MSgt) RH. (JA at 172; *see also* JA at 56.) Shortly afterwards, Appellant spoke with MSgt RH on the phone. (JA at 56, 172.)

Appellant admitted to MSgt RH "that he had viewed child pornography." (JA at 172; *see also* JA at 56.) He also clarified that he last "looked at it" two weeks ago and saved it on his computer, but deleted it out of shame. (JA at 172; *see also* JA at 57.) After speaking with Appellant, MSgt RH drove to the conference so that he could bring Appellant to the Air Force Office of Special Investigations (AFOSI) for questioning. (JA at 57, 172.) Appellant agreed to go with MSgt RH, but before leaving the conference, Appellant announced to the 100-150 people in attendance that "he had done some 'illegal things' and that his First Sergeant [] was going to take him so that he could take care of what he had done." (JA at 172; *see also* JA at 57-58.)

Appellant then arrived at the base AFOSI detachment where he was interviewed by Special Agent (SA) Lippert and SA Barbosa, and "discuss[ed]

viewing child porn." (JA at 62, 64, 130.) Appellant began the interview by stating he struggled with a pornography addiction and in 2011 the "addiction [went] into illegal forms with the pornography." (Transcript (Tr.) at 1;[1] JA at 130 17:45:30;[2] *see* also JA at 64.) He then told AFOSI that he would go to nudist websites to find "pictures of underage people" about four or five times a year. (Tr. at 1; JA at 130 17:46:09.) He explained that his pornography addiction began to worsen over time and, as he continued to view pornography, "the younger and younger and younger pornos [he] was trying to find" until he came across images that were "illegal." (Tr. at 2; JA at 130 17:47:30; *see also* JA at 65.) On one occasion while conducting searches for "teenage porn," Appellant came across images that made him think "[h]oly s[***]. That's not legal." (Tr. at 2; JA at 130 17:47:50.) But he still clicked on those images to learn what website hosted them and later returned to the website to "see what else was there." (Tr. at 2; JA at 130 17:48:00.)

The website Appellant discovered contained nude images of "every age." (Tr. at 2; JA at 17:48:20). Appellant was primarily interested in finding images of girls between 13 and 17 years of age, but he also viewed images of girls who were

[1] These citations refer to the transcription this Court ordered on 28 February 2020.
[2] Page 130 holds a disc that contains a recording of Appellant's AFOSI interview. Citations to the recording, for example: JA at 130 17:45:00, are to the running timestamp displayed in the overlay. Appellant was interviewed for approximately six hours and spent an additional four hours at the AFOSI detachment while the special agents completed a search of his residence. (JA at 66.)

"younger than that," including "small children." (Tr. at 3; JA 17:48:28, 17:49:29; *see also* JA at 65.) To find these images, Appellant explained that he would use search terms such as "teenage porn," "young teenage porn," "young naked girl," and "young nude girl." (Tr. at 2; JA at 130 17:48:45.) He was confident that the images depicted underage females because they were sometimes depicted beside adults where the differences in body size, breast and figure development, and lack of body hair were obvious. (Tr. at 4; JA at 130 17:51:38.)

During his most recent pornography "relapse" that occurred two weeks prior to the interview, Appellant looked at legal and illegal images over the course of six days. (Tr. at 25; JA at 130 18:29:00.) He saved two images he believed to be illegal, but was not sure of the age of the females depicted therein. (Tr. at 25; JA at 130 18:29:50.) One of the images depicted "a girl laying on a bed," and the other depicted a girl at a beach. (Tr. at 26; JA at 130 18:30:20.) These two images were some of Appellant's "favorite images." (Tr. at 26; JA at 130 18:30:40.) When asked to describe the image of the girl on the bed, Appellant stated the girl on the bed "was holding her chest and kind of looking down" and agreed that it was a "pornographic" image. (Tr. at 26-27; JA at 130 18:31:45.) He admitted that he had saved this image "a couple of times on [his] computer." (Tr. at 26; JA at 130 18:30:45.)

Appellant also described the most "sexual" image that he saw on the nudist website: "There was one picture I saw where a teenage girl was, I guess, looking down at a little boy, just staring at -- obviously looking at his reproductive organs; but everybody else in the picture was just kind of standing there looking at the camera." (Tr. at 5.)

During the interview, Appellant also provided some personal background that he believed were reasons for his addiction. He disclosed that he had been a victim of sexual abuse when he was 9 years old, and admitted to molesting "one of [his] younger sisters" for "about 3 years straight," which began when he was 14 years old. (Tr. at 15; JA at 130 18:13:50.) Further, Appellant described himself as a "hebephile" and that his "sexual template" ranged from adolescent females as young as 13 to those that were older than him. (Tr. at 3; JA at 130 17:49:49.) He admitted that he had "definitely fantasized about" and had "definitely been tempted" to inappropriately touch underage females, but never did so. (Tr. at 17; JA at 130 18:17:20.) Indeed, Appellant disclosed that he was "sexually triggered by" his neighbor's 13-year-old daughter. (JA at 130 18:53:30.) He posited that "in a few years down the road," she could "possibly" be at risk of being harmed by him if he could not contain his addiction. (JA at 130 18:56:00.) And due to his growing addiction, Appellant believed it would "take [him] into toddlers" if left unchecked. (Tr. at 18; JA at 130 18:19:10.)

Before he left the AFOSI detachment, Appellant also provided a written statement where he stated the following, in relevant part:

> I am a masterbation [sic] and pornography addict, though this is not illegal, some of the pornography that I have viewed has been illegal…. [S]ome of my pornography use has been illegal child porn. Where I have viewed child pornography is on nudist websites…. I didn't get into child pornography until I was 31 years old, shortly after my 1st deployment to Afghanistan.

(JA at 140-43.)

In all, Appellant admitted to viewing "100 to 150" illegal images throughout his life, and downloading "30 or 40" images that he "knew without a shadow of a doubt" was "underage porn." (Tr. at 33; JA at 130 18:42:55.) Appellant informed SA Lippert and SA Barbosa that he had saved child pornography to his electronic media storage devices, but would later delete it due to feeling ashamed. (Tr. at 19-20; JA at 130 18:20:10-18:23:15; *see also* JA at 66-67.) Afterwards, Appellant consented to the seizure of his electronic media storage devices in his home that he had used to store pornographic images. (JA at 67, 149-50; *see also* JA at 18:25:00.) However, he revoked consent the next day. (JA at 151-52.)

On 8 August 2016, SA Lippert sought authorization from a military magistrate, Colonel MH, to search and seize Appellant's various electronic media storage devices. (JA at 68, 153-59.) Colonel MH consulted with a base judge

advocate and SA Lippert about the case and considered an affidavit prepared by SA Lippert. (JA at 68-69, 75-76.)

The affidavit conveyed much of Appellant's history with child pornography: (1) Appellant would view "child pornography" approximately "four times per year" beginning in 2011 and that "the most recent time was two weeks ago" (JA at 160); (2) Appellant would find "pictures of underage girls on nudist websites and masturbated to them and ejaculated" (JA at 160); (3) to find images, Appellant would use search terms such as "teenage porn," "young teenage porn," and "young nude girls" (JA at 160-61); (4) Appellant's stated preference of females "aged 13-17, although he had also viewed younger children" (JA at 161); and (5) that Appellant "had viewed approximately 100-150 images of child pornography and downloaded approximately 30-40" (JA at 161). Colonel MH was also informed that Appellant was sexually interested in a 13-year old female neighbor, who he would watch through his window as he masturbated. (JA at 161; *see also* JA at 148.)

Based upon the information provided to him, Colonel MH determined "evidence of child pornography would likely be found" and authorized the search and seizure of Appellant's electronic media storage devices. (JA at 77, 153-59.) Pursuant to the search authorizations, AFOSI seized Appellant's electronic media

storage devices and uncovered images that were used to find Appellant guilty of the specifications[3] of Charge I. (JA at 53-54, 119, 153-59.)

Prior to trial, Appellant moved to suppress the images obtained from the searches of his electronic media storage devices. (JA at 133.) The military judge held a hearing where witness testimony and arguments of counsel were presented. (JA at 55-92.) Afterwards, he determined the magistrate had sufficient probable cause to authorize the search of Appellant's electronic digital media for evidence that he viewed and received child pornography, and therefore denied Appellant's request to suppress the images. (JA at 174-81.)

SUMMARY OF THE ARGUMENT

At trial, Appellant failed to raise any argument that SA Lippert's affidavit was intentionally false or made with a reckless disregard for the truth under Mil. R. Evid. 311(d)(4)(B). Therefore, under Mil. R. Evid. 311(d)(2)(A), Appellant waived that argument as a basis for relief on appeal.

When reviewing the magistrate's decision, the military judge properly found a substantial basis to find probable cause existed. Even assuming the argument was not waived, SA Lippert did not make deliberate falsehoods nor did her affidavit manifest a reckless disregard for the truth. The affidavit lawfully

[3] Specifications 1 and 2 of Charge I respectively alleged that Appellant had received and viewed child pornography in violation of Article 134, UCMJ. (JA at 53.)

summarized Appellant's admissions showing a fair probability that evidence of a crime would be found on his electronic media storage devices. The military judge relied on applicable precedent to review the magistrate's probable cause determination. Therefore, the military judge did not abuse his discretion when he denied Appellant's motion to suppress

Further, even if the military judge erred, the record disclosed that AFOSI acted in good faith under Mil. R. Evid. 311(c)(3). Moreover, the balancing test of Mil. R. Evid. 311(a)(3) shows that little deterrence would be gained from excluding the images found during the search, and any deterrence would not outweigh the costs to the justice system. Accordingly, Appellant is entitled to no relief.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE LOCATED ON APPELLANT'S DIGITAL MEDIA.

Standard of Review

Appellate courts "review a military judge's denial of a motion to suppress for an abuse of discretion." United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010). "An abuse of discretion occurs when [appellate courts] determine that the military judge's findings of fact are clearly erroneous or that he misapprehended the law." Id. In doing so, courts "view the evidence in the light most favorable to

the party prevailing." United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016). "That means [courts] review the military judge's findings of fact for clear error but [his] conclusions of law de novo." Id.

With regard to search and seizure, "'[t]he task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." United States v. Macomber, 67 M.J. 214, 218 (C.A.A.F. 2009) (internal citations omitted). "Great deference" is given to the magistrate's probable cause determination because of "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." Illinois v. Gates, 462 U.S. 213, 236 (1983) (citation omitted) (internal quotation marks omitted). If the military magistrate did not have a substantial basis for concluding that probable cause existed, "the Government has the burden of establishing [the good-faith doctrine] by a preponderance of the evidence." United States v. Nieto, 76 M.J. 101, 108 (C.A.A.F. 2017).

Law & Analysis

A. Appellant Waived Any Objection under Mil. R. Evid. 311(d)(4)(B) at Trial

As an initial matter, any argument that SA Lippert'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."). Mil. R. Evid. 311(d)(4)(B) states "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." Appellant makes this argument now by arguing that the information omitted from SA Lippert's affidavit was done with a "reckless disregard" for the truth. (App. Br. at 13-15, 21-23, 26.) But this Court should not reach this argument because it was waived at trial.

At trial, Appellant's written motion focused on the argument that "[t]here was simply not probable cause to support the search authorization." (JA at 136-37.) And during the motions hearing, at no point did Appellant claim AFOSI was intentionally false or acted with "reckless disregard" for the truth by omitting information from the affidavit under Mil. R. Evid. 311(d)(4)(B). Further, as recognized by the lower court, Appellant "did not confront SA Lippert at the suppression hearing with the claim that the omission of [] information was intentional or reckless." (JA at 6.) Indeed, during argument on the motion, trial defense counsel stated "[w]e will focus our argument on essentially what we consider . . . an affidavit that did not establish probable cause." (JA at 86.)

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, this Court rejected the appellant's attempt to object to the scope of his consent to search for the first time on appeal. Id. 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. In Perkins, 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. Id. 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, 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 relevant here, where Appellant made no allegation at trial that AFOSI acted with "reckless disregard" for the truth. In fact, Mil. R. Evid. 311(d)(4)(B) outlines a specific 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." Id. 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." Id. 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 and Perkins. At trial, Appellant did not: (1) cite Mil. R. Evid. 311(d)(4)(B); (2) cite the "substantial preliminary showing" standard under Mil. R. Evid. 311(d)(4)(B) or attempt to meet it; (3) request a hearing or attempt to meet the "preponderance of the evidence" burden under Mil. R. Evid. 311(d)(4)(B); or (4) use the terms "false" or "reckless" to describe SA Lippert's affidavit. Simply put, Appellant did not preserve an objection under Mil. R. Evid. 311(d)(4)(B). Therefore, any argument

that SA Lippert's affidavit was knowingly false or reckless was waived and cannot now serve as a basis for suppression.

Moreover, the sound policy reasons for waiver that were identified in Perkins are also applicable here. Because Appellant never objected on the basis of Mil. R. Evid. 311(d)(4)(B) at trial, the government was unable to present relevant evidence at trial to rebut an inference that SA Lippert acted with a "reckless disregard for the truth." 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 reckless omissions. And had SA Lippert been examined on this point during the hearing, the government would have had an opportunity to rehabilitate her. Instead, the government was unable to present "relevant evidence that might be reviewed on appeal." Perkins, 78 M.J. at 390. Therefore, the issue was waived and this Court should decline 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.")

B. Appellant Failed to Demonstrate the Military Judge Abused His Discretion

The central issue to this appeal is whether Appellant's admissions provided probable cause to search his electronic media storage devices for child

pornography. The relevant definition of child pornography here is "material that contains . . . a visual depiction of an actual minor engaging in sexually explicit conduct." Manual for Courts-Martial, United States ¶68b.c.(1) (2016 ed.) (MCM). Based on Appellant's admissions, the most relevant definition for "sexually explicit conduct" is an image that depicts a "lascivious exhibition of the genitals or pubic area of any person." MCM, ¶68b.(c)(7)(e). This Court has adopted the following factors to determine whether an image contains a lascivious exhibition:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Roderick, 62 M.J. 425, 429-30 (C.A.A.F. 2006) (quoting United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

Here, after citing the above authorities and reviewing Appellant's oral and written statements, the military judge determined that:

> [T]here was overwhelming evidence [Appellant] both downloaded and viewed child pornography based on the confession . . . and the details and specificity he provided in describing the images, how he accessed the images, what he did with the images, and how he knew the images to be those of which he should not either be downloading or viewing.

(JA at 181.)

Appellant contends the military judge erred for five reasons: (1) SA Lippert's affidavit was allegedly "defective on its face"; (2) SA Lippert's affidavit allegedly "contained knowing omissions of material facts"; (3) SA Lippert's affidavit allegedly contained reckless and/or intentional "false statements and conclusory allegations"; (4) Appellant's omitted descriptions amounted to "child erotica," which "does not in itself support probable cause to search for child pornography"; and (5) the military judge and AFCCA erred in their reliance of United States v. Leedy, 65 M.J. 208 (C.A.A.F. 2007), and United States v. Mason, 59 M.J. 416 (C.A.A.F. 2004). (App. Br. at 15-16.) These allegations are addressed in turn.

1. SA Lippert's Affidavit Sufficiently Supported Probable Cause

SA Lippert's affidavit provided the magistrate a substantial basis to conclude probable cause that evidence of viewing or receiving child pornography would be found on Appellant's electronic media. This Court should uphold the

magistrate's determination that probable cause existed to authorize the search and seizure of Appellant's electronic devices.

"Probable cause to search exists when there is a reasonable belief that . . . property or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). As this Court has observed:

> Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. Thus, the 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, there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present.

Leedy, 65 M.J. at 213 (citations omitted).

Here, SA Lippert's affidavit provided the following facts that constituted a substantial basis upon which to find probable cause. First, Appellant himself stated the files he received and viewed were "child porn." (JA at 160.) Second, Appellant admitted that he was sexually excited by the images and masturbated while viewing them. (JA at 160.) Third, Appellant stated preferred young girls between 13 to 17 years of age and admitted to being sexually interested in his 13-year old neighbor. (JA at 161.) Fourth, the search terms Appellant used to find the files included "teenage porn, "young teenage porn," and "young nude girls." (JA at 160-61.) Fifth, Appellant confessed that he had viewed 100-150 illegal images and had downloaded between 30 and 40 onto his "cellphone, laptop computer, and

32 GB thumb drive." (JA at 161.) Sixth, Appellant disclosed that he had viewed and downloaded images to his computer as recent as two weeks prior to his AFOSI interview. (JA at 160.)

Appellant does not contend that he did not make the above admissions. Rather, Appellant takes issue SA Lippert's decision not to provide the magistrate with his descriptions of the suspected child pornography. (App. Br. at 16-17.) He effectively argues that his descriptions were per se required to be provided in the affidavit, and that, if they had been, it would have led to a finding of no probable cause. (Id.) He cites several cases to support his position, but these cases are unavailing. (Id.)

First, the warrant applications in these cases relied almost exclusively on conclusions that the images sought constituted child pornography. *See* United States v. Doyle, 650 F.3d 460, 473-74 (4th Cir. 2011); United States v. Lowe, 516 F.3d 580, 582-83, 585-86 (7th Cir. 2008); United States v. Chrobak, 289 F.3d 1043, 1044 (8th Cir. 2002); United States v. Brunette, 256 F.3d 14, 18-19 (1st Cir. 2001); United States v. Monroe, 52 M.J. 326, 332 (C.A.A.F. 2000). But here, the magistrate had much more than just a law enforcement officer's conclusion that Appellant had received and viewed child pornography. The numerous other factors in SA Lippert's affidavit provided a substantial basis for probable cause, making descriptions of images unnecessary in this case. (JA at 160-61.) As this

Court recognized, "probable cause is founded not on the determinative features of any particular piece of evidence provided an issuing magistrate. . . but rather upon the overall effect or weight of all factors presented to the magistrate." Leedy, 65 M.J. at 213. And here, the overall weight of the factors presented established a substantial basis for probable cause. Thus, the omission of Appellant's descriptions did not invalidate the magistrate's decision to authorize the searches.

Second, most of the cases cited assume the images were in fact available to present to the magistrate, which is not the case here. Third, the cases do not represent the opinion of all circuits. *See* United States v. Dennington, No. 1:07-cr-43-SJM-1, 2009 U.S. Dist. LEXIS 74372, at *78-80 (W.D. Pa. Aug. 21, 2009); *see also* United States v. Simpson, 152 F.3d 1241, 1246-47 (10th Cir. 1998) (where an affidavit neither presented to the issuing judge copies of unlawful materials believed to be in the defendant's possession, nor described in detail the content of those materials, but merely informed the judge that the material was "child pornography," the information in affidavit was nevertheless sufficient for the judge to find probable cause for the search); United States v. Genin, 594 F. Supp. 2d 412, 426 (S.D.N.Y. 2009) (upholding search on good faith grounds where affidavit contained agent's bare conclusion that videos contained "child pornography") (citing United States v. Jasorka, 153 F.3d 58 (2d Cir. 1998)).

Fourth, the cases Appellant cites stand, at most, for the proposition that law enforcement should include witness descriptions of images suspected to be child pornography to magistrates for probable cause determinations. None of the cases require an appellant's self-serving descriptions to be included in the affidavit. To the contrary, law enforcement is not required to include an appellant's innocent explanations in an affidavit. The Supreme Court of the United States recently summarized federal case law that holds law enforcement is "not required to take a suspect's innocent explanation at face value." District of Columbia v. Wesby, 138 S. Ct. 577, 592 (2018) (citation omitted). The Court also observed that Federal Courts of Appeal have continually suggested that an appellant's "innocent explanations—even uncontradicted ones, do not have any automatic, probable-cause-vitiating effect." Id.

Fifth, and finally, Appellant's reliance on this Court's decision in Monroe is also inapt. Monroe did not require a detailed description or an exemplar to be presented to a magistrate. Rather, it only stated that such practices were "preferable." Monroe, 52 M.J. at 332. And even though law enforcement in Monroe failed to take these steps, this Court still found a substantial basis for probable cause. Id.

Here, SA Lippert was not required to present Appellant's descriptions—that were most likely meant to downplay his misconduct to AFOSI[4]—to the magistrate. *See* United States v. Colkley, 899 F.2d 297, 302-03 (4th Cir. 1990) (rejecting the argument that exculpatory evidence must be included in affidavits). And even if she had, the magistrate was also not duty bound to take Appellant's self-serving statements at "face value." Wesby, 138 S. Ct. at 592. Therefore, the omission of Appellant's descriptions of the images was not reckless, nor would those descriptions have invalidated the magistrate's finding of probable cause.

Given all of the information presented to him, there was "substantial evidence in the record supporting the magistrate's decision to issue the [search authorization]." Macomber, 67 M.J. at 218 (quoting citation and internal marks omitted); Wesby, 138 S. Ct. at 586 ("Probable cause is not a high bar."). The information showed Appellant actively searched for, viewed, and saved what he repeatedly described as "illegal" images of underage females. Appellant himself termed them "child pornography." In fact, at one point, he even said that he knew

[4] Despite initially confessing to molesting his younger sister, Appellant later denied inappropriately touching any underage minors. (JA at 15, 16-17.) He then admitted that this was a lie because he had touched his underage sister. (JA at 17.) This was indicative of Appellant's reflexive desire to minimize his conduct. Under such circumstances, AFOSI was under no obligation to believe that Appellant was being entirely forthcoming about the nature and content of the images he had received and viewed. And AFOSI had no obligation to present questionable, self-serving information to the magistrate.

"beyond a shadow of a doubt" that he had viewed "illegal child pornography," and saved such images onto several devices. It was reasonable for the magistrate and military judge to believe there was a fair probability that at least some of the images Appellant described as "illegal" would indeed meet the legal definition of child pornography. Finally, the images were sufficiently sexual that Appellant masturbated to them, and he had used terms like "young teenage porn, "young naked girl,' and "young nude girl" to search for them. Under these circumstances, it would be reasonable for the military magistrate to expect to find pictures on Appellant's electronic devices containing a lascivious exhibition of the genitals.

Despite no requirement that it be "more probable than not," the affidavit showed that it was highly probable that at least some of the images founds on Appellant's electronic devices would be child pornography. Leedy, 65 M.J. at 213. And even if this Court finds this case to be a "close call," in light of the "preference for warrants," it should uphold the magistrate's decision. Macomber, 67 M.J. at 218. Therefore, the military judge did not abuse his discretion when he denied the motion to suppress.

2. SA Lippert did not Make Knowing Material Omissions

Appellant alleges that SA Lippert "mischaracterized [his] statements by omitting key information." (App. Br. at 18.) However, as discussed above, SA Lippert did not have to take Appellant's potentially innocent explanations at face

value, Wesby, 138 S. Ct. at 592, and was not required to include potentially exculpatory evidence in the affidavit, Colkley, 899 F.2d at 302-03. As the Fourth Circuit observed:

> [A] requirement that all potentially exculpatory evidence be included in an affidavit would severely disrupt the warrant process. The rule would place an extraordinary burden on law enforcement officers, who might have to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded…. In addition, a broad duty of inclusion would turn every arrest or search into a warrant contest. Such consequences would, in turn, discourage reliance on warrants, a result the Supreme Court has stated should be avoided in shaping Fourth Amendment doctrine.

Id. (citing Gates, 462 U.S. at 236-37). The omissions—Appellant's descriptions of some of the images he viewed—were not material and, thus, not required to be included in the affidavit.

Assuming Appellant did not waive the issue, he failed to satisfy his burden under Mil. R. Evid. 311(d)(4)(B) to show SA Lippert made knowing omissions or acted with a reckless disregard for the truth. Under the first requirement of Mil. R. Evid. 311(d)(4)(B), Appellant was initially required to make an allegation that SA Lippert "included a false statement knowingly and intentionally or with a reckless disregard for the truth." This requires at least a substantial preliminary showing of "deliberate falsehood or of reckless disregard for the truth" because "[a]llegations

of negligence or innocent mistake are insufficient." Franks v. Delaware, 438 U.S. 154, 171 (1978); United States v. Cowgill, 68 M.J. 388, 391 (C.A.A.F. 2010). Here, Appellant never made such an allegation.

Nor did Appellant satisfy his burden at the actual hearing to show "by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth." Mil. R. Evid. 311(d)(4)(B). In fact, as AFCCA observed, Appellant "did not confront SA Lippert at the suppression hearing with the claim that the omission[s]" were "intentional or reckless, and no evidence was presented that it was." (JA at 6.) This Court has noted, "[t]his [is] a question of fact for the trial judge," but Appellant failed to put the question in issue at trial. United States v. Cravens, 56 M.J. 370, 375 (C.A.A.F. 2002). Simply put, Appellant never made the objection, presented no evidence to support an allegation, and failed to carry his burden under Mil. R. Evid. 311(d)(4)(B). Therefore, the military judge did not abuse his discretion in concluding the affidavit provided a substantial basis for probable cause.

Appellant also alleges that the military judge failed to rule on whether the omitted information invalidated probable cause. (App. Br. at 18.) However, Appellant ignores the fact that the military judge reviewed the recorded interview and obviously had no concerns that the statements made in the interview diminished or undermined probable cause. (JA at 130, 165.) Indeed, the military

judge found that SA Lippert learned Appellant had admitted to viewing, storing, and receiving what she concluded was child pornography and presented this information to the magistrate. (JA at 180-81.) Despite the defense presenting evidence in an attempt to show what Appellant described was legal child erotica, the military judge found that Appellant "intended to find child pornography" and that the images Appellant described during his AFOSI interview were "properly classified as illegal child pornography." (JA at 180 ¶ 18.) This finding was properly supported by the record and was not clearly erroneous. Cravens, 56 M.J. at 375 (declining to disturb the question of fact for the trial judge when "his ruling [was] supported by evidence in the record") (citing Colkley, 899 F.2d at 301)).

In addition, contrary to Appellant's assertions on appeal, at least one image Appellant admitted to viewing credited AFOSI's belief that Appellant had viewed child pornography. Specifically, Appellant described a picture of a nude teenage girl "obviously" staring down at a little boy's genitalia during his interview. (Tr. at 5.) It was reasonable for AFOSI to conclude that this image constituted a lascivious exhibition of the genitals, and thus, child pornography under the Dost factors.

The fact that the girl was obviously staring at the young boy's genitalia suggests that the genitalia was the real "focal point" of the image and that the picture might be "sexually suggestive." Roderick, 62 M.J. at 429-30 (quoting

Dost, 636 F. Supp. at 832). Indeed, Appellant himself described the images as "sexual," saying it was likely the most sexual images he had seen. (Tr. at 5.) Also, the minors were all nude, and Appellant admitted to searching for these images to gratify his sexual desires. Taking the facts in the light most favorable to the government, the description of this image supported AFOSI's belief that images containing a lascivious exhibition of the genitals of minors would be found on Appellant's electronic devices. Therefore, it was reasonable for SA Lippert to rely on Appellant's characterization of the images as "illegal child pornography" without presenting all of Appellant's descriptions to the magistrate. In any event, if SA Lippert had included, rather than omitted, Appellant's description of the image of the girl staring at the boy's genitalia, it would have only have strengthened the case for probable cause.

Even if this Court finds SA Lippert knowingly or recklessly omitted Appellant's descriptions of the images he viewed, the magistrate's probable cause determination was still valid. When the defense meets its burden under Mil. R. Evid. 311(d)(4)(B), the rule requires the prosecution to prove by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. Mil. R. Evid. 311(d)(4)(B). For omissions the test is whether their "inclusion in the affidavit would defeat probable cause[.]" Colkley, 899 F.2d at 301 (citation

omitted); Mason, 59 M.J. at 422 ("the Fourth Amendment is not violated if the affidavit would still show probable cause after such … omission is … corrected.")

Here, including Appellant's omitted explanations would not have automatically invalidated probable cause. Wesby, 138 S. Ct. at 592 ("innocent explanations—even uncontradicted ones, do not have any automatic, probable-cause-vitiating effect.") Moreover, the omissions were not material and did not outweigh the information originally contained in SA Lippert's affidavit. Even if his descriptions were added, the affidavit would have still conveyed that Appellant was sexually attracted to minors, actively searched for nude images of prepubescent females, used the term "porn" to search for these images, viewed illegal images of children younger than 13, and masturbated to ejaculation when viewing these images. (JA at 160-61.) And Appellant's specific description of the image depicting the teenage girl staring at the young boy's genitalia would have supported probable cause – not extinguished it.

Moreover, Appellant admitted that he had saved such images onto his electronic devices. (JA at 161.) Despite Appellant's self-serving descriptions of some of the images, his admission to saving such images supported the belief "that the search *may* reveal evidence of a crime" on Appellant's electronic devices. United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting citation omitted) (emphasis added); Leedy, 65 M.J. at 214 (recognizing the determination

is a "commonsense, practical question whether there [was] 'probable cause' to believe that contraband… is located in a particular place.") Thus, the military judge did not abuse his discretion, and this Court should uphold the magistrate's decision.

3. SA Lippert's Affidavit did not Contain False Statements or Conclusory Allegations

Appellant alleges that SA Lippert's use of the term "child pornography" in her affidavit amounted to a deliberate falsehood and conclusory statement. (App. Br. at 20-22.) As with the allegation of recklessness, Appellant did not attempt to show that SA Lippert's use of the term "child pornography" was done knowingly to mislead the magistrate at trial as required. Franks, 438 at 171 (requiring falsehoods to be "deliberate"). As a result, the government had no need to present evidence meant specifically to rebut the allegation. Nevertheless, the evidence presented to the military judge still showed SA Lippert did not act in bad faith.

The record demonstrates that SA Lippert's use of the term "child pornography" was not false or conclusory. She knew that Appellant had used the term "child pornography" when speaking to his supervisor and first sergeant. More importantly, he admitted to viewing "child pornography" in his written statement three times, and there is no evidence in the record that Appellant was prompted to adopt this term. Further, during his AFOSI interview, Appellant explained the images depicted nude underage females and repeatedly referred to

them as "illegal." He also admitted that his sexual attraction to females between 13 to 17 years old led him to seek out these images, and stated he gained sexual gratification from viewing them. Moreover, as previously discussed, it was reasonable for AFOSI to conclude that the image of the nude girl looking at a nude boy's genitalia constituted child pornography under the Dost factors. On these facts, SA Lippert's use of the term child pornography was not knowingly false, reckless, or conclusory, but a reasonable conclusion based on Appellant's admissions. *See* Baker v. McCollan, 443 U.S. 137, 145-46 (1979) (rejecting the idea that the police have a standing obligation to investigate potential defenses before finding probable cause to arrest).

At worst, SA Lippert's use of the term child pornography might arguably have been negligent for not strictly complying with a legal definition. But negligence is insufficient to constitute a deliberate falsehood or reckless disregard for the truth. Franks, 438 U.S. at 171; *see also* Gates, 462 U.S. at 288-89 ("courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner") (quoting citation omitted). And even if the term "child pornography" were set aside and corrected, the affidavit still supports a finding of probable cause. United States v. Gallo, 55 M.J. 418, 421 (C.A.A.F. 2001) ("the Fourth Amendment is not violated if the affidavit would still show

probable cause after such falsehood or omission is redacted or corrected") (quoting citation omitted).

Appellant essentially invites this Court to "review[] the affidavit in a hypertechnical, rather than commonsense manner." Gates, 468 at 288-89. However, probable cause determinations are not technical, "they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id. at 231. And here, the facts in a "corrected" affidavit would still show that Appellant actively sought and saved "illegal" nude images of females aged 13-17 years to satisfy his sexual desires. When considering those facts in a common sense manner, and in the light most favorable to the government, SA Lippert's affidavit showed a "fair probability" that images of a lascivious exhibition of the genitals of a minor would be found on Appellant's electronic storage devices. Leedy, 65 M.J. at 213 (quoting Gates, 462 U.S. at 238). Thus, the military judge did not abuse his discretion when he denied the motion to suppress.

4. Appellant's Admissions Supported Probable Cause to Search for Child Pornography

Appellant contends that "child erotica standing alone cannot justify" probable cause to search.[5] (App. Br. at 22-24.) But the affidavit contained more

[5] Yet this Court has affirmed convictions for possession of child erotica in violation of Article 134, UCMJ. United States v. Davenport, 76 M.J. 340

than child erotica standing alone. It disclosed that Appellant admitted to being sexually attracted to underage females. And it showed he used search terms that included the word "porn" and used the images he found to gratify his sexual desires. In addition, Appellant described the images he saw as "illegal" and "child pornography" on several occasions. When viewed "in the light most favorable to the prevailing party," the magistrate had more than child erotica standing alone to authorize a search. Carter, 54 M.J. at 418 (citations omitted); *see also* Gates, 462 U.S. at 243 n.13 ("innocent behavior frequently will provide the basis for a showing of probable cause"); United States v. Hansel, 524 F.3d 841, 846 (8th Cir. 2008) (finding the presence of child erotica "combined with [] other facts included in the affidavit" established probable cause); United States v. Newsom, 402 F.3d 780, 783 (7th Cir. 2005) (finding a video that was not necessarily "pornographic" but showed a naked minor to reasonably supported an inference that the video was "an ominous hint of what might be found in [the appellant]'s home" and a search for child pornography). But even if this Court finds the probable cause determination was "doubtful," "close calls [should] be resolved in favor of sustaining the magistrate's decision." Monroe, 52 M.J. at 331 (quoting citation omitted).

(C.A.A.F. 2017) (affirming United States v. Davenport, 2016 CCA LEXIS 729 (Army Ct. Crim. App. 2016)).

Finally, Appellant states this Court should find child erotica cannot serve as the basis for probable cause because of "the rule" in Jacobson: "that evidence of a predisposition to engage in lawful activity 'is not, by itself, sufficient to show predisposition to do what is now illegal….'" (App. Br. at 15, 24 (citing Jacobson v. United States, 503 U.S. 540 (1992).) His reliance on Jacobson, is misplaced for two reasons.

First, the quotation Appellant cites stands for the principle that, in entrapment cases, an appellant's predisposition "to do what once was lawful" cannot be used by itself to show he has the predisposition "to do what is now illegal." Jacobson, 503 U.S. at 551. This case does not involve entrapment nor an act that was once legal, but is now unlawful. Second, a magistrate's probable cause determination is not subject to rules of evidence that prohibit the use of predisposition evidence. Mil. R. Evid. 404(b)(1). Therefore, Jacobson is inapposite and does not show the military judge abused his discretion.

5. The Military Judge and AFCCA Properly Relied on Applicable Precedent

Appellant last argument focuses on "The Military Judge and Air Force Court's Reliance on Leedy and Mason." (App. Br. at 24.) But contrary to this assertion, the military judge did not rely on the factual background of Leedy, 65 M.J. 208, to guide his probable cause review in his case, nor did he cite to or rely

at all on Mason, 59 M.J. 416, in his written ruling. (JA at 176-81.) Therefore, the military judge could not have abused his discretion in this regard.

Nonetheless, AFCCA's reliance on Leedy and Mason was proper. In Leedy, a witness found a list of filenames of recently accessed files on the appellant's computer. 65 M.J. at 211. One file was named "14 year old Filipino girl" and other files mentioned ages and acts. Id. There were no file names that conclusively indicated a file contained child pornography. Despite this, this Court considered the context and "weight of all factors presented to the magistrate" and determined "[t]here is more than a fair probability that a list of files referencing sex acts that also includes a file referencing a fourteen-year-old child will result in the discovery of child pornography." Id. at 213, 217.

Here, as was the case in Leedy, considering Appellant's admissions in context shows a fair probability child pornography would be found on his electronic devices. Assuming Appellant's admissions fell short of describing actual child pornography, like Leedy's "14 year old Filipino girl" file name, his search terms[6] were equivalent to the file names in Leedy that mentioned ages and acts and provided context. As AFCCA found, "Appellant's use of these terms along with admission to masturbate to pictures of female children he found on

[6] Those search terms were "[t]eenage porn," "young teenage porn," "young naked girl," and "young nude girl." (Tr. at 2; JA at 130 17:48:45.)

nudist websites was part of the total circumstances available to the military magistrate to consider." (JA at 8.) Therefore, as in Leedy, the weight of all factors provided the magistrate a substantial basis to determine probable cause existed.

The lower court's consideration of Mason was likewise proper. AFCCA first articulated the correct standard for material omissions where it quoted Mason: "the Fourth Amendment is not violated if the affidavit *would still show probable cause* after such . . . omission is . . . corrected." (JA at 7 (quoting Mason, 59 M.J. at 422) (emphasis in quotation).) Then, the lower court applied the facts to this principle of law where it found "there is no basis to find … that omissions in [SA Lippert's] affidavit were deliberate or reckless and would have precluded a finding of probable cause had they been considered by the magistrate." (JA at 8.)

To argue AFCCA's conclusion under Mason was incorrect Appellant gives great weight to his self-serving descriptions of the images. However, "innocent explanations—even uncontradicted ones, do not have any automatic, probable-cause-vitiating effect." Wesby, 138 S. Ct. at 592. And as previously discussed, Appellant's descriptions would not outweigh the fact that he affirmatively searched for "illegal" nude images of females aged 13-17 years multiple times to satisfy his sexual desires. These facts contained in the affidavit established "a fair probability" that the nude images of minors Appellant saved would include a lascivious exhibition of the genitals. Mason, 59 M.J. at 420-21 (quoting Gates,

462 at 238). Therefore, even if the omissions were corrected pursuant to Mason, the affidavit would still provide a substantial basis for the magistrate to find probable cause existed.

C. The Good Faith Exception Precludes Application of the Exclusionary Rule

Assuming arguendo this Court finds SA Lippert's affidavit lacked sufficient information to support probable cause, it should still deny Appellant's claim pursuant to the good faith exception under Mil. R. Evid. 311(c)(3). The rule's first prong requires that the search or seizure had to have "resulted from an authorization to search or seize … [and] issued by an individual competent" to do so. Mil. R. Evid. 311(c)(3)(A). Here, there is no question that the magistrate had the authority to issue the search authorizations; thus, the first prong is met.

The rule's second prong, Mil. R. Evid. 311(c)(3)(B), is also satisfied because AFOSI "had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause." Perkins, 78 M.J. at 388 (quoting Carter, 54 M.J. at 422). AFOSI had no reason to doubt the magistrate's determination of probable cause. SA Lippert presented ample information to the magistrate for AFOSI to hold an objectively reasonable belief that there was a substantial basis to issue the search authorization. Appellant's admissions alone—that he knew "beyond a shadow of a doubt" that he had viewed "illegal child pornography" and downloaded it on several devices—was a substantial basis for

AFOSI to believe the magistrate was correct to authorize the search. In addition, the magistrate consulted with an attorney before granting the search authorization.

Further, there is no binding precedent in the military requiring a detailed description of suspected child pornography images to be included in an affidavit accompanying a search authorization. *Cf.* Monroe, 52 M.J. at 332 (noting "it would have been preferable . . . to include exemplary image files in the affidavit or to give a more detailed description of what is depicted," yet there was still a substantial basis to find probable cause). Therefore, AFOSI did not act in bad faith in failing to include such descriptions.

Moreover, SA Lippert's failure to compare Appellant's descriptions of the images with the technical definition of child pornography and present this information to the magistrate in the affidavit did not amount to bad faith. Perkins, 78 M.J. at 389 ("a flaw in legal reasoning is not a determinative factor in deciding whether a law enforcement agent acted in good faith"). Appellant made several statements that credited SA Lippert's belief that Appellant had "viewed and stored child pornography on several occasions." (JA at 162.) Appellant described the images as "illegal" and "child pornography" multiple times and that they sexually excited him. And, on one occasion, Appellant admitted that he was not sure whether individuals depicted engaging in sex in videos he viewed were underage. (Tr. at 8.)

It was also reasonable for AFOSI to conclude that the image Appellant described of a girl looking a boy's genitalia constituted child pornography under the Dost factors. The fact that the girl was looking the boy's genitalia suggests that the genitalia is the real "focal point" of the images and that the picture might be "sexually suggestive." Dost, 636 F. Supp. at 832. Indeed, Appellant himself described the images as "sexual," saying it was likely the most sexual images he had seen. (Tr. at 5.) Also, the minors were all nude, and Appellant admitted to searching for these images to gratify his sexual desires. Taking the facts in the light most favorable to the government, the totality of the circumstances lead AFOSI to conclude the magistrate had a substantial basis to find probable cause existed. Perkins, 78 M.J. at 387 (quoting Carter, 54 M.J. at 422). Thus, the second prong was also met.

The record shows that the third requirement was satisfied as well. The final prong requires that law enforcement "reasonably and with good faith relied on the issuance of the authorization or warrant." Mil. R. Evid. 311(c)(3)(C). As previously discussed, AFOSI believed they were executing a valid search and seizure and executed it within the scope of the authorization. United States v. Henley, 53 M.J. 488, 491(C.A.A.F. 2000). Nothing in the record even tends to show that law enforcement went beyond what the magistrate authorized to be searched and seized.

Finally, there is no evidence the agents knew "the magistrate merely 'rubber stamped' the request," and the warrant was not "facially defective." Carter, 54 M.J. at 421. The magistrate consulted with a base judge advocate and AFOSI, discussed the facts and circumstances with them, and reviewed the affidavit. Only after these measures were taken did the magistrate authorize the search, which "particularize[d] the place to be searched or the things to be seized." United States v. Leon, 468 U.S. 897, 923 (1974). Therefore, the third prong of the rule was also met.

In sum, this Court should find that the requirements of the good faith exception were met as enumerated by Mil. R. Evid. 311(c)(3). AFOSI had no reason to question the authorization's validity considering the factual basis upon which it was issued. The agents conducted the search and seizure while relying on and following the guidelines of a search authorization issued by a competent military magistrate. Accordingly, this Court should affirm the findings and sentence even if probable cause was lacking because the requirements of the good faith exception were met.

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

Regardless of the Court's conclusions on probable cause and the good faith exception, the exclusionary rule is not appropriate in Appellant's case. Before a motion to suppress may be granted, there must be a finding that "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). The Supreme Court has stated that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct." Herring v. United States, 555 U.S. 135, 144 (2009). Here, the record discloses no conduct that warrants the exclusionary rule's application.

In short, there is insufficient evidence showing SA Lippert or AFOSI acted with "'deliberate,' 'reckless,' or 'grossly negligent' disregard" for Appellant's rights. Davis v. United States, 564 U.S. 229, 237 (2011). Rather, the evidence demonstrates that law enforcement acted with the belief that their conduct was lawful.

AFOSI's actions in this case prove it took care to honor Appellant's constitutional rights. Based on Appellant's admissions, the agents made the commonsense conclusion that evidence of a crime may be found on his electronic devices. AFOSI had no "obvious reasons to doubt the veracity of the allegations" given Appellant's stated "sexual template" for under-aged females, and his desire to find nude, "illegal" images thereof. Cravens, 56 M.J. at 374-75. As a result, AFOSI first sought Appellant's consent to search, which is a valid and reasonable method to obtain evidence under the Constitution. Then, after Appellant revoked consent, AFOSI paused its search to pursue a search authorization from Colonel

MH, a competent magistrate, with the assistance of the base legal office. United States v. Fogg, 52 M.J. 144, 149 (C.A.A.F. 1999) (concluding that applying for search authorization shows law enforcement was "not trying to ignore or subvert the Fourth Amendment"; *see also* 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 U.S at 921 n.21). Only then did AFOSI execute the search, which it did within the parameters of the authorization. These facts demonstrate that AFOSI took care to comply with the Fourth Amendment.[7]

In short, a reasonable law enforcement officer in SA Lippert's position would not "'have known that the search was illegal' in light of all the circumstances.'" Herring, 555 U.S. at 145 (quoting Leon, 468 U.S at 922 n.23). Given Appellant's admissions and the procedural steps taken to obtain the search authorization, AFOSI had every reason to believe they had complied with the law. When viewed in the light most favorable to the prevailing party, the record shows law enforcement's actions did not constitute "deliberate misconduct in need of deterrence." United States v. Eppes, 77 M.J. 339, 349 (C.A.A.F. 2018).

In the absence of any bad faith in the application for the search authorization or its subsequent execution, the deterrent effect of exclusion is low and any

[7] U.S. CONST. amend. IV.

"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 [Appellant's] guilt." Davis, 564 U.S. at 237. The evidence at issue is compelling proof that Appellant knowingly received and viewed child pornography, 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 costs." Eppes, 77 M.J. at 349. The burden of the exclusionary rule is too great and would be inappropriate if applied to the evidence obtained from the search and seizure of Appellant's electronic devices. Therefore, Appellant is entitled to no relief.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court to affirm the lower court's decision that the military judge did not abuse his discretion in denying Appellant's motion to suppress, and affirm the findings and sentence.

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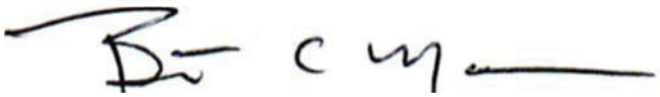

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 23 March 2020.

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