IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Jerry R. White Chief Petty Officer (E-5) U.S. Navy, Appellant	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW** Crim.App. Dkt. No. 201900221 USCA Dkt. No. 20-0231/NA

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

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Issue Presented

DID THE LOWER COURT ERR IN DETERMING THE GOOD FAITH EXCEPTION APPLIED WHEN THE MILITARY JUDGE FOUND SO LITTLE INDICIA OF PROBABLE CAUSE EXISTED THAT NO REASONABLY WELL-TRAINED OFFICER WOULD RELY ON THE SEARCH AUTHORIZATION?

Introduction

This case tests the limits of how low a quantum of evidence will suffice to sustain an "objective good faith belief" by a law enforcement officer seeking a command authorized search and seizure (CASS).

Pursuant to a CASS, agents from the Naval Criminal Investigative Service (NCIS) searched AE1 White's person, car, and off-base home in Japan on March 27, 2017—a Saturday morning—and seized all his electronic devices.

The search was based on an affidavit describing the activities of Christopher Villanueva, a producer of live-streamed pornography in the Philippines. It also contained some information about: AE1 White's wire transfers to the Philippines; his single attempted wire transfer to "Noriega" (one of Villanueva's identified money collectors, but labeled Villanueva's alias in the affidavit); the typical behavior of child pornography offenders (and child molesters), and; the reputation of Taguig City, Phillippines—the destination of many of the transfers—as a

"harbor for those that engage in child exploitation and sex trafficking." Finally, it mentioned that AE1 White had a cell phone and used IP addresses to conduct the wire transfers. The cell phone was contracted with a brand marketed by the Japanese company that owned those IP addresses.

In sum, the authorization was based on AE1 White's association with an individual who was associated with a known criminal. It contained no details to contend that AE1 White's wire transfers were for child pornography, and no information on which to infer that *if* the wire transfers were for child pornography, images would be on any of AE1 White's devices or in his home.

After he completed the affidavit, Special Agent (SA) Garhart, NCIS, sent it to the staff judge advocate (SJA) for Naval Air Station (NAS) Atsugi, Japan and met with Captain (CAPT) Bushey, the commanding officer (CO), NAS Atsugi, who signed the authorization.

The military judge determined that there was not a substantial basis for probable cause because "at every step in the chain—the point of alleged production, solicitation by the accused, delivery to the accused, and storage by the accused in his home—the affidavit failed to provide information sufficient to establish a nexus between the crimes alleged . . . and the place to be searched."[1]

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[1] App. Ex. VIII at 8 (Military Judge's Ruling).

He ruled that the good faith exception did not apply because the search authorization was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

Finding the commander lacked probable cause, the N-M.C.C.A. affirmed the search based on the good faith exception. The opinion provides a safe harbor for agents once they send their affidavit to an attorney, regardless of how few facts they have, how speculative their assumptions, or how wide-ranging their search.

This Court should review the N-M.C.C.A.'s decision because it errs by: (1) expanding this Court's decision in *Perkins* to create a safe harbor for investigators to ignore a lack of probable cause whenever they consult with a judge advocate; (2) applying the good faith exception when the special agent recklessly misstated information; (3) injecting a subjective analysis into the good faith exception by considering what the special agent knew, not what he told the search authority; and (4) failing to analyze whether the search authority served as a "rubber stamp" for law enforcement.

Statement of Statutory Jurisdiction

The trial court's ruling excluded evidence that was substantial proof of the charged offenses. Accordingly, this case fell within the lower court's jurisdiction under Article 62(a)(1), Uniform Code of Military Justice (UCMJ).[2] The Navy-Marine Corps Court of Criminal Appeals (N-M.C.C.A.) ruled adversely to Aviation Electrician's Mate First Class Petty Officer (AE1) Jerry R. White. He now invokes this Court's jurisdiction under Article 67, UCMJ.[3]

Statement of the Case

On May 6, 2019, the convening authority referred one charge—a violation of Article 134, UCMJ (Child Pornography)—and three specifications against AE1 White to a general court-martial.[4] The specifications allege that AE1 White possessed child pornography; they are identical except that each references a separate hard drive.[5]

AE1 White timely filed a motion to suppress evidence obtained during a (CASS) of his person, home, and vehicle.[6] The military judge suppressed the

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[2] 10 U.S.C. § 862(a)(1) (2016).
[3] 10 U.S.C. § 867 (2016); *see United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2019).
[4] Charge Sheet.
[5] *Id.*
[6] App. Ex. IV (Def. Mot. to Suppress).

evidence,[7] which the government appealed to the N-M.C.C.A.[8] On March 11, 2020, the N-M.C.C.A. affirmed there was not a substantial basis to find probable cause, but found the good faith exception to the exclusionary rule applied and the military judge abused his discretion by suppressing the evidence. AE1 White filed a timely petition for grant of review and requested to file the supplement separately, which this Court granted. He now files this supplement to the petition.

Statement of Facts

A. The Investigation

By April 2015, Homeland Security Investigations (HSI) was investigating Christopher Villanueva—a person accused of live-streaming his sexual abuse of children in the Philippines for a paying audience.[9] When an HSI agent contacted Villanueva to obtain a show, Villanueva directed the agent to pay fifty-five dollars to one of "his identified money collectors," Jusan Noriega, Taguig City, Philippines, via Western Union as a partial payment for a hundred-dollar show.[10]

[7] App. Ex. VIII (Military Judge's Ruling).
[8] App. A (Interlocutory Appeal by the United States, Aug. 8, 2019).
[9] App. Ex. IV, encl. (A) at 2 (Def. Mot. to Suppress, DHS Report).
[10] App. Ex. IV, encl (A) at 2-3 (Def. Mot. to Suppress, DHS Report).

The special agent made the payment and several others, but did not receive the show.[11] Villanueva was arrested on June 10, 2015.[12]

Investigating further, HSI issued summonses for wire transfers to Jusan Noriega and then obtained his payors' account information.[13] A summons to Xoom revealed that on May 16, 2015, AE1 White sent Jusan Noriega ten dollars.[14] But Noriega never picked up the payment and Xoom returned it to AE1 White.[15]

Although AE1 White's transaction to Noriega was never completed, HSI issued summons for AE1 White's Xoom account and other wire transfer services matching his Xoom account information.[16] The results showed that from 2012 to May 2016, AE1 White used MoneyGram (from May 2012 through December 2014) and Xoom (from May 2015 to May 2016) to send almost $5,500 to the Philippines.[17] Many of the older transactions—from MoneyGram—went to recipients in Taguig City.[18] Taguig City is a district in the capitol city of the

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[11] *Id*. (However, Villanueva displayed "historical looped video recordings of him having sex with young female children" to "prove his legitimacy to the undercover agent.")
[12] *Id*. at 5.
[13] *Id*. at 2.
[14] *Id*. at 4.
[15] *Id*. at 5.
[16] *Id*. at 4, 6.
[17] *Id*.
[18] *Id*. at 6.

Philippines, Manila, with a population over 800,000 people.[19] Aside from the attempted transaction to Noriega, the other recipients of AE1 White's transfers were not identified in law enforcement reports.[20]

AE1 White's Xoom account listed a civilian email account and the physical address of AE1 White's previous command at Naval Station Norfolk.[21] He completed a permanent change of station to Naval Air Station Atsugi, Japan in October 2015.[22]

Xoom also provided the internet protocol (IP) addresses AE1 White used for wire transfers to the Philippines; the nineteen addresses were registered to KDDI, a "telecommunications company with headquarters in Chiyoda, Japan."[23] AE1 White owned a cell phone contracted with "au"—a brand marketed by KDDI.[24] IP address analysis stopped there—the addresses were not linked to AE1 White's home, a particular device, or even a particular area.[25] Trial counsel conceded the IP addresses were extraneous: "a part of what they were trying to create as a

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[19] App. Ex. IV, encl. (C) (Def. Mot. to Suppress, Wikipedia Taguig).
[20] *See id*. at encls. (A) (DHS Report), (B) (NCIS Report).
[21] *Id.* at encl. (A) at 4 (DHS Report).
[22] *Id*. at 5.
[23] *Id*. at 4.
[24] *Id*. at encl. (B) at 26 (NCIS Report, Statement of Probable Cause).
[25] *See id*. at encls. (A) (DHS Report), (B) (NCIS Report).

calculus to narrow it down, but in the end—a server can interact; the address can be anywhere."[26]

In February 2017, HSI sent their investigation to the NCIS, Portsmouth, New Hampshire, which quickly transferred jurisdiction to NCIS Atsugi, where AE1 White had been assigned since October 2015.[27]

When Special Agent ("SA") Garhart got the case, he reviewed law enforcement indices and AE1 White's service record book.[28] Finding nothing of note, SA Garhart found out where AE1 White lived and prepared an affidavit for a CASS.[29]

B. The Affidavit and Search Authorization

The affidavit to support the search authorization relied on SA Garhart's training and experience and the HSI report—as he took no investigative steps other than the records check and address look-up.[30] The military judge summarized the government's argument for probable cause as "amounting to three assertions:"

> 1. That between May 2012 and May 2016, the accused effected 189 wire or electronic transfer transactions totaling more than $5,500 with unknown persons located in the Philippines;

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[26] R. at 49.
[27] App. Ex. IV, encl. (B) at 3 (Def. Mot. to Suppress, NCIS Report).
[28] *Id*. at 8.
[29] *Id*. at encl. (D) at 25 (Art. 32 transcript).
[30] *Id*.

2. That Taguig City is widely known to harbor persons who engage in child exploitation and child sex trafficking; and
3. That in May 2015, the accused electronically sent $10 to an alias of, or associate of, a person subsequently arrested for child sexual exploitation in the Phillipines.[31]

The affidavit also included that AE1 White's Xoom account contained his previous command's address. It also included that some transactions were conducted on IP addresses registered to KDDI, and that AE1 White owned a Japanese cell phone under contract by "au"—a phone brand widely used in Japan and marketed by KDDI in the main islands of Japan and Okinawa.[32]

Although the affidavit devoted a whole paragraph to the attempted May 16, 2015 Noriega Xoom transfer detailed in the HSI report,[33] the affidavit differed from the HSI report. The HSI report identified Noriega as "one of Villanueva's identified money collectors" and never implied that Noriega and Villanueva were the same person, but SA Garhart's affidavit plainly stated that Noriega was Villanueva's alias.[34] SA Garhart stated that the attempted May 16, 2015 transfer was to Villanueva and implied that the Xoom transaction was not completed only because Villanueva was arrested shortly after, without any evidence that Noriega

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[31] App. Ex. VIII, at 6 (Military Judge's Ruling).
[32] App. Ex. IV, encl. (B) at 26 (Def. Mot. to Suppress, NCIS Report).
[33] *Id*.
[34] *Compare* App. Ex. IV, encl. (A) at 3 (HSI Report) *with* encl. (B) at 26 (NCIS Report).

and Villanueva were the same person[35] and ignoring that more than three weeks elapsed between the transfer and the arrest.[36]

The affidavit did not contain any information supporting Taguig City's alleged reputation for "harboring those involved in child exploitation" and "pervasive child trafficking."[37] When given the chance to explain how he knew that child exploitation was a problem in the Phillipines, SA Garhart testified that it was "fairly public knowledge" and that he often talked to a friend, an NCIS agent in the Philippines, and "a lot of the cases they were involved with with (*sic)* the Philippine government, and law enforcement centered around child exploitation and you know, child sex trafficking and such."[38]

The affidavit did not explain how evidence of live-streamed shows would be retained on media devices—especially in light of the ten months between the last wire transfer and the search, or the twenty-two months between the attempted Noriega transfer and the search.[39] It also did not contain any electronic devices AE1 White owned other than the "cell phone" contracted with "au." It failed to

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[35] App. Ex. IV, encl. (B) at 26 (Def. Mot. to Suppress, NCIS Report).
[36] *Id*. at encl. (A) at 5 (HSI Report).
[37] *Id*. at encl. (B) at 27 (NCIS Report).
[38] R. at 20.
[39] App. Ex. IV, encl. B at 24-36 (Def. Mot. to Suppress, NCIS Report).

explain how any file would be transferrable between media devices that AE1 White might own, or why those additional devices would be in AE1 White's home.

It did, however, provide an "offender typology" for those who "buy, produce, trade, or sell child pornography; who molest children and/or who are involved with the use of children in sexual acts."[40]

While SA Garhart's affidavit stated that he was looking for "evidence, fruits, and instrumentalities" of violations of federal child-pornography statutes,[41] his probable cause statement only related that HSI "identified WHITE as a person of interest in matters related to child sexual exploitation,"[42] without specifying the nature of exploitation. SA Garhart testified to including the offender typology "not as much for the probable cause portion of it," but because it provided "bona fides for all the requested material."[43]

Despite his failure to identify whether AE1 White had any devices other than a cell phone, SA Garhart requested the search and seizure of all his electronic media storage devices, among other items, and to search AE1 White's person, car, and home for all his electronic media storage devices.[44] He sent the affidavit to the

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[40] *Id*. at 27.
[41] *Id*. at 25.
[42] *Id*.
[43] R. at 31.
[44] App. Ex. IV, encl. (B) at 22-23 (Def. Mot. to Suppress, NCIS Report).

staff judge advocate (SJA) and Captain (CAPT) Bushey, the commanding officer (CO) of NAS Astugi ahead of a meeting.[45] The CO signed the authorization on March 23, 2017.[46] On March 27, 2017, agents searched AE1 White's home, car, and person and seized nine electronic devices, medication prescribed to someone else, a notebook, and some internet and phone bills.[47] Three of the hard drives contained images suspected to be child pornography.

C. The Suppression Hearing

Trial defense counsel submitted a timely motion to suppress arguing there was no probable cause to search, and that the good faith exception should not apply because SA Garhart did not have an objectively reasonable belief that the search authority had a substantial basis for determining the existence of probable cause, and he did not reasonably and with good faith rely on the issuance of the authorization.[48]

Special Agent Garhart testified at the Article 32 hearing[49] and was suppression hearing's only witness.[50] He testified that he provided the affidavit to

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[45] *Id.* at encl. (D) at 28 (Art. 32 testimony).
[46] *Id.* at encl. (B) at 21 (NCIS Report).
[47] *Id*. at 18-20.
[48] *Id*. at 8 (Def. Mot. to Suppress.)
[49] *Id*., encl. (D) (Art. 32 testimony).
[50] R. at 17.

his supervisor after he wrote it and forwarded it to CAPT Bushey and the SJA.[51] He was not sure the SJA was in the room when the CASS was signed,[52] but the SJA had reviewed it with CAPT Bushey.[53] Again not able to remember the specifics of *this* meeting, he testified that CAPT Bushey always had questions.[54] He described the affidavit as including "everything he knew about the case."[55]

When he requested the search authorization, SA Garhart had been an NCIS agent for fourteen years and had requested more than two or three dozen search authorizations from CAPT Bushey.[56] Yet SA Garhart described his understanding of probable cause as "reasonable suspicion that a crime has occurred."[57] He felt "absolutely comfortable" with requesting the CASS with just the facts in the affidavit,[58] despite not "being too intimately familiar" with HSI's case against Villanueva.[59]

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[51] R. at 21-23.
[52] R. at 23.
[53] App. Ex. IV, encl. (D) at 28 (Def. Mot. to Suppress, Art. 32 testimony).
[54] R. at 19.
[55] App. Ex. IV, encl. (D) at 31 (Def. Mot. to Suppress, Art. 32 testimony).
[56] R. at 17-18.
[57] R. at 22.
[58] R. at 22.
[59] App. Ex. IV, encl. (D) at 24 (Def. Mot. to Suppress, Art. 32 testimony).

D. The military judge found the affidavit so lacking in indicia of probable cause as to make reliance unreasonable

After an extensive discussion of the facts presented in the affidavit and the investigative reports, the military judge determined the affidavit wholly failed to provide information sufficient to establish a nexus between the crimes alleged and the place searched.[60] He found the government could not avail itself of the good faith exception because the "search authorization was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[61] He acknowledged that "while agents operating in good faith may not always discern the legal threshold for probable cause with the same authority as the courts, still warrants and authorizations must be rooted in *some* evidence from which a critical eye might perceive probable cause exists."[62] Exclusion would deter authorizations based on "similarly insubstantial speculation."[63]

E. The N-M.C.C.A. applied the good faith exception

After listing information from the HSI report, the N-M.C.C.A. also found there was not probable cause to issue the search warrant;[64] SA Garhart "had a lot of

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[60] App. Ex. VIII at 8.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *White*, 2020 CCA LEXIS 68, at *10.

smoke,"[65] and "could have, and should have, done more investigating."[66] But the N-M.C.C.A. determined the military judge abused his discretion because SA Garhart had a "substantial basis to believe" the CASS he executed had been lawfully obtained. This is because it found "a quantum of information sufficient to believe the CO would not hesitate to sign the search authorization" and SA Garhart provided the information to the CO and his SJA before obtaining the CASS "to seek legal advice."[67]

Reason for Granting Review

THE MILITARY JUDGE DETERMINED THE GOOD FAITH EXCEPTION DID NOT APPLY BECAUSE THE AFFIDAVIT WAS SO LACKING IN INDICIA OF PROBABLE CAUSE THAT NO REASONABLE LAW ENFORCEMENT OFFICER WOULD RELY ON IT. THE N-M.C.C.A. ERRED WHEN IT FOUND THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE GOOD FAITH EXCEPTION.

Standard of Review

In reviewing an Article 62, UCMJ, appeal this Court "reviews the military judge's decision directly and reviews the evidence in the light most favorable to

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[65] *Id.*
[66] *Id.* at 16.
[67] *Id.*

the party which prevailed at trial."[68] "A military judge's decision to find probable cause existed to support a search authorization as well as to admit or exclude evidence is reviewed for an abuse of discretion."[69] Under the abuse of discretion standard, "findings of fact are reviewed for clear legal error and conclusions of law are reviewed *de novo.*"[70]

Analysis

I. The lower court erred in its application of *Perkins* by applying the good faith exception to a search authorization for child pornography based on an affidavit that provided so little indicia of probable cause that no reasonably well-trained officer would rely on it.

The Fourth Amendment protects against unreasonable searches and seizures and provides that warrants shall not be issued absent probable cause, thereby ensuring the "security of one's privacy against arbitrary intrusion by the police."[71] There is a strong preference for searches conducted pursuant to a warrant.[72] That a law enforcement agent went to a magistrate is the best evidence of their good faith.[73] As such, the Supreme Court created the "good faith

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[68] *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019) (internal citations omitted).
[69] *United States v. Cowgill*, 68 M.J. 388, 399 (C.A.A.F. 2010) (internal citations omitted).
[70] *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016) (internal citations omitted).
[71] *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). (Overruled on other grounds).
[72] *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).
[73] *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012).

exception" that forgives an officer relying on an authorization otherwise lacking in probable cause as long as he did so in good faith.[74]

But in some circumstances, a law enforcement officer "will have no reasonable grounds for believing that the warrant was properly issued"[75] and exclusion of evidence is appropriate. This Court summarized these caveats to the good faith rule in *United States v. Leon*: (1) a false or reckless affidavit; (2) lack of judicial review; (3) a facially deficient affidavit; or (4) a facially deficient warrant.[76]

Military Rule of Evidence (MRE) 311(b)(3), incorporated the good faith exception in a three prong test.[77] The first prong was not raised as error by trial defense counsel. The second and third prongs provide that evidence obtained as a result of an unlawful search or seizure may be used if:

> (B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
> (C) The official seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the search authorization or warrant.[78]

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[74] *United States v. Leon*, 468 U.S. 897 (1984).
[75] *Id*. at 922.
[76] *United States v. Carter*, 54 M.J. 414, 422 (C.A.A.F. 2001).
[77] *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992).
[78] MANUAL FOR COURTS-MARTIAL, MIL. R. EVID. 311(b)(3) (2016) [hereinafter MCM].

Prong (B) incorporates the *Leon* requirements that the affidavit must not be intentionally or recklessly false, and must be more than a "bare bones" recital of conclusions.[79] This is because an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"[80] Prong (C) addresses that "objective good faith cannot exist when the police know that the magistrate merely 'rubber stamped' their request, or when the warrant is facially defective."[81]

To reconcile the rule with its foundation in *Leon*, this Court held in *United States v. Carter* and *United States v. Perkins*[82] the term "substantial basis" has a different meaning than in the probable cause analysis: "the second prong of Mil. R. Evid. 311(b)(3) is satisfied if the *law enforcement official* had an objectively reasonable belief that the magistrate had a substantial basis for determining the existence of probable cause."[83]

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[79] *Carter*, 54 M.J. at 421.
[80] *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (Powell, J., concurring in part)).
[81] *Id.*
[82] 78 M.J. 381 (C.A.A.F. 2019).
[83] *Carter*, 54 M.J. at 422.

A. The N-M.C.C.A. found this case to be like *Perkins* because SA Garhart sent the affidavit to the SJA. But this Court should clarify that mere inclusion of the SJA is not carte blanche for officers to ignore the absence of facts supporting probable cause.

In this case, the N-M.C.C.A. determined there was no probable cause but failed to conduct any substantive analysis of how far the affidavit departed from establishing probable cause and whether any reasonably well-trained officer would rely on it. Instead, the N-M.C.C.A. focused on SA Garhart's reliance on the SJA and the CO. The decision to absolve SA Garhart of *any* independent analysis of probable cause is an unwarranted expansion of this Court's *Perkins* decision and conflicts with decisions of this Court, the Supreme Court, and federal courts. It brings to fruition Judge Ohlson's prediction in *Perkins* that "judges at the service courts of criminal appeals will undoubtedly conclude that a commander's probable cause determination—no matter how meritless—is, for all intents and purposes, immune from appellate review."[84]

This Court applied the good faith exception in *United States v. Perkins* when the affiant agent, acting under time pressure, relied on the advice of three attorneys before requesting a search authorization.[85] The search was authorized based on a victim's statement that the accused was threatening to expose compromising

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[84] *Perkins*, 78 M.J. at 394.
[85] 78 M.J. 381 (C.A.A.F. 2019).

photos and videos, possibly taken with his phone. The victim told the agent that the accused had devices in his home where photos could be stored, but because the accused was out of state at the time of the search, "[t]he most concrete nexus between the requested authorization and potential evidence is the possibility that the appellant removed the SD card from his phone and stored it in his house while he was out of state."[86]

The N-M.C.C.A. analyzed the case in light of *United States v. Nieto*[87] and determined that because there was no indication phone photos would be found on other media in the home, there was no probable cause. But taking into account all the circumstances—the time pressure, the advice of the three attorneys, that the CO asked questions, and that the agent requested a second warrant when needed—the good faith exception applied.[88] At its core, *Perkins* was about the agent's flawed reasoning about where evidence would likely be found. This Court held that flawed legal reasoning is not a *determinative* factor in deciding whether a law enforcement officer acted in good faith.[89]

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[86] *Id.* at 384 (citing lower court's opinion).
[87] 76 M.J. 101 (C.A.A.F. 2017).
[88] *Id.* at 388.
[89] *Perkins*, 78 M.J. at 388 (emphasis added).

1. This court should use this case to establish the outer bounds of *Perkins'* analysis for weighing an insufficient affidavit against reliance on an SJA's and CO's approval.

Contrasting this case with *Perkins*, the facts in this case could effectively set the outer limit for when flawed reasoning and insufficient facts are not outweighed by reliance on an SJA's review and a CO's approval. First, the external circumstances in this case are different. SA Garhart was under no time pressure, and in contrast to the three *Perkins* lawyers, SA Garhart sent the affidavit to one attorney—whose name he could not remember by the time of the suppression hearing—and assumed that attorney told the CO there was probable cause. While the *Perkins* agent *relied* on those attorneys' advice,[90] SA Garhart checked a procedural box but never personally received or relied on the SJA's advice that there was sufficient evidence for probable cause.

A more significant difference is the probable cause analysis itself. While both agents lacked probable cause when they requested a search, SA Garhart's affidavit was more lacking. The *Perkins* agent had a direct allegation and little time to investigate it. SA Garhart had a jumping off point provided by HSI and all the time he needed.[91] Yet his resulting affidavit was in stark contrast to what Constitutional principles and this Court have deemed sufficient. SA Garhart's

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[90] *Id*.

[91] R. at 29 (AE1 White was not aware he was under investigation).

affidavit provided weak factual support to believe a crime occurred, and little information to believe any evidence would be on the items or in the place he sought to search. No reasonably well-trained agent would rely on an affidavit so lacking in both areas.

B. When an affidavit does not supply probable cause, the test is whether a reasonably well-trained law enforcement officer would rely on it. The N-M.C.C.A. failed to measure the affidavit against this standard.

The law enforcement officer against which reasonable reliance on an affidavit is measured is "reasonably well-trained."[92] In *Malley v. Briggs*, the Supreme Court held that when an officer relies on a magistrate's approval, the question is "whether a reasonably well-trained officer . . . [in the same position] would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."[93]

Law enforcement officers are to be especially well-versed in probable cause,[94] and are expected to understand the laws they apply. They "can gain no Fourth Amendment advantage through a sloppy study of the laws [they are] duty

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[92] *See Davis* v. *United States*, 564 U.S. 229 (2011); *United States v. Herring*, 555 U.S. 135, 145 (2009); *Malley v. Briggs*, 475 U.S. 335, 344 (1985); *Leon*, 468 U.S. at 923.
[93] 475 U.S. at 344.
[94] *See N.J. v. T.L.O.*, 469 U.S. 325, 353 (1985) ("A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses.").

bound to enforce."[95] "The government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware or untrained in the law."[96]

1. No reasonably well-trained officer would think "mere propinquity" to a known criminal under these circumstances established probable cause.

Although "the threshhold for probable cause is subject to evolving case-law adjustments, at its core it requires a factual demonstration or reason to believe that a crime has or will be committed."[97] It requires more than bare suspicion, but less than a preponderance of the evidence.[98]

The only specific link to child pornography in SA Garhart's affidavit was the transaction to Noriega, an "associate of Villanueva." But "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."[99] This principle is "clearly established."[100] Allowing an agent to focus on the activities of someone other than the person targeted for a search "might dilute the First Amendment's protection against guilt by association and diminish the Fourth Amendment's focus

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[95] *Heien v. North Carolina*, 574 U.S. 54, 65 (2014).
[96] *Id*. at 68 (J. Kagan and J. Ginsberg, concurring).
[97] *Leedy*, 65 M.J. at 213.
[98] *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005).
[99] *Ybarra v. Illinois*, 444 U.S. 85, 91(1979).
[100] *Poolaw v. Marcantel*, 565 F.3d 721, 731 (10th Cir. 2009).

on particularity and on protection of the privacy of the individual to be searched."[101] In sum, probable cause requires more than that a person be close to—physically or financially—the wrong person at the wrong time.

The focus of HSI's investigation was Villanueva. Special Agent Garhart's affidavit merely recited that AE1 White attempted to transfer ten dollars to Noriega.[102] He then assumed, without evidence, that Noriega was the same person as Villanueva. Special Agent Garhart had no knowledge of how AE1 White knew Noriega, why he sent money, what, if any, product he was seeking, or why the transaction failed. He similarly knew nothing about Noriega and what businesses he may have been involved in, aside from his association with Villanueva.

2. No reasonably well-trained officer would rely on guilt by association within a geographic area where criminals were suspected of operating.

Special Agent Garhart's next set of information—that AE1 White sent more than $5,500 to the Philippines over four years in nearly 200 transfers—adds little more to the probable cause analysis. While some child pornography purchasers may send money orders to the Philippines, people who send money orders to the Philippines are not necessarily child pornography purchasers. It is a logical fallacy to assume that because some people buy child pornography from the Philippines,

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[101] *United States v. Falso*, 544 F.3d 110, 120 (2nd Cir. 2008).
[102] App. Ex. IV, encl. (B) at 26 (Def. Mot. to Suppress, NCIS Report).

then all transfers to the Philippines are for child pornography.[103] AE1 White's non-criminal acts of sending money to the Philippines provides no "intuitive relationship" to child pornography, and the pool of those who send transfers to the Philippines for wholly legal reasons (or even other crimes) is likely many times larger than those soliciting child pornography.

Based on information that SA Garhart put in his affidavit, there is little to distinguish him from someone sending money home to family or supporting charity. The N-M.C.C.A.'s decision opens the door to more unjustified—and mistaken—searches.

3. No reasonably well-trained officer would believe that the information about this particular crime provided a nexus between contraband, AE1 White's home, and all his electronics—especially in light of this Court's ruling in *United States v. Nieto*.

It's not enough that law enforcement suspect criminal activity. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is a reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[104]

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[103] *See United States v. Hoffmann*, 75 M.J. 120 (C.A.A.F. 2016) (even if all people that collect child pornography are attracted to children, it is a logical fallacy to assume that all people attracted to children collect child pornography).
[104] *United States v. Clayton*, 68 M.J. 419, 426 (C.A.A.F. 2010) (Ryan, J., dissenting) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (abrogated by statute on other grounds)).

This "nexus" requirement maybe inferred from facts and circumstances in a particular case, including the type of crime, nature of the items sought, and reasonable inferences about where evidence is likely to be kept."[105] Staleness is another aspect of the probability test.[106]

In *United States v. Nieto*, this Court distinguished between speculation and "the sort of articulable facts necessary to find probable cause to search."[107] There, a law enforcement officer provided only a generalized profile that deployed soldiers usually downloaded photos to laptops, and that the accused had a laptop. This Court held that the magistrate "could not draw any reasonable inferences linking the crime and the laptop based on the limited information and generalized profile offered" by the officer.[108] The generalized profile "provided no basis…for the magistrate to conclude that probable cause existed to seize the laptop."[109] And, because there was no basis to believe a nexus existed between the crime and the laptop, the good faith exception did not save the search.

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[105] *Nieto*, 76 M.J. at 106 (quoting *United States v. Gallo*, 55 M.J. at 421).
[106] *Lopez*, 35 M.J. at 38-39.
[107] 76 M.J. at 106 (C.A.A.F. 2017) (quoting *United States v. Macomber*, 67 M.J. 214, 220 (C.A.A.F. 2009)).
[108] *Id.* at 107.
[109] *Id.*

a. Despite this Court's clarification in *Nieto* about probable cause in a digital media case, SA Garhart's affidavit still relied on a generalized profile and failed to provide any nexus.

This Court decided *Nieto* approximately a month before SA Garhart's search.[110] Yet SA Garhart submitted an affidavit that relied on what this Court in *Nieto* said was inadequate—a generalized profile of a "child pornography offender" without evidence the accused fit the profile. He also failed to identify whether AE1 White owned any devices other than a cell phone, yet sought a search authorization for all his electronic devices.

Although SA Garhart could not supply information indicating AE1 White fit the profile of a child pornography offender, he relied on the "offender typology" to overcome holes in the nexus between the crime alleged, the place to be searched, the items to be seized, and the staleness problem (AE1 White's Noriega wire transfer occurred twenty-two months before the search). Without the profile, SA Garhart had no reason to suspect, nor any indicia of probable cause, that AE1 White possessed child pornography on any electronic device at the time of the search. The N-M.C.C.A. erred in the application of this Court's ruling in *Nieto* because it found SA Garhart acted reasonably when he relied on a "generalized

[110] 76 M.J. 107 (decided on Feb. 21, 2017).

profile" of child pornographers to support probable cause, without tying AE1 White to the profile.

b. SA Garhart's belief that contraband would be found in AE1 White's home and on his electronic devices was speculative because it relied on a chain of tenuous inferences.

SA Garhart's firmest fact linking AE1 White to child pornography was the attempted Noriega transaction. But Noriega did not pick up the money, and it was eventually returned to White. As the military judge noted, "(t)his fairly implies a transaction in which the accused received nothing for his money. As a result, the affidavit provided no information from which one might reasonably determine that the accused received electronic contraband that then might be stored on his computer hard drive or other device."[111]

But from this transaction, SA Garhart had to make additional assumptions—that AE1 White received live-streamed video, converted it into a saved file (without any indication he owned the necessary software to do so), and took whatever device it was saved on with him to Japan (the transaction occurred while he was stationed in Norfolk). Special Agent Garhart relied on an overly broad assumption that the minimal connection to Villanueva, via Noriega, meant that

[111] App. Ex. VIII at 8 (Ruling).

AE1 White's other transfers to the Philippines—all to unidentified recipients—led to contraband on AE1 White's electronic devices.

Furthermore, SA Garhart mentioned IP addresses in his affidavit, but failed to take any steps to make them useful to the probable cause analysis. The loose correlation between the IP addresses (owned by KDDI) and the cell phone (contracted with a brand marketed by KDDI), does not make it more likely that the cellphone was used in the Noriega transaction, or that AE1 White had other internet connected-devices (much less ones with KDDI IP addresses).

Any well-trained agent would have recognized that these layers of assumptions failed to supply a nexus between the crime alleged and the items and place to be searched. Special Agent Garhart's apparent ignorance of *Nieto* does not change that his affidavit did not provide any indicia of probable cause and that his reliance on the resulting search authorization was unreasonable. The government should not be able to rely on an agent's lack of training to qualify an unreasonable search for the good faith exception. To do so would minimize the Court's role in enforcing Fourth Amendment protections.

4. The N-M.C.C.A. ignored that SA Garhart's affidavit recklessly misstated information. In contrast, the A.F.C.C.A. takes a more stringent approach to whether statements are made in reckless disregard for the truth.

In *United States v. Cowgill,* this Court stated that "reckless disregard requires something more than negligence . . . (but) the distinction between mere

negligence and reckless disregard can be opaque in this area of the law."[112] Special Agent Garhart mischaracterized the evidence he did have by unambiguously referring to Noriega as Villanueva's alias when the only information he had about the relationship strongly implied they were separate people. He compounded this error by concluding, contrary to the evidence, that Villanueva's arrest was the reason AE1 White's transfer to Noriega was not picked up. He vaguely stated that AE1 White was a person of interest related to "matters of child sexual exploitation," included references to the typical behavior of child molesters, and described Taguig City as a destination for sex tourists, but left out information that AE1 White had never traveled to the Philippines.

The N-M.C.C.A. erred by dismissing the Noriega/Villanueva distinction as "not relevant to our analysis" and by not addressing the ambiguity in the affidavit regarding the actual criminal acts suspected. But in a case that had only a tenuous nexus to begin with, the factual distinction between Noriega and Villanueva was an important one. The implication that AE1 White was a child molester or sex tourist was also not immaterial. Yet the N-M.C.C.A. wholly failed to conduct *any* analysis of whether the misstatements and omissions were reckless enough to affect the good faith analysis.

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[112] 68 M.J. at 392.

This Court is considering *United States v. Blackburn*.[113] *Blackburn* shows that the A.F.C.C.A. is taking a more stringent approach to false or reckless misstatements in an affidavit. In *Blackburn*¸ the A.F.C.C.A. did not apply the good faith exception because the agent "inject(ed) a reference to child pornography"[114] in a case where the appellant asked for nude pictures from, and attempted to film naked, his minor step-daughter. Essentially, the *Blackburn* agent failed to make a legal distinction about the crime committed. SA Garhart, however, failed to accurately convey *the* important fact that any reviewing authority should want to know—how closely linked AE1 White was to a purveyor of child pornography. Such widely divergent approaches from two CCAs indicate this Court should provide more guidance.

C. The N-M.C.C.A. expanded their good faith assessment beyond facts the search authority knew. Whether the good faith analysis should include facts known only to the agent is a question that reflects a circuit split and has not yet been answered by this Court.

The N-M.C.C.A. wrongly focused on what SA Garhart knew, rather than what he told the CO.[115] *Leon* rejected such subjective inquiry because "sending state and federal courts on an expedition into the minds of police officers would

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[113] *United States. v. Blackburn*, No 20-0071/AF (C.A.A.F. Dec. 17, 2019) (granting review of No. 39397, 2019 CCA LEXIS 336 (A.F. Ct. of Crim. App. Aug. 22, 2019).
[114] *Blackburn*, 2019 CCA LEXIS 336 at *44.
[115] *Compare White*, 2020 CCA LEXIS 68 at *11 *with* NCIS ROI at X24-36.

produce a grave and fruitless misallocation of judicial resources."[116] However, in *Messerschmidt v. Millender*, the Court held that it was appropriate to consider extrinsic factors in determining whether an agent reasonably relied on a warrant—specifically, that an agent sent the affidavit to a supervisor and a deputy district attorney.[117] The Court noted that the fact omitted from the affidavit would have helped establish probable cause (in other words, the omission was not made in bad faith), but did not address whether extra-affidavit facts could be used as a positive factor to determine the officer acted in good faith in relying on an affidavit otherwise lacking indicia of probable cause.

In determining whether an officer acted with objective reasonableness when relying on an affidavit lacking in indicia of probable cause, the Sixth,[118] Seventh,[119] Ninth,[120] and Tenth Circuits all reject considering facts not presented to the magistrate. The Tenth Circuit reasoned that the rule is faithful to *Leon* and "will enhance administrability and encourage…the type of comprehensive affidavits upon which proper probable cause determinations should rest."[121]

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[116] *Leon*, 468 U.S. at 922 n.23.
[117] 565 U.S. 535, 551 (2012).
[118] *United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005).
[119] *United States v. Koerth*, 312 F.3d 862, 871 (7th Cir. 2002).
[120] *United States v. Thai Tung Luoung*, 470 F.3d 898, 905 (9th Cir. 2006).
[121] *United States v. Knox*, 883 F.3d 1262, 1272 (10th Cir. 2018).

However, the Fourth Circuit, citing cases from the Eighth, and Eleventh circuits, explicitly considers "uncontroverted facts known to them but inadvertently not presented to the magistrate."[122]

Special Agent Garhart had slightly more information about the transactions than included in his affidavit. He knew, but nothing indicates he told CAPT Bushey, that the transfers were mostly under fifty dollars and that there were at least ten different recipients for the 2015-2016 transfers.[123] The N-M.C.C.A., however, listed what SA Garhart knew about the investigation without limiting their consideration to what was conveyed to CAPT Bushey. By expanding the facts, the lower court side-stepped the military judge's finding that the affidavit lacked any indicia of probable cause and no reasonable officer would rely upon it. Although inclusion of the extra-affidavit facts still does not provide indicia of probable cause, at least it extinguishes one innocent explanation for the transfers such as providing familial support.

This Court should review the N-M.C.C.A.'s holding because focusing on what the agent knew, instead of what the CO knew, would cause the exception to swallow the rule.[124] In a system that allows unsworn and oral statements to be

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[122] *United States v. McKenzie-Gude*, 671 F.3d 452, 460 (4th Cir. 2011).
[123] *White*, 2020 CCA LEXIS 68, at *8.
[124] *See Thai Tung Luoung*, 470 F.3d at 905 (predicting the exception would swallow the rule).

considered for a search authorization, military judges would face another burden to find facts about what the agents knew and when they knew it to ensure facts learned post-search were not being used to justify a search.[125]

D. Trial defense counsel asserted that the good faith exception did not apply under M.R.E. 311(c)(3)(C). The N-M.C.C.A. erred by not analyzing whether the CO was neutral and detached or whether he rubber stamped the search authorization.

The N-M.C.C.A. failed to analyze whether the commanding officer was neutral and detached or merely rubber stamped the CASS, stating "(w)ith no reason to doubt prong (C), we focus exclusively on prong (B)."[126] But unlike in *Perkins,* trial defense counsel in this case specifically asserted that "the Government fails to meet prongs two and three of the good-faith exception."[127] Once trial defense counsel raised that error, it was the government's to show the search authority was neutral and detached and not a rubber stamp for the agent.

The drafter's analysis provides notice that because a commander is not constitutionally equivalent to a magistrate, the good faith exception applies to their search authorizations only when they are "neutral and detached"—a question that

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[125] *See Laughton*, 409 F.3d at 752 (holding otherwise would force courts to determine not only how much affiants knew, but also when and from whom they learned it).
[126] *White*, 2020 CCA LEXIS 68 at *7.
[127] App. Ex. IV at 8 (Def. Mot. to Suppress).

requires "close scrutiny."[128] Analysis includes whether the commander received the advice of the SJA; whether the rule governing the search was clear, and; whether the defect in the authorization was substantive.[129]

The government declined to have either the SJA or the CO testify. Instead of applying "close scrutiny" to this question, the N-M.C.C.A. did not address the issue. The government should not be allowed to profit from its decision to starve the record of these key facts.

Instead of addressing the deficiencies, the N-M.C.C.A. focused on the SJA's review of the affidavit. This was problematic from a factual standpoint because the record is ambiguous as to what the SJA actually did. In the middle of a seven paragraph narrative during the Article 32 hearing, SA Garhart stated "[CAPT Bushey] and his legal counsel reviewed it, determined that there was, you know, probable cause to conduct a command authorized search."[130] But at the suppression hearing, when questioned directly about whether the CO received legal advice before he signed the CASS, the transcript of SA Garhart's reply reads: "I---I—it—it—that would be a question for CAPT Bushey. I can't testify to that. (Chuckles) I'd---I'd---that's not a question I would ask him."[131] The N-M.C.C.A.

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[128] MCM, Mil. R. Evid. 311(b) analysis at A22-21 (2016).
[129] *Id.*
[130] App. Ex. IV, encl. D at 27 (Def. Mot. to Suppress, Art. 32 Transcript).
[131] R. at 23.

did not explicitly resolve the conflict, and simply inferred that because the CO signed the CASS, the SJA must have endorsed the probable cause finding. Whether that inference is correct or not, it's at least clear from SA Garhart's testimony that *he* did not know and did not care whether the SJA thought there was probable cause.

The N-M.C.C.A. also failed to consider whether the CASS received a "substantive" rubber-stamp. "Substantive rubber-stamping . . . arises when it can be said that the magistrate necessarily must have acted as a rubber stamp for law enforcement because it was facially and objectively clear from the paucity or the quality of the information contained in the affidavit that there was no probable cause."[132] As in *Perkins*, the commanding officer in this case had little on which to base his probable cause determination, and especially little nexus to the place and items searched (for all the reasons addressed *supra)*. But unlike *Perkins*, trial defense counsel in this case preserved the error, and the government brought this case before the N-M.C.C.A. When the N-M.C.C.A. stated they had "no reason to doubt prong (C)," they failed to hold the government to its burden to supply facts to rebut the charge of rubber-stamping.

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[132] *Perkins*, 78 M.J. at 392 (Ohlson, J., dissenting).

Conclusion

The lower court improperly found that the good faith exception applied. The lower court expanded the good faith exception to apply to an affidavit that relied on guilt by association and failed to provide a nexus between the crime alleged and the place and items searched. The lower court provided safe harbor for all affidavits whenever a judge advocate is included in the review process, and created an incentive for all parties to be willfully ignorant of the law controlling searches.

This broadening of the good faith exception whittles away the Fourth Amendment and puts service members at risk of officers who search first and ask questions later. This Court should review the case and uphold the trial judge's ruling.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on 15 June 2020.

CERTIFICATE OF COMPLIANCE

This supplement complies with the page limitations of Rule 21(b) because it contains fewer than 9,000 words. Using Microsoft Word version 2010 with 14-point Times-New-Roman font, this supplement (not including the appendix) contains 8,968 words.

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Appendix

1. *United States v. White*, No. 201900221, 2020 CCA LEXIS 68 (N-M. Ct. Crim. App. Mar. 11, 2020).

2. *United States v. Blackburn*, No. 39397, 2019 CCA LEXIS 336 (A. F. Ct. Crim. App. Aug. 23, 2019).

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Content Type	Narrowed by
Cases	-None-

United States v. White

United States Navy-Marine Corps Court of Criminal Appeals

March 11, 2020, Decided

No. 201900221

Reporter
2020 CCA LEXIS 68 *; 2020 WL 1174477

UNITED STATES, Appellant v. Jerry R. WHITE, Aviation Electrician's Mate First Class (E-6), U.S. Navy, Appellee

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 30.2.

Subsequent History: Motion granted by *United States v. White, 2020 CAAF LEXIS 276 (C.A.A.F., May 11, 2020)*

Motion granted by *United States v. White, 2020 CAAF LEXIS 281 (C.A.A.F., May 26, 2020)*

Prior History: Appeal by the United States Pursuant to *Article 62, UCMJ*. **[*1]** Military Judge: Jonathan T. Stephens, JAGC, USN (arraignment); Aaron C. Rugh, JAGC, USN (motions). Arraignment: 9 May 2019 by a general court-martial convened at Naval Base San Diego, California.

Core Terms

military, wire, pornography, dollars, suppressed, videos, prong, e-mail, exclusionary, package, seized, phone, sex

Case Summary

Overview
HOLDINGS: [1]-While the search authorization lacked probable cause, the Government could have relied on the good faith exception, under Mil. R. Evid. 311(c)(3), Manual Courts-Martial (2019), to use the seized evidence at trial because it was reasonable for the special agent to believe the commanding officer who authorized the search had a substantial basis to determine probable cause existed. Based on the information he had and the actions he took, the agent had a substantial basis to believe the CASS he executed had been lawfully obtained.

Outcome
Appeal granted. Military judge's ruling vacated. Record of trial returned for remand.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

HN1[] **Evidence, Evidentiary Rulings**

Whether under the normal course of appeal or an interlocutory appeal, a court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. In reviewing a military judge's ruling on a motion to suppress, the court reviews factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation

HN2 **Search & Seizure, Exclusionary Rule**

The exclusionary rule was always aimed squarely at the objectively unreasonable actions of law enforcement and not neutral judicial officers and magistrates with no stake in the outcome. A magistrate's imprimatur upon a search warrant was thought to curb law enforcement's excesses. The U.S. Supreme Court's good faith exception permits the use of evidence when an officer acting with objective good faith obtained a search warrant from a judge or magistrate and acted within its scope because in most such cases, there is no police illegality and thus nothing to deter.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Military & Veterans Law > Military Justice > Search & Seizure

HN3 **Exceptions to Exclusionary Rule, Good Faith**

Mil. R. Evid. 311, Manual Courts-Martial, allows evidence obtained from an unlawful search or seizure to be used if: (A) the search authorization came from a military or civilian official competent to issue such authorizations, (B) the official had a substantial basis for determining the existence of probable cause, and (C) the individuals seeking and executing the search relied with objective good faith on the issuance of the search authorization. Mil. R. Evid. 311(c)(3), Manual Courts-Martial (2019). The language in prong (B) of the Rule is very similar to the term substantial basis as used in the U.S. Supreme Court's probable cause definition from Illinois v. Gates. If read literally, it would mean any time a reviewing court held a search authorization lacked probable cause, that the second prong of the Rule could not apply. So, the U.S. Court of Appeals for the Armed Forces later interpreted prong (B) to read as the law enforcement official had an objectively reasonable belief that the magistrate had a substantial basis for determining the existence of probable cause.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Military & Veterans Law > Military Justice > Search & Seizure

HN4 **Exceptions to Exclusionary Rule, Good Faith**

The good faith exception applies when law enforcement agents act with an objectively reasonable good-faith belief that their conduct is lawful. In applying Mil. R. Evid. 311(c)(3)(B), Manual Courts-Martial (2019), of the good faith exception, courts focus on the information law enforcement possessed at the time of seeking a search authorization.

Counsel: For Appellant: Lieutenant Joshua C. Fiveson, JAGC, USN; Captain Brian L. Farrell, USMC.

For Appellee: Captain Mary Claire Finnen, USMC.

Judges: Before TANG, LAWRENCE, and STEPHENS, Appellate Military Judges. Senior Judge TANG and Judge LAWRENCE Concur.

Opinion by: STEPHENS

Opinion

STEPHENS, Judge:

This is a Government interlocutory appeal[1] from a military judge's ruling suppressing evidence of child pornography found on Appellee's computers. When the Department of Homeland Security (DHS) investigated sexual exploitation of children in the Philippines, Aviation Electrician's Mate First Class (AE1) Jerry White's name turned up. The connection, though somewhat tenuous, was enough for Naval Criminal Investigative Service (NCIS) Special Agent (SA) Mark Garhart to obtain a search authorization for AE1 White's home and any electronics in it. When NCIS agents searched his off-base home near Naval Air Facility Atsugi, Japan, they seized nine computer hard drives; three of them contained suspected child pornography. **[*2]** As a result, the Government preferred charges alleging violations of *Article 134, Uniform Code of Military Justice (UCMJ)*, for possession of child pornography on three separate devices, and referred the charges to a general court-martial. The military judge suppressed the evidence because the search authorization lacked probable cause. We agree that it lacked probable cause, but the salient question before us is whether SA Garhart acted in good faith in seeking and executing the search authorization. We find it was reasonable for SA Garhart to believe the commanding officer who authorized the search had a substantial basis to determine probable cause existed. Accordingly, we apply the good faith exception to vacate the military judge's ruling that suppressed the fruits of the search and remand.

I. Background

A. The Department of Homeland Security Investigation

Christopher Villanueva raped young girls for the enjoyment of a paying live-stream Internet audience. He operated out of Taguig City in Manila, an area known for child sexual exploitation, and collected payment through wire transfers. An undercover Homeland Security Investigations (HSI) agent attempted to purchase a pornographic **[*3]** child-rape show from Villanueva, who directed the agent to send payment to an account in the name of Jusan Noriega. It was unknown whether Noriega was an associate of Villanueva or an alias.[2] HSI agents suspected AE1 White may have been one of Villanueva's customers because a Xoom wire transfer account under the name "Jared White"[3] was used to attempt to wire Noriega exactly ten dollars in May of 2015. Less than four weeks after this attempted transfer, the Philippine government arrested Villanueva. With "Jared White's" money unclaimed, the wire-transfer company returned it to the sending account.

After AE1 White became a suspect in the investigation, HSI obtained records showing the history of his other suspected wire transfers using the name "Jared White." They located a MoneyGram account belonging to "Jared White," listing the same Norfolk address used for the Xoom account. Between May 2012 and December 2014, the "Jared White" MoneyGram account was used to make 167 wire transfers—nearly all to the Philippines—totaling almost 5,000 dollars. The payments were all between 10 and 180 dollars, with the majority under 50 dollars. None of the recipients' identities were known, but 60 percent **[*4]** of them were in Taguig City. From May 2015 to May 2016, "Jared White" made another 22 wire transfers, using Xoom, totaling over 700 dollars to 11 different people.[4] One of the transfers was the 10 dollars transferred to Jusan Noriega.

An e-mail and a physical address were associated with the Xoom account. The e-mail matched the one HSI had in its intelligence file for AE1 White, and the physical address was the address of his Norfolk command. The Xoom records also showed "Jared White" used 19 different Internet protocol (IP) addresses to wire money between May 2015 and May 2016. All the IP addresses were registered to KDDI, a Japanese Internet service provider. AE1 White left Norfolk for assignment to Naval Air Station Atsugi, Japan, in October 2015. In February 2017, DHS transferred the case to NCIS.

B. The Command Authorized Search and Seizure

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[1] *10 U.S.C. § 862 (2016)*.

[2] The HSI report indicated Noriega was an associate of Villanueva and never referred to him as an alias. In his affidavit, SA Garhart referred to Noriega as an "alias" for Villanueva, a contention that appears to be adopted by both trial defense counsel and trial counsel. *See* App. Ex. IV (Defense Motion to Suppress) at 1; App. Ex. V (Government Response to Defense Motion to Suppress) at 1; and Record at 41-42. The military judge made a Finding of Fact that it "may" have been an alias, noting the DHS report indicated Noriega was an associate. Whether Noriega was a separate person or an alias for Villanueva himself is not relevant to our analysis.

[3] The account was registered to "Jared White," using an e-mail address of "jared[ ]@[ ].com" and listed an address belonging to AE1 White's prior squadron in Norfolk, VA. The HSI report indicates that agents were also able to link the "jared[ ]@[ ].com" e-mail address with AE1 White but did not indicate how.

[4] The HSI report states AE1 White made wire transfers to "Jusan Noriega and the (10) other recipients in the Philippines." *See* App. Ex. IV (Defense Motion to Suppress), Enclosure (A) (DHS Report) at 4.

After he received the HSI investigation, SA Garhart reviewed AE1 White's military records, but found nothing of evidentiary value, though he was able to confirm his off-base residence. With the above information, SA Garhart—who then had about 15 years of experience, including three years at Naval Air Station Atsugi, and more than 50 child pornography **[*5]** cases under his belt—drafted an affidavit and a search authorization for the commanding officer's (CO) signature.[5] He forwarded the documents to the CO and his staff judge advocate (SJA) for legal review.[6]

Just as he had done many times in the past, as it was his usual course of business, SA Garhart followed up by meeting with the CO. He personally briefed the CO and answered his questions. In his affidavit, SA Garhart included a "typology" section stating that, based on his experience, collectors of child pornography rarely permanently disposed of their images or videos. The CO signed the search authorization allowing SA Garhart to search AE1 White's off-base home for electronic media storage devices that could contain child pornography. Three of the nine hard drives that were seized contained such contraband. NCIS also found software for recording live-streamed videos.

C. The Military Judge Suppressed the Evidence

The Government charged AE1 White with possessing child pornography in violation of *Article 134, UCMJ*.[7] The Defense moved to suppress the suspected child pornography found on AE1 White's hard drives. In his written ruling granting the motion, the military judge held the search **[*6]** authorization lacked probable cause due to its lack of "connective tissue" between Villanueva and AE1 White. He wrote that SA Garhart's foundation for probable cause rested on "only three assertions": (1) that AE1 White made almost 200 wire transfers to unknown persons in the Philippines, including Taguig City, for more than 5,000 dollars, (2) that Taguig City is widely known as a hub for child exploitation and child sex trafficking, and (3) that in May 2015, AE1 White attempted to wire transfer 10 dollars to Villanueva/Noriega.[8] The military judge concluded the Government had not established whether AE1 White ever received any child pornography from Villanueva or anyone else in the Philippines, what types of electronic devices he possessed, or even whether he had Internet service in his home.

The military judge also briefly discussed, and dismissed, the possibility of the Government availing itself of the good faith exception. He concluded SA Garhart did not act with "malice" but, relying on *United States v. Carter*,[9] found the information he provided the CO was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[10] The **[*7]** military judge also wrote, "While agents operating in good faith may not always discern the legal threshold for probable cause with the same authority as the courts, still warrants and authorization must be rooted in *some* evidence from which a critical eye might perceive probable cause exists."[11]

II. Discussion

A. Standard of Review

HN1[↑] Whether under the normal course of appeal or an interlocutory appeal, we review a military judge's decision to admit or exclude evidence for an abuse of discretion.[12] "In reviewing a military judge's ruling on a motion to suppress, we review factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard."[13] Because we do not find the military judge abused his discretion in finding the search authorization lacked probable cause, we focus our discussion on the application of the good faith exception found in Military Rule of Evidence 311(c)(3).[14]

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[5] Record at 39. Because the off-base rental property was managed by Naval Air Station Atsugi, the commanding officer had authority to sign a CASS for an off-base residence.

[6] *Id.* at 21.

[7] *10 U.S.C. § 934 (2012)*.

[8] App. Ex. VIII at 6.

[9] *54 M.J. 414, 419-20 (C.A.A.F. 2001)*.

[10] App. Ex. VIII at 3 (quoting *Carter, 54 M.J. at 419*).

[11] *Id.* at 9 (emphasis in the original).

[12] *United States v. Wuterich, 67 M.J. 63, 77 (C.A.A.F. 2008)* (applying abuse of discretion standard in *Article 62, UCMJ*, appeal from evidentiary ruling).

[13] *United States v. Henning, 75 M.J. 187 (C.A.A.F. 2016)* (quoting *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)*).

[14] *See United States v. Perkins, 78 M.J. 381, 386-87 (C.A.A.F. 2017)* (citing *United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992)*) (finding that a court need not determine sufficient probable cause if concluding good faith exception applies).

B. Good Faith Exception

1. The establishment of the good faith exception

Ratified in 1791, the *Fourth Amendment* states in part, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[15] Over a century later in *Weeks v. **[*8]** United States*,[16] the Supreme Court, desiring to deter abuses of power by Federal law enforcement, created the exclusionary rule. Evidence seized in violation of the *Fourth Amendment* was to be suppressed. The exclusionary rule was not "incorporated" against the States until 1961 in *Mapp v. Ohio*.[17] The rule was now "brought to bear in favor of accused murderers and armed robbers . . . which had previously largely had an application to bootleggers and purveyors of stolen lottery tickets."[18] After two decades of concern over the "substantial social costs" of the exclusionary rule, the Court created the good faith exception in *United States v. Leon*.[19]

HN2[] The exclusionary rule was always aimed squarely at the objectively unreasonable actions of law enforcement and not neutral judicial officers and magistrates with no "stake in the outcome."[20] A magistrate's imprimatur upon a search warrant was thought to curb law enforcement's excesses. The Court's new good faith exception permitted the use of evidence "when an officer acting with objective good faith obtained a search warrant from a judge or magistrate and acted within its scope" because "[i]n most such cases, there is no police illegality and thus nothing to deter." **[*9]** [21]

Two years after *Leon*, the President promulgated the military good faith exception in Military Rule of Evidence 311.[22] *HN3*[] The Rule (paraphrased) allows evidence obtained from an unlawful search or seizure to be used if:

> (A) the search authorization came from a military or civilian official competent to issue such authorizations,
> (B) the official had a substantial basis for determining the existence of probable cause, and
> (C) the individuals seeking and executing the search relied with objective good faith on the issuance of the search authorization.[23]

The language in prong (B) of the Rule is very similar to the term "substantial basis" as used in the Supreme Court's probable cause definition from *Illinois v. Gates*.[24] If read literally, it would mean any time a reviewing court held a search authorization lacked probable cause, that the second prong of the Rule could not apply. So, our superior court later interpreted prong (B) to read as "the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause."[25] With AE1 White conceding prong (A), and no reason to doubt prong (C) ,[26] we focus exclusively on prong (B).

*2. The application of the **[*10]** good faith exception*

HN4[] The good faith exception applies when law enforcement agents "act with an objectively 'reasonable good-faith belief' that their conduct is lawful."[27] In applying prong (B) of the good faith exception, we focus on the information law enforcement possessed at the time of seeking a search authorization. Here, SA Garhart unquestionably had a lot of

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[15] *U.S. Const. amend IV*.

[16] *232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914)*.

[17] *367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961)*. The Court incorporated the *Fourth Amendment* against the States in *Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949)*, but declined to incorporate the exclusionary rule as it was not a necessary feature of the *Fourth Amendment*.

[18] ***California v. Minjares, 443 U.S. 916, 927, 100 S. Ct. 9, 61 L. Ed. 2d 892 (1979)*** (Rehnquist, J., dissenting).

[19] *468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*.

[20] *Id. at 917*.

[21] *Id. at 920-21*.

[22] Initially promulgated as Military Rule of Evidence 311(b)(3), Manual for Courts-Martial, United States (1984 ed.).

[23] Mil. R. Evid. 311(c)(3), Manual for Courts-Martial, United States (2019 ed.).

[24] *462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*.

[25] *United States v. Carter, 54 M.J. 414, 422 (C.A.A.F. 2001)*.

[26] Here, as in *United States v. Perkins, 78 M.J. 381, 389 (C.A.A.F. 2019)*, we find neither that the CO "rubber-stamped" the search authorization, nor that there was a "facially defective" search authorization "because it identified the place to search (Appellant's home) and described in detail what to look for ('all electronic devices and media storage containers . . . ')."

[27] *Davis v. United States, 564 U.S. 229, 238, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011)* (citing *Leon, 468 U.S. at 922 n.23*).

"smoke." It is also true had he taken more investigatory steps, he could have easily obtained additional information amounting to probable cause, such as verifying that the e-mail address from the wire-transfers matched a civilian e-mail listed in AE1 White's military records, verifying if AE1 White had any devices registered with the Japanese Internet service provider or that he had this particular Internet service in his home, or even questioning AE1 White directly. But with the information he did have, the question is whether SA Garhart had an "objectively reasonable" belief the CO had a "substantial basis" to determine probable cause.

Drawing on the DHS investigation, SA Garhart knew the following:

> Between May 2012 and May 2016, accounts connected to AE1 White—registered in a name similar to his, using an e-mail address linked **[*11]** to AE1 White, and using the physical address of AE1 White's prior command—made 189 wire transfers using two different companies;
> The wire transfers totaled $5,440.67;
> Of the 167 wire transfers between May 2012 and December 2014, 157 listed addresses, 102 of which were in "Taguig City";
> Taguig City, a self-contained city in Manila, in the Philippines, is known for its "widespread child exploitation," the "pervasive" "sex trafficking of children," and is a "destination for child sex tourists;"
> The 2012 to 2014 wire transfers were all between 10 and 180 dollars, with the majority being less than 50 dollars;
> The 22 wire transfers between May 2015 and May 2016 were all to the Philippines;
> The 2015 to 2016 wire transfers used IP addresses registered to KDDI, a Japanese Internet service provider;
> AE1 White lived off-base near Naval Air Station Atsugi, Japan, and had an e-mail address;
> The 2015 to 2016 wire transfers were to 11 different recipients;
> Though the wire transfer was never completed, one of the 2015 to 2016 recipients was to a name associated with Christopher Villanueva for exactly 10 dollars;
>
> Christopher Villanueva was known to live-stream broadcast his rapes of young girls in Taguig City **[*12]** for a paying Internet audience.

With this information at SA Garhart's disposal, he drafted and signed a sworn affidavit, drafted a search authorization for his supervisor to review, submitted them to the CO and his SJA for review, and scheduled a meeting to discuss the search authorization where he answered questions. According to SA Garhart, the CO "and his legal counsel reviewed" the documents.[28] Ultimately, we agree with the military judge that despite SA Garhart's efforts, the information he provided to the CO and his legal advisor falls short of establishing probable cause for issuance of the search authorization. We must therefore decide whether SA Garhart's actions were "simple, isolated negligence" or if his actions descended to "deliberate, reckless, or grossly negligent disregard of *Fourth Amendment* rights."[29]

A few cases in which the Court of Appeals for the Armed Forces (CAAF) considered searches and seizures or the good faith exception are instructive. In *United States v. Hoffmann*,[30] an NCIS special agent investigated a corporal allegedly driving around base soliciting young boys for sex. The NCIS special agent obtained a search authorization to look for child pornography on his computer. This **[*13]** was based solely on the allegations and her "training and experience" of an "intuitive relationship" between child molestation and possession of child pornography. Because this search authorization had no "substantial basis for determining the existence of probable cause," CAAF declined to apply the good faith exception. Although later, in *United States v. Perkins*,[31] CAAF noted certain deficiencies in its analysis in *Hoffmann*, we still find a factual comparison to be helpful.

In *United States v. Darnall*,[32] United States Customs agents intercepted a package from China containing chemicals used for manufacturing drugs. It was addressed to a "Brandon Darnall" living near the Marine Corps base at Twentynine Palms, California. When a Marine Criminal Investigative Division (CID) agent went to the address on the package, he found only an empty house for rent. Public records showed three people in the surrounding county with the same name, including one Twentynine Palms Sailor. The CID agent decided to make a fake package resembling the package shipped from China and have Darnall summoned to retrieve it from his unit's mailroom. When Darnall had no real reaction upon seeing the package, CID detained **[*14]** and questioned him. He admitted to purchasing drugs from China that he sold to local "smoke shops" before the drugs were added to the

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[28] Appellate Exhibit IV, "Defense Motion to Suppress Evidence Obtained From the Search of AE1 White's Home," Enclosure (D) "Special Agent Garhart Article 32 Testimony" at 27.

[29] *Id. at 238*.

[30] *75 M.J. 120 (C.A.A.F. 2016)*.

[31] *78 M.J. 381 (C.A.A.F. 2019)*.

[32] *76 M.J. 326 (C.A.A.F. 2017)*.

Drug Enforcement Agency's list of controlled substances. On this information, later held to be statements Darnall made after an illegal apprehension not supported by probable cause, CID obtained a search authorization for Darnall's cell phone. Largely because the CID agent's behavior was not "objectively" reasonable—in fact, CAAF called his investigation "sloppy and apathetic"—the good faith exception did not apply.[33]

The good faith exception also did not apply in *United States v. Nieto*.[34] When two Soldiers saw Nieto recording them in the toilet with his cellphone, they reported him. A non-commissioned officer looked through Nieto's cell phone but found no such pictures or videos. An Army CID special agent coupled this information with his "experience" that people transferred such videos from a phone to a computer, and obtained a search authorization for Nieto's laptop. The special agent's only basis for believing Nieto owned a laptop was that another special agent told him "somebody" had previously seen a laptop on Nieto's bunk.[35] Because there was an insufficient **[*15]** nexus between Nieto's cell phone and his laptop, there no probable cause and the good faith exception did not apply.

When we compare SA Garhart's actions with the actions of the NCIS special agent in *United States v. Perkins*—a case in which CAAF held the good faith exception did apply—as contrasted with the special agents in *Hoffmann*, *Darnall*, and *Nieto*, we find SA Garhart's actions justify application of the good faith exception. In *Perkins*, a civilian woman reported that a Marine threatened to extort her by publicizing videos of their past sexual intercourse. She did not have any information about any such videos, but offered that he once used his cell phone during sex. The command recalled Perkins from leave to issue him a Military Protective Order to avoid contact with the civilian woman. They expected him to arrive the next day. The NCIS special agent consulted with the SJA and two trial counsel before obtaining a verbal search authorization from the base CO to enter Perkins's home and search all electronic devices capable of storing videos and pictures. During her sweep, she saw what appeared to be stolen military property in plain sight. She stopped and requested and received **[*16]** a search authorization for those items, too. Though her initial search lacked probable cause, CAAF applied the good faith exception primarily because she sought, received, and relied on legal advice.

While we conclude SA Garhart could have, and should have, done more investigating, he nevertheless did have a quantum of information sufficient to believe the CO would not hesitate to sign the search authorization. He also specifically provided this information to the CO and his SJA to seek legal advice prior to obtaining the CASS. Based on the information he had and the actions he took, SA Garhart had a substantial basis to believe the CASS he executed had been lawfully obtained. For these reasons, we find his actions were not of the type targeted by the exclusionary rule and hold that the Government may rely on the good faith exception to use the seized evidence at trial.

III. CONCLUSION

The appeal of the United States is **GRANTED**. The military judge's ruling in Appellate Exhibit VIII is **VACATED** and the record of trial is returned to the Judge Advocate General for remand to the convening authority and delivery to the military judge for further proceedings.

Senior Judge TANG and Judge LAWRENCE **[*17]** Concur.

End of Document

[33] *Id. at 332*.

[34] *76 M.J. 101 (C.A.A.F. 2017)*.

[35] *Id. at 103, 105*.

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1. *United States v. Blackburn, 2019 CCA LEXIS 336*

Client/Matter: -None-
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Cases	-None-

United States v. Blackburn

United States Air Force Court of Criminal Appeals

August 22, 2019, Decided

No. ACM 39397

Reporter
2019 CCA LEXIS 336 *; 2019 WL 3980730

UNITED STATES, Appellee v. Jason M. BLACKBURN, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Christopher M. Schumann. Approved sentence: Bad-conduct discharge, confinement for 5 years, and reduction to E-1. Sentence adjudged 2 September 2017 by GCM convened at Keesler Air Force Base, Mississippi.

Core Terms

military, authorization, camcorder, records, good faith, child pornography, substantial basis, trial defense counsel, mental health records, probable cause, videos, bathroom, in camera, media, suppress, spouse, circumstances, speedy trial, communications, disclosure, facially, camera, nexus, asserting, remote, good faith exception to the exclusionary rule, admissible evidence, specification, docketing, sentence

Case Summary

Overview
HOLDINGS: [1]-Military judge (MJ) properly determined that appellant did not show there was a reasonable likelihood that the victim's mental health records would yield admissible evidence or that the requested information met an enumerated exception in Mil. R. Evid. 513(d), Manual Courts-Martial; [2]-MJ erred in finding the good faith exception to the exclusionary rule applied where the evidence provided to the magistrate was facially deficient in that it failed to establish a nexus between appellant's use of a camcorder and downloading files to a computer because without any knowledge that appellant possessed a computer, the inference that he was manufacturing child pornography was unreasonable; [3]-Erroneous admission prejudiced appellant, as the search of his home yielded evidence that the government used to establish his guilt to the indecent recording charge and specification.

Outcome
The findings of guilty were affirmed in part and set aside in part. The sentence was set aside and the case was returned for further processing. A rehearing was authorized.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Counsel

HN1[] **Criminal Process, Assistance of Counsel**

A military court of criminal appeals reviews claims of ineffective assistance of counsel de novo. Pursuant to Strickland, an appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the *Sixth Amendment*; and (2) that the deficient performance prejudiced the defense through errors so serious as to deprive the defendant of a fair trial. The appellant has the burden to demonstrate both deficient performance and prejudice.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Military courts of criminal appeals do not measure deficiency based on the success of a trial defense counsel's strategy, but instead examine whether counsel made an objectively reasonable choice in strategy from the available alternatives. For this reason, counsel receives wide latitude in making tactical decisions. In making this determination, courts must be highly deferential to trial defense counsel and make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN3[] **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

An accused must be brought to trial within 120 days after preferral of charges. R.C.M. 707(a), Manual Courts-Martial. The "date of preferral of charges shall not count, but the date on which the accused is arraigned under R.C.M. 904, Manual Courts-Martial, shall count. R.C.M. 707(b), Manual Courts-Martial. Pretrial delays approved by a military judge or convening authority are excluded from the 120 day limit and may be based on time requested by the defense or additional time for other good cause. R.C.M. 707(c)(1) and its Discussion. Any interval of time between events is a "delay" and, if approved by the appropriate authority, is excluded from the government's accountable time under R.C.M. 707(a).

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN4[] **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

The appropriate remedy for a violation of R.C.M. 707, Manual Courts-Martial, is dismissal with or without prejudice. R.C.M. 707(d)(1). Dismissal with prejudice is determined after considering the following factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case that lead to dismissal; (3) the impact of a re-prosecution on the administration of justice; and (4) any prejudice to the accused resulting from the denial of a speedy trial. R.C.M. 707(d)(1). Dismissal with prejudice is generally only appropriate for a constitutional violation of an accused's right to speedy trial. Manual Courts-Martial App. 21, at A21-41 (2016).

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] **Privileged Communications, Psychotherapist-Patient Privilege**

A military court of criminal appeals reviews a military judge's rulings under Mil. R. Evid. 513, Manual Courts-Martial, for abuse of discretion.

Governments > Legislation > Interpretation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Legislation, Interpretation**

Construction of a military rule of evidence, as well as the interpretation of statutes, the Uniform Code of Military Justice, and the Rules for Courts-Martial are questions of law reviewed de novo. Interpretation of a rule begins with the rule's plain language. The plain language of the rule controls unless use of the plain language would yield an absurd result. The fact a party deems a result undesired does not render the result absurd. A result is not absurd merely because it is uncommon, unanticipated, or represents an imperfect realization of the drafter's intent.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN7[] **Privileged Communications, Psychotherapist-Patient Privilege**

Mil. R. Evid. 513(a), Manual Courts-Martial, addresses the psychotherapist privilege and states that a patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. The privilege has a number of exceptions found in Rule 513(d), including when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse, Rule 513(d)(2), and when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or accomplishment of a military mission. Rule 513(d)(6).

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN8[] **Privileged Communications, Psychotherapist-Patient Privilege**

Whether an exception to the psychotherapist privilege applies is a fact-specific determination for a military judge to consider. A military judge must conduct a hearing to determine if the privilege exists. Mil. R. Evid. 513(e)(2), Manual Courts-Martial. A military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Rule 513(e)(3). Before a military judge may do an in camera review, the judge must find by a preponderance of evidence that the moving party showed: (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; (B) that the requested information meets one of the enumerated exceptions under Rule 513(d); (C) that the information sought is not merely cumulative of other information available; and (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. Rule 513(e)(3).

Governments > Legislation > Interpretation

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN9[] **Legislation, Interpretation**

The second clause of Mil. R. Evid. 513(d)(2), Manual Courts-Martial., is independent of the first, as the two are separated by a comma and the disjunctive "or." The words "in a proceeding" indicate the second clause only applies to the admissibility of evidence, not the production or disclosure of evidence. By contrast, the first clause applies to production, disclosure, and admissibility of otherwise privileged communications.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN10[] **Criminal Process, Right to Confrontation**

The right to confront witnesses does not include the right to discover information to use in confrontation.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN11[] **Brady Materials, Brady Claims**

There is no general constitutional right to discovery in a criminal case. Rather, constitutional "discovery" is usually delineated by the contours of the seminal case of Brady.

Criminal Law & Procedure > ... > Exclusionary

Rule > Exceptions to Exclusionary Rule > Good Faith

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

HN12 **Exceptions to Exclusionary Rule, Good Faith**

Appellate courts review a military judge's denial of a motion to suppress for an abuse of discretion. When reviewing a military magistrate's issuance of a search authorization, the appellate court does not review the probable cause determination de novo. An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or he misapprehends the law. In doing so, the appellate court examines whether a military magistrate had a substantial basis for concluding that probable cause existed. A substantial basis exists when, under the totality of the circumstances, there is a fair probability that evidence of a crime will be found at the identified location. Great deference is given to the magistrate's probable cause determination due to the *Fourth Amendment's* strong preference for searches conducted pursuant to a warrant. However, as the Supreme Court held in Leon, the deference is not boundless. If the military magistrate did not have a substantial basis for concluding that probable cause existed, the government has the burden of establishing both the good faith and inevitable discovery doctrines by a preponderance of the evidence.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN13 **Search & Seizure, Scope of Protection**

The *Fourth Amendment* protects individuals from unreasonable governmental intrusion into an individual's reasonable expectation of privacy. *U.S. Const. amend. IV*. The *Fourth Amendment* protection against unreasonable searches and seizures applies to military members. The United States Supreme Court in Riley reiterated that the ultimate touchstone of the *Fourth Amendment* is "reasonableness." The question of whether an expectation of privacy exists is resolved by examining whether there is a subjective expectation of privacy that is objectively reasonable. Searches conducted pursuant to a warrant are presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions.

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN14 **Search & Seizure, Searches Requiring Probable Cause**

Mil. R. Evid. 315(f), Manual Courts-Martial provides that a search authorization issued under this rule must be based upon probable cause, which exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Rule 315(e)(2) provides that the execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or any applicable Act of Congress.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN15 **Exceptions to Exclusionary Rule, Good Faith**

The good-faith doctrine applies if: (1) a 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.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

HN16 **Exceptions to Exclusionary Rule, Good Faith**

In Leon, the United States Supreme Court listed four circumstances where the "good faith" exception would not apply: (1) where a magistrate was misled by information in an affidavit that the affiant knew was false or would have known

was false; (2) where the magistrate wholly abandoned his judicial role; (3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Military & Veterans Law > Military Justice > Search & Seizure > Unlawful Search & Seizure

HN17[] **Exceptions to Exclusionary Rule, Good Faith**

In the military, the good faith exception is enumerated in Mil. R. Evid. 311(c)(3), Manual Courts-Martial.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN18[] **Search Warrants, Probable Cause**

Application of the nexus requirement is directly related to the evidence of the crime presented to the magistrate and the likelihood of a suspect acting in conformance with others who commit that type of crime. The case law concedes that a law enforcement officer's professional experience may be useful in establishing such a nexus -- such as profiles of how those engaged in child pornography generally do not delete files, they maintain them.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN19[] **Harmless & Invited Error, Constitutional Rights**

Constitutional error is harmless only when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The burden is on the government to prove the constitutional error was harmless. An error that did not contribute to the verdict is one which was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN20[] **Posttrial Procedure, Actions by Convening Authority**

In Moreno, the United States Court of Appeals for the Armed Forces (CAAF) established a presumption of a facially unreasonable post-trial processing delay when the record of trial is not docketed by the service court of criminal appeals within 30 days of the convening authority's action, and when appellate review is not completed and a decision is not rendered within 18 months of docketing the case before the court of criminal appeals. Where there is such a delay, a court of criminal appeals examines the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review and appeal; and (4) prejudice. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding. In Moreno, the CAAF identified three types of cognizable prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing.

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HN21[] **Courts Martial, Sentences**

A military court of criminal appeals has the de novo power and responsibility to disapprove any portion of a sentence that it determines, on the basis of the entire record, should not be approved, even absent any actual prejudice.

Counsel: For Appellant: Major Meghan R. Glines-Barney, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Captain Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Judges: Before MAYBERRY, MINK, and LEWIS, Appellate Military Judges. Chief Judge MAYBERRY delivered the opinion of the court, in which Senior Judge MINK joined. Judge LEWIS filed a separate opinion dissenting in part and in the result.

Opinion by: MAYBERRY

Opinion

MAYBERRY, Chief Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one charge and specification of sexual abuse of a child (requesting nude photos) and one charge and specification of indecent recording in violation of *Articles 120(b)* and *120(c)*, Uniform Code of Military Justice (UCMJ),[1] *10 U.S.C. §§ 920(b)*, *920(c)*.[2] The panel sentenced Appellant to a bad-conduct discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority **[*2]** approved the adjudged sentence but disapproved the adjudged forfeitures, deferred the mandatory forfeiture of pay in the amount of $728.00 until the date of action, and waived the mandatory forfeiture of pay and allowances for six months, release from confinement or expiration of term of service, whichever was sooner.

Appellant asserts eight assignments of error (AOEs):[3] (1) whether trial defense counsel was ineffective for failing to file a speedy trial motion pursuant to Rule for Courts-Martial (R.C.M.) 707; (2) whether the military judge erred in failing to perform an *in camera* review of mental health records pursuant to Mil. R. Evid. 513;[4] (3) whether the military judge erred in applying the good faith exception to the exclusionary rule after finding no probable cause for a search authorization; (4) whether the military judge erred in allowing expert witness testimony; (5) whether the military judge erred by admitting improper sentencing evidence; (6) whether the convening authority improperly denied Appellant's request to defer his reduction in rank; (7) whether the staff judge advocate recommendation (SJAR) and SJAR addendum failed to address Appellant's deferral request; and (8) whether Appellant's **[*3]** sentence was too severe.[5] Additionally, we address the post-trial processing delay. We find the military judge erred in applying the good faith exception to the exclusionary rule and set aside the findings and sentence.[6]

I. Background

Appellant was convicted of sexually abusing his 12-year-old stepdaughter, ES, by requesting she send nude pictures of herself to him, and for using a camcorder, on divers occasions, to record ES's private area while she was in the bathroom.

Appellant was married and stationed at Keesler Air Force Base (AFB), Mississippi. He lived on base with his wife MB and her daughter ES, and their two biological children. MB attended classes at night. Appellant's brother, his brother's wife and their two children were staying at the house. As a result of the living arrangements, Appellant, MB, and their children used the bathroom in the master bedroom.

On the night of 20 April 2016, ES was in the family bathroom preparing to take a shower. After she had removed only her pants, she saw a camcorder on the bathroom floor with a red light on. She went over and picked the camcorder up, saw that there were two videos on it, only one of which she could view, and it showed **[*4]** her in the bathroom without her pants on. ES walked out of the bathroom, upset. Appellant told her a short time later that "he was trying to make it look like a trick and that he was just kidding." ES wanted to call her father, but Appellant took the phone from her. Approximately five minutes later, Appellant returned the

[1] Unless otherwise indicated, all references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial, and Mil. R. Evid. are to the versions found in the *Manual for Courts-Martial, United States* (2012 ed.).

[2] Appellant was found not guilty of one charge and one specification of knowingly enticing a minor to engage in sexually explicit conduct in violation of *Article 134, UCMJ, 10 U.S.C. § 934*.

[3] The assignments of error were reordered by the court.

[4] This issue was filed under seal and the discussion, *supra*, only reveals that which is necessary to resolve the issue.

[5] This issue was raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

[6] In light of our finding as to the admission of the evidence from Appellant's computer, we do not address AOEs (4) through (8).

phone to ES who called her father and left a voicemail.

ES's biological father JS and her stepmother LS were in the process of moving from Texas to Arkansas. JS testified at trial and described the evening of 20 April 2016. He was having dinner with his wife at a restaurant and saw that he had missed calls from ES and had a voicemail from her. He described the voicemail as ES "barely able to talk. It sounded like she was having a hard time breathing, just telling me to call her back as soon as I can." JS called his daughter back and she sounded scared, initially asking to come live with him. JS testified that ES then told him about finding the camcorder in the bathroom. JS informed his wife of the nature of the phone call and she called the Biloxi (Mississippi) police. Eventually, she also called the security forces at Keesler AFB.

ES was taken to the Air Force Office **[*5]** of Special Investigations (AFOSI) and interviewed in the early morning hours of 21 April 2016. In addition to describing the events of the previous night, ES indicated this was not the first time Appellant had a camcorder in the bathroom. She stated that a few weeks prior, Appellant came into the bathroom while she was in the shower and held the camera over the shower curtain. On that occasion Appellant told her it was not recording and it was just a joke. ES also told AFOSI that one night when Appellant was tucking her into bed, he talked about his upcoming deployment and asked her to send him photos of her naked because he was going to miss her.

After ES's interview, AFOSI sought authorization to search. TSgt DD, an AFOSI agent at the time of the investigation but not at the time of trial, had listened when ES was being interviewed by other AFOSI agents and he had contacted the military magistrate seeking search authorization. The affidavit to support the search authorization stated "[b]ased on [TSgt DD's] experience, training and the facts listed above, I believe evidence proving [Appellant's] intent to manufacture child pornography is located within his residence" and requested **[*6]** "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" Appellant's house. During the search of Appellant's home, 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 were found and seized from the residence. No nude photos of ES were found on any of the devices. Video files were found in the temp folder on one of the tower computers, all depicting ES in various stages of undress in the bathroom. AFOSI sent six videos found on Appellant's computer to the Department of Defense Computers Forensics Laboratory (DCFL) for analysis.

II. Discussion

A. Ineffective Assistance of Counsel

Appellant asserts that his trial defense counsel, Maj ZW, failed to file a motion to dismiss the charges and specifications for a speedy trial violation under R.C.M. 707 and that this failure amounts to ineffective assistance of counsel. At the Government's request, the court ordered Maj ZW to submit **[*7]** a declaration addressing Appellant's claims. Maj ZW's declaration generally does not contradict Appellant's assertions of fact but rather explains the strategic and tactical decisions made before and during the trial by the Defense. We disagree that trial defense counsel provided ineffective assistance based on our assessment that the trial defense counsel made an objectively reasonable choice in strategy from the available alternatives.

1. Additional Facts

Charges were preferred on 15 March 2017. During docketing discussions, trial defense counsel and the Government agreed to an exclusion of 56 days for R.C.M. 707 computation purposes. This 56 day period was from the Government's proposed ready date for trial, 3 July 2017, through 28 August 2017, the day Appellant was arraigned. On 16 June 2017, the military judge issued a scheduling order for the parties, excluding 10 July 2017 through 20 August 2017 (34 days), from the speedy trial calculation.

Trial defense counsel recognized the military judge's omissions from the confirmation memorandum and "believed the [military judge] mistakenly entered the dates on the confirmation memo and failed to exclude Defense delay, depriving the Government of **[*8]** an additional 15 days [he] [had] previously agreed" should have been excluded. Based on this mistake, trial defense counsel believed the "true speedy trial date" to be 7 September 2017. Further, trial defense counsel believed an additional 30 days of time would have been found to be excludable due to his lack of immediate availability for the *Article 32, UCMJ*, preliminary hearing.

Trial defense counsel considered a speedy trial motion under R.C.M. 707, but did not file one for two reasons. First, he believed that he could not credibly oppose a Government

request to exclude additional time when he had previously "agreed in the docketing memo the Government should receive 56 days of excludable delay" and that "there was likely an additional 30 days of excludable delay" due to his unavailability for the preliminary hearing.

Second, trial defense counsel also had a strategic reason not to do so. Based on information from trial counsel, Appellant's ex-wife, and a subsequent Government motion to permit remote live testimony that was filed two days before trial, it became apparent to Appellant and trial defense counsel that the victim, ES, may refuse to appear at trial and testify. As a result, Appellant **[*9]** decided that it was in his best interest to continue to trial in the hopes that a submitted request to be discharged in lieu of trial would be approved "while ES was wavering."

Based on these circumstances, trial defense counsel believed that Appellant's "only tactical advantage was the combination of [a] motion to suppress potentially succeeding and ES's wavering participation." As a result, the Defense "decided our best strategy was to pursue that tactical advantage and see if it could result in an even better bargaining position for a PTA or Chapter 4 request." In his declaration, trial defense counsel ultimately summarized why a motion under R.C.M. 707 was not filed:

> Filing a motion to dismiss under R.C.M. 707 would have given up this tactical advantage for no clear benefit. Even if the R.C.M. 707 motion to dismiss was successful, the military judge would have dismissed the case without prejudice. This would have given the Government time to reprefer and convince ES to testify in the second court-martial. Further, the Government would have had more time to resubmit [Appellant's] electronics for additional forensic analysis, something the [Senior Trial Counsel] threatened but the legal office ultimately declined **[*10]** to pursue because their SJA was pushing to finish the case quickly. However, with the benefit of additional time, a motivated legal office may have been willing to search for new evidence and bring additional charges. I would not have wanted to expose [Appellant] to that risk. In short, I would not have filed the R.C.M. 707 motion and ceded the only tactical advantage the Defense was likely to have to give the Government further time to convince ES to testify and perfect its case against [Appellant].

2. Law

HN1[] We review claims of ineffective assistance of counsel de novo. *United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)*. Pursuant to *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, Appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the *Sixth Amendment*"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial." Appellant has the burden to demonstrate both deficient performance and prejudice.

HN2[] Reviewing courts "do not measure deficiency based on the success of a trial defense counsel's strategy, but instead examine 'whether counsel made an objectively reasonable choice in strategy' from the available alternatives." **[*11]** *United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015)* (quoting *United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001))*. For this reason, counsel receives "wide latitude . . . in making tactical decisions." *Cullen v. Pinholster, 563 U.S. 170, 195, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* (quoting *Strickland, 466 U.S. at 689*). In making this determination, courts must be "highly deferential" to trial defense counsel and make "every effort. . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time." *Strickland, 466 U.S. at 689*.

HN3[] An accused must be brought to trial within 120 days after preferral of charges. R.C.M. 707(a). The "date of preferral of charges" shall not count, but the date on which the accused is arraigned under R.C.M. 904 shall count. R.C.M. 707(b). Pretrial delays approved by a military judge or convening authority are excluded from the 120 day limit and may be based on "time requested by the defense . . . or additional time for other good cause." R.C.M. 707(c)(1) and its Discussion. "[A]ny interval of time between events is a 'delay' and, if approved by the appropriate authority, is excluded from the government's accountable time under R.C.M. 707(a)." *United States v. Nichols, 42 M.J. 715, 721 (A.F. Ct. Crim. App. 1995)*.

HN4[] The appropriate remedy for a violation of R.C.M. 707 is dismissal with or without prejudice. R.C.M. 707(d)(1). Dismissal with prejudice is determined after considering the following factors: (1) the seriousness of the offense; **[*12]** (2) the facts and circumstances of the case that lead to dismissal; (3) the impact of a re-prosecution on the administration of justice; and (4) any prejudice to the accused resulting from the denial of a speedy trial. *Id.* Dismissal with prejudice is generally only appropriate for a constitutional violation of an accused's right to speedy trial. *Manual for Courts-Martial, United States* (2016 ed.), App. 21, at A21-41.

3. Analysis

Trial defense counsel provided a reasonable explanation for why a motion to dismiss the charges for speedy trial was not raised. First, he believed he had agreed to excludable delay that led him to believe the "true" speedy trial date was 7 September 2017, 10 days after Appellant was arraigned. Second and perhaps most importantly, trial defense counsel believed that ES was reluctant to testify and knew that the most likely outcome of a successful motion would have been dismissal of the charges without prejudice. Counsel, with Appellant's concurrence, made the tactical decision to press to trial rather than allow the Government more time to find more evidence and or convince ES to testify.

Appellant relies solely on the prospect that a successful R.C.M. 707 motion would **[*13]** result in dismissal and therefore concludes the outcome would have been significantly different. However, Appellant provided no evidence of any constitutional violation of his right to speedy trial that would support dismissal with prejudice. Only under those circumstances would Appellant's conclusion be persuasive.

Appellant has not met his burden to show his counsel's tactical actions were unreasonable, or that trial defense counsel's level of advocacy fell measurably below the performance expected. Even assuming *arguendo* we found trial defense counsel's decision not to file an R.C.M. 707 speedy trial motion was not tactically reasonable, under the facts of this case, dismissal with prejudice was not a reasonable possibility. Therefore Appellant has also failed to show a "reasonable probability that absent the error, there would have been a different result." *Gooch, 69 M.J. at 362*. Appellant's trial defense counsel effectively represented Appellant throughout the trial and post-trial and therefore no relief is warranted.

B. Failure to Conduct *In Camera* Review of Mental Health Records

Appellant asserts the military judge erred in denying the request to perform an *in camera* review of ES's mental health records which **[*14]** were not in the possession of the Government or definitively determined to exist. We disagree.

1. Additional Facts

Two days prior to trial, the Government filed a motion requesting ES testify remotely and the Defense objected. One basis for the request was a statement by LS, ES's stepmother, that ES was so fearful of Appellant she would likely be unable to testify in his presence. At the motions hearing on the first day of trial, the Government called Dr. BE, a forensic psychologist, in support of their request for remote live testimony. Dr. BE stated that he met with ES and her parents the day before, and conducted an interview with ES alone that lasted approximately 40 minutes. Dr. BE also met with LS, JS, and MB, ES's biological mother, individually. Dr. BE testified that "one of ES's parents told him that ES had been told for months she would not have to testify at trial." Dr. BE further stated that ES thought she could testify in front of a small group if she were outside the courtroom but preferred not to testify at all. Based on these meetings, Dr. BE testified that it was his expert opinion that if ES were "required to appear in open court and testify in front of [Appellant] **[*15]** that it would cause severe psychological harm or severe psychological trauma." Dr. BE was aware that ES had received counseling but did not rely on that in forming his opinion.

After receiving the Government's motion, the Defense interviewed ES's mother, father, and stepmother the day before trial and learned that ES had received counseling from a civilian provider shortly after the allegations giving rise to the charges and specifications. The counseling "lasted approximately seven weeks, no diagnosis was made, and the counseling ended because ES did not require further treatment." As a result of this interview, the Defense made a verbal request on the record that the military judge compel records pertaining to ES's counseling, contending the information was necessary to be able to effectively cross-examine Dr. BE, and possibly ES, looking for any evidence of "documentary evidence regarding trauma," and possibly to rebut sentencing evidence. The Defense did not call any witness or offer any documentary evidence in support of their motion. The Defense interpreted the exception contained in Mil. R. Evid. 513(d)(2) as removing the privilege whenever the communication is evidence of child abuse or neglect when **[*16]** one spouse is charged with a crime against the child of either spouse.

The military judge denied the motion to compel ES's records, even for an *in camera* review, stating he did not interpret Mil. R. Evid. 513(d)(2) the same way the Defense did and they had not met their burden that the communications would reveal admissible evidence but granted the Government's motion to allow ES to testify remotely unless Appellant elected to absent himself from the courtroom. As a result of the ruling allowing remote testimony, the Defense asked the military judge to reconsider his ruling denying an *in camera* review of ES's counseling records, specifically asking for any discussion of testifying. The Defense asserted that in a case where (1) the patient is a victim of an alleged offense by their parent or spouse of a parent, (2) there is a request for remote

testimony, and (3) the defense satisfies their burden to establish that the counseling records would provide admissible evidence to cross-examine either the victim or the expert who is offering an opinion that non-remote testimony would cause trauma, no privilege applies and the records should be released. The trial defense counsel further argued "we are not going to **[*17]** know what she said to the counselor unless we see the records, and we'll never see the records unless we exactly know what she said to the counselor" and therefore there was only a requirement to establish a "reasonable likelihood" to satisfy the standard for an *in camera* review—"because you never know what you don't know." The military judge denied the reconsideration as to the remote testimony ruling, but left open the Mil. R. Evid. 513 motion regarding cross-examination of ES and sentence rebuttal until they were ripe.[7]

Later that same day, the military judge indicated that he continued to assess the Mil. R. Evid. 513 issue and had advised the Government to make efforts to see if records exist. He also alerted the parties that he had preliminarily reviewed, but not yet fully analyzed *LK v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017)*, and found one bit of language he thought was instructive, which stated that the purpose of Mil. R. Evid. 513(d)(2) is not to turn over every alleged child victim's mental health records to an alleged abuser. The following afternoon, the military judge provided a "follow up ruling" on the Mil. R. Evid. 513 issue which included:

> In analyzing the issue, the court first looks to see whether or not there is an exception to MRE 513 that would be applicable in the case based on the defense's **[*18]** proffer. Assuming an exception may apply, the court would then need to examine the records *in camera* to determine if, in fact, production is warranted, but only if the defense is able to show by a preponderance of the evidence that "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege."
> . . . .
>
> First, I'll just note the only evidence that [ES], in fact, even sought counseling after the alleged offense comes in the form of, essentially, proffers from counsel, as well as a reference during Doctor [BE]'s testimony concerning a comment made by a family member. This, in and of itself, doesn't amount to a likelihood that any such records would yield evidence admissible under an exception to the privilege. Before an *in camera* review can be even conducted that standard has to be met.
>
> Second, assuming the defense were able to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege, the court may examine those records to determine if, in fact, and [sic] exception even applies **[*19]** that would warrant production. The defense has indicated that the records are being requested to rebut the testimony of Doctor [BE] on whether [ES] is, in fact, fearful of the accused, but even if such evidence existed, it's arguable to as even whether or not that type of evidence would amount to evidence of "child abuse or neglect" as required by the exception vice evidence of fear or lack of fear of an absence of the accused.
> But in any event, the second portion of the exception states "or in a proceeding in which one spouse is charged with a crime against a child of either spouse." A plain reading of this language suggests that in any court proceeding where an accused is charged with a crime against his child, that child's mental health records would not be protected by the privilege under MRE 513. It's this court's belief that such an interpretation would produce an essentially absurd result. It would gut the privilege under MRE 513 protecting mental health records of an alleged child victim who is the victim of an alleged accused who happens to be a parent, thereby exposing that alleged victim's mental health record to her alleged parent abuser.
>
> This court adopts the interpretation of the Army **[*20]** Court of Criminal Appeals in a case *L.K. v. Acosta, 76 M.J. 611* . . . . "We interpret any proceeding to mean in the proceeding in question. *MRE 1101(a)* lists the proceedings applicable to the rules of evidence, that is, it is an exception to the evidentiary privilege, not an exception to the disclosure of privileged information. It is an exception that prevents the assertion of the privilege at trial regarding the admission of evidence. It is not an exception that allows the disclosure of privileged information." And the court goes on to state, "In cases of child witnesses, it is the parent or guardian who generally may assert a privilege on behalf of the child. The exception in question thus operates to prevent one spouse from asserting the psychotherapist privilege to prevent the admission of statements of child abuse against themselves or their spouse." This interpretation is consistent with the drafter's intent. The purpose of the exceptions to MRE 513 were to ensure the psychotherapist communications could be transmitted to military commanders without fear of violating the

[7] Ultimately, Appellant chose to voluntarily absent himself from the courtroom during ES's testimony.

privilege contained in the rule, that is a military psychiatrist can inform a military commander of allegations of child abuse without violating the privilege. **[*21]** And this is the Army court's language, but the purpose of the exception was not to turn over every alleged child victim's mental records to the alleged abuser,

Therefore, this court finds that the defense has failed to articulate a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege justifying *in camera* review to determine whether production is even appropriate or that the exception would apply based on the basis for their request.

The court's previous ruling stands. The defense request for the production of mental health records of [ES] is denied.

2. Law

HN5[] We review a military judge's rulings under Mil. R. Evid. 513 for abuse of discretion. *United States v. Chisum, 77 M.J. 176, 179 (C.A.A.F. 2018)*.

HN6[] "Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the [Rules for Courts-Martial], are questions of law reviewed de novo." *LRM v. Kastenberg, 72 M.J. 364, 369 (C.A.A.F. 2013)* (citations omitted). Interpretation of a rule begins with the rule's plain language. *United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)*. The plain language of the rule controls unless use of the plain language would yield an absurd result. *Id.* The fact a party deems a result undesired does not render the result absurd. A result is not **[*22]** absurd merely because it is uncommon, unanticipated, or represents an imperfect realization of the drafter's intent. *See United States v. Fontaine, 697 F.3d 221, 228, 57 V.I. 914 (3d Cir. 2012)*.

HN7[] Mil. R. Evid. 513(a) addresses the psychotherapist privilege and states:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

The privilege has a number of exceptions found in subsection (d):

> (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
> . . .
> (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or accomplishment of a military mission.

HN8[] Whether an exception applies is a fact-specific determination for a military judge to consider. *See United States v. Jenkins, 63 M.J. 426, 430 (C.A.A.F. 2008)*. A military judge must conduct a hearing to determine if the privilege exists. Mil. R. Evid. 513(e)(2). A military judge "may examine the evidence **[*23]** or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications." Mil. R. Evid. 513(e)(3). Before a military judge may do an *in camera* review, the judge must find by a preponderance of evidence that the moving party showed:

> (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
> (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
> (C) that the information sought is not merely cumulative of other information available; and
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3).

In *United States v. Morales, No. ACM 39018, 2017 CCA LEXIS 612 (A.F. Ct. Crim. App. 13 Sep. 2017)* (unpub. op.), we held the military judge did not abuse his discretion in denying a motion to compel mental health records when trial defense counsel frankly conceded he had "no way of knowing" and could "merely speculate" as to the contents of the records. *Morales, 2017 CCA LEXIS 612, unpub. op. at *27*.

The Army Court of Criminal Appeals (ACCA) held ***HN9***[] the second clause of Mil. R. Evid. 513(d)(2) is independent of the first, as the two **[*24]** are separated by a comma and the disjunctive "or." *Acosta, 76 M.J. at 617*. The words "in a proceeding" indicate the second clause only applies to the admissibility of evidence, not the production or disclosure of evidence. *Id. at 618-19*. By contrast, the first clause applies to production, disclosure, and admissibility of otherwise privileged communications.

In *AJ v. Cook, ARMY MISC 20180441, 2018 CCA LEXIS 611*

(A. Ct. Crim. App. 7 Dec. 2018) (unpub. op.), trial counsel breached the victim's privacy by obtaining her mental health records. The case involved the admissibility of evidence, not the disclosure of evidence because the trial counsel sought out and procured petitioner's mental health records on his own initiative, and thereby rendered any questions about whether those records could have been compelled moot. *2018 CCA LEXIS 611, [WL] at *8*. The court held the military judge did not abuse his discretion in admitting the records because the second clause of Mil. R. Evid. 513(d)(2) states the psychotherapist-patient privilege does not apply "in a proceeding in which one spouse is charged with a crime against a child of either spouse."

HN10[↑] The right to confront witnesses does not include the right to *discover* information to use in confrontation. *Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)* ("If we were to accept this broad interpretation . . . the effect would be **[*25]** to transform the *Confrontation Clause* into a constitutionally-compelled rule of pretrial discovery. Nothing in the case law supports such a view.").

3. Analysis

HN11[↑] There "is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)*. Rather, constitutional "discovery" is usually delineated by the contours of the seminal case of *Brady v. Maryland, 371 U.S. 812, 83 S. Ct. 56, 9 L. Ed. 2d 54 (1962)*. As the mental health records in question here were not in the possession of the prosecution, they do not fall under the ambit of *Brady*. With no other constitutional right to disclosure at play, the disclosure of the mental health records in this case is not "constitutionally required."

Here, Appellant sought information to challenge the evidence used to justify remote live testimony, to include cross-examination of Dr. BE and ES if she testified, and asked the military judge to do an *in camera* review of the records. The military judge did not perform the *in camera* review. Our review of the evidence supports the military judge's determination that Appellant did not show there was a reasonable likelihood that the records would yield admissible evidence under an exception to the Mil. R. Evid. 513 privilege or that the requested information met one of the enumerated exceptions in Mil. R. Evid. 513(d).

First and foremost, **[*26]** we hold the military judge did not abuse his discretion in finding Appellant offered no evidence regarding the contents of the records he sought, nullifying any reasonable likelihood they would reveal admissible evidence. Appellant instead relies on the position that the likelihood need only be "reasonable" due to the difficulties in articulating the content of records without knowing the content. Although our analysis could end here, we address the second prong of the test for *in camera* review as it applies to mental health records since this issue is one we see on a regular basis.

We disagree with Appellant's interpretation of Mil. R. Evid. 513(d)(2) that mental health records lose their privileged status when the accused is charged with an offense under the UCMJ involving a child victim who is their own child or the child of their spouse. Applying the standard set out by the CAAF in *United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)* regarding the principles of statutory construction as applied to rules of evidence, we agree with the analysis of our sister service court in *Acosta;* Mil. R. Evid. 513 (d)(2) has two distinct clauses. The first exception would apply if the privileged communications were evidence of child abuse or neglect and allows disclosure to commanders. Here, **[*27]** Appellant was seeking communications involving testifying in general, not statements regarding the offenses themselves. As such, the clause one exception does not apply in Appellant's case.

While Appellant asserts that the second clause "removes" the privilege whenever the victim is the child of the accused or his spouse and therefore allows disclosure of the privileged information, we do not agree with this broad interpretation. As the ACCA stated in *Acosta*, the second clause of Mil. R. Evid. 513(d)(2) only pertains to the *admission* of evidence, not the *disclosure* of evidence, and does not apply in this case. Assuming *arguendo* the evidence sought was admissible, this exception would prevent ES's parent or guardian from asserting the privilege to prevent the admission of ES's statements.

In asserting prejudice, Appellant again combines the impact of the military judge's decision to allow remote testimony and the failure to compel disclosure of ES's mental health records.[8] Appellant ultimately chose to voluntarily absent himself from the courtroom during ES's testimony, so the remote live testimony became a non-issue. Similarly, we are not persuaded the mental health records would have been effective in rebutting **[*28]** ES's unsworn statement in pre-

[8] We do not address Appellant's allegation that the instruction given led the members to believe that Appellant's physical presence would be damaging to ES, which in turn suggested she would only be so harmed if Appellant was guilty. This instruction was given at the request of the Defense and as such, the issue was waived. *See United States v. Harcrow, 66 M.J. 154, 157 (C.A.A.F. 2008)*.

sentencing that "sixteen months ago her life changed forever," as that statement was based not only on the offenses committed that night, but on the overall upheaval of her life as she knew it—moving away from her young siblings, taking their father away from them, and leaving her friends to name a few. The failure to disclose ES's mental health records did not prejudice Appellant.

C. Applicability of the Good Faith Exception to the Exclusionary Rule

Appellant alleges that the military judge erred in finding the good faith exception to the exclusionary rule applied after determining the military magistrate did not have a sufficient basis to find probable cause. We agree. We find the evidence provided to the military magistrate was facially deficient, in that it failed to establish a nexus between Appellant's use of a camcorder and downloading files to a computer. We set aside the finding of guilty as to the indecent recording offense and authorize a rehearing.

1. Additional Facts

On 14 August 2017, the Defense submitted a motion to suppress the evidence obtained during the search of Appellant's home. Both AFOSI Special Agent (SA) MD and TSgt DD testified, **[*29]** as did the magistrate. ES did not testify at the motions hearing.

SA MD was the AFOSI case agent for Appellant's investigation. SA MD did not conduct the interview of ES, but listened to the majority of that interview.[9] SA MD's testimony at the suppression hearing provided a description of the allegations made. ES had found a small handheld camcorder in the bathroom, on the floor covered by clothing to conceal its location. ES retrieved the camcorder, saw it was recording and said there was an 11 minute video of herself in the bathroom. She also indicated that approximately a month earlier, Appellant had come in the bathroom while she was showering and placed a camcorder over the shower curtain, she saw it, and Appellant later told her it was not recording. Finally, SA MD testified that ES told AFOSI that Appellant had requested she send nude photographs of herself to him. SA MD did not recall that ES said she was nude in the video. SA MD also testified that he had attended an Internet Crimes Against Children course and was taught some of the characteristics of people that manufacture and collect child pornography, to include that they do not typically delete files of child pornography, **[*30]** but rather organize and maintain them, which was one of the reasons AFOSI wanted to request search authorization for additional media. SA MD was in the room when TSgt DD called the magistrate.

TSgt DD's testimony at the motions hearing essentially mirrored that of SA MD with regard to the allegations made by ES. He confirmed that there was no evidence that ES was captured nude on the recording that night.

TSgt DD testified as to the normal process to obtain search authorization—call the on-call JAG, patch through with the military magistrate, explain the facts and circumstances of the case, and the magistrate gives search authorization, typically. TSgt DD testified that he called the military magistrate, Colonel (Col) SA, and briefed her on the reasons why a search should be authorized. TSgt DD did not have the camcorder at the time of this request, but testified that the search authorization request included additional media because "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 [his] own personal experience with a camera like that, it would be uploaded **[*31]** to a computer." TSgt DD testified that he believed all the information he verbally shared with Col SA was included in a written affidavit that he provided a few days later to Col SA.

TSgt DD did not brief Col SA regarding any technical specifications of the video camcorder ES described, to include the memory capacity of the camcorder or whether there were any files on the camcorder, or whether files on the camcorder were transferable to a computer or that Appellant had actually connected that camcorder to a computer. TSgt DD did not brief Col SA as to whether any child pornography was known to be on Appellant's computer, or whether he had visited any child pornography websites. Finally, TSgt DD did not recall mentioning to Col SA his belief that traditionally individuals do not watch videos on camcorders, or that files on camcorders can be transferred to computers.

Col SA also testified at the suppression hearing. Col SA agreed that the affidavit contained all the information that TSgt DD verbally briefed her on. Col SA further testified she authorized the broad scope of electronic devices due to her understanding Appellant had asked for photos in the past and held a camcorder over the **[*32]** shower curtain. Col SA also believed that it seemed reasonable that someone would back up their data. However, Col SA acknowledged she did not have any specific technical communications training with regard to the backing up or transferring of files.

The military judge denied the motion, finding that while the magistrate did not have a substantial basis for finding

[9] Although the interview was recorded, there is no audio as the equipment was not functioning properly.

probable cause, all of the elements of the good faith exception to the exclusionary rule were met. The military judge made findings of fact which *inter alia*, included:

> TSgt [DD] testified that he requested authority to seize additional digital media devices because in his experience camcorders were not typically used to watch videos, and therefore he believed the accused may have transferred videos onto other media devices. He did not specifically relay this belief to the magistrate.
>
> The search authorization ([Air Force Form] 1176) and affidavit are before the court as attachments to Appellate Exhibit IX. In the affidavit, TSgt [DD] requests authority to seize "any cameras or electronic media to include hard drives, SD cards, compact discs, computer and tablet computers that could contain evidence of child pornography.". . **[*33]** . The affidavit did not directly tie the camcorder to any other digital media belonging to [Appellant], nor was there evidence presented to the magistrate to suggest [Appellant] 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. . . . Tech Sergeant [DD] stated that he had no specialized training in matters relating to child crimes investigations beyond the initial training he received at the Federal Law Enforcement Training Center (FLETC).
>
> . . . Col [SA] stated that she could not remember verbatim the discussion she had with TSgt [DD] at the time she granted the search authorization due to the time that had passed, but she did have an opportunity to review the search authorization and affidavit prior to providing her testimony. She testified that while she could not recall the verbal discussion verbatim, the written authorization was consistent with her recollection of the discussion. She recalled having a conversation with OSI and JA and that she was informed that [ES] had alleged that she found a camera recording her while she was in the bathroom for a **[*34]** shower that was placed there by [Appellant], that in a previous incident [Appellant] held the camera over the shower curtain while [ES] was in the shower, and that in the past [Appellant] had requested nude photos of [ES]. Specifically, Col [SA] testified that when discussing the scope of the search authorization, she agreed to include other digital media including computers based on the fact that there were multiple instances involving a camcorder and because [Appellant] had asked for naked pictures of [ES]. It was Col [SA]'s impression that this behavior spanned a period of time, and given the fact that there was more than one instance involving the camcorder, she believed [Appellant] had likely backed up the video from the camera onto other devices. Col [SA] testified that backing up such material seemed reasonable to her, and that these factors were all taken into consideration by her when she was considering whether to grant the search authorization. . . . In response to questions posed by the Court, Col [SA] stated that she did not recall talking about the specific nature of camcorders with the OSI agent, but based on her own personal knowledge of camcorders, she would expect **[*35]** that individuals would back them up to other media devices.

In his conclusions of law, the military judge found that

> (1) the facts in Appellant's case were "very similar" to those in *United States v. Nieto, 76 M.J. 101 (C.A.A.F. 2017)* due to the lack of a "particularized nexus between the camcorder and the accused's laptop or other electronic media devices";
>
> (2) the affidavit in Appellant's case "provided even less of a generalized profile than the agent in the *Nieto* case";
> (3) "the military magistrate had no substantial basis for finding probable cause even after according the military magistrate great deference"; and
> (4) "the inevitable discovery doctrine does not apply in this case."

However, the military judge found that "all of the elements of the good faith exception have been satisfied"[10] and concluded his ruling as follows:

> Finally, the court notes that this was a very close call, and recognizes that the court's ruling may appear inconsistent with the holding of the CAAF in *Nieto*. However, given the Supreme Court's favorable approach to the deference provided to magistrates and the warrant process, and the fact that this court has found no bad faith or illegality on the part or actions of the participants involved in the search authorization **[*36]** process that would justify the deterrent remedy of exclusion, the good faith exception to the exclusionary rule justifies greater consideration and analysis.

2. Law

HN12[↑] Appellate courts "review a military judge's [denial of] a motion to suppress . . . for an abuse of discretion." *United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016)*.

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[10] The military judge noted that the *Nieto* decision had been decided approximately two months prior to this case and then later mistakenly indicated the decision was only published approximately two months prior to the execution of this search.

When reviewing a military magistrate's issuance of a search authorization, we do not review the probable cause determination de novo. *Id. at 125*. An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or he misapprehends the law. *See United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010)* (citations omitted). In doing so, we examine 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)*). A substantial basis exists when, under the totality of the circumstances, "there is a fair probability that evidence of a crime will be found at the identified location." *Rogers, 67 M.J. at 165* (citing *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*; *United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)*). Great deference is given to the magistrate's probable cause determination due to the *Fourth Amendment's* strong preference for searches conducted pursuant to a warrant. *Gates, 462 U.S. at 236*. However, as the Supreme Court held in *United States v. Leon, 468 U.S. 897, 914, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*, the deference is "not boundless." If the military magistrate did not have a substantial basis for concluding that probable **[*37]** cause existed, "the Government has the burden of establishing both [the good faith and inevitable discovery] doctrines by a preponderance of the evidence." *Nieto, 76 M.J. at 108*.

HN13[↑] The *Fourth Amendment*[11] protects individuals from unreasonable governmental intrusion into an individual's reasonable expectation of privacy. The *Fourth Amendment* protection against unreasonable searches and seizures applies to military members. *United States v. Ezell, 6 M.J. 307 (C.M.A. 1979)*. The Supreme Court in *Riley v. California* reiterated that "the ultimate touchstone of the *Fourth Amendment* is 'reasonableness.'" *573 U.S. 373, 381, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)*. The question of whether an expectation of privacy exists is resolved by examining whether there is a subjective expectation of privacy that is objectively reasonable. *United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014)*. Searches "conducted pursuant to a warrant [are] presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within 'a few specifically established and well-delineated exceptions.'" *Id. at 99*.

HN14[↑] Mil. R. Evid. 315(f) provides that "[a] search authorization issued under this rule must be based upon probable cause," which "exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(e)(2) provides, "[t]he execution of a search warrant affects admissibility only **[*38]** insofar as exclusion of evidence is required by the Constitution of the United States or any applicable Act of Congress."

HN15[↑] "[T]he 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* (citations omitted).

HN16[↑] In *Leon*, the Supreme Court listed four circumstances where the "good faith" exception would not apply: (1) where the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false"; (2) where the magistrate "wholly abandoned his judicial role"; (3) where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) where the warrant is so "facially deficient . . . in failing to particularize the place to be searched or the things to be seized . . . that the executing officers cannot reasonably presume it to be valid." *Leon, 468 U.S. at 923*.

HN17[↑] In the military, the good faith exception is enumerated **[*39]** in Mil. R. Evid. 311(c)(3), which provides:

> Evidence that was obtained as a result of an unlawful search or seizure may be used if:
>
> (A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
>
> (B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

The United States Court of Appeals for the Armed Forces (CAAF) recently analyzed their decisions concerning the applicability of the good faith exception and acknowledged "tension between [its] discussion of the good-faith doctrine" in its case law interpreting Mil. R. Evid. 311(c). *Nieto, 76 M.J. at 108 n.6* (citing *Hoffmann, 75 M.J. at 127-28*; *United States v. Carter, 54 M.J. 414, 419-22 (N.M. Ct. Crim. App. 2018)*). Our sister court sought to harmonize the holdings in

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[11] *U.S. Const. amend. IV*.

Hoffmann and *Carter* as follows:

> In *Hoffmann*, the CAAF applied the plain language of Mil. R. Evid. 311(c)(3) to determine if otherwise excludable evidence qualified for the good faith exception. . . . Applying **[*40]** the plain language of the rule to this case as the CAAF did in *Hoffman* [sic] is straightforward. Subsection (B) of the rule requires the person who authorized the search to have had a substantial basis for finding probable cause.
> . . . .
>
> *Carter* purports to apply the Supreme Court's seminal good faith case, *United States v. Leon*, to courts-martial.
> . . . .
>
> . . . *Leon* listed four circumstances in which the good faith exception was not available to the government . . . .
>
> . . . [T]he CAAF attempted to reconcile Mil. R. Evid. 311(c)(3)'s three-pronged good faith test with *Leon*. But this is not easily done. In order for a search to qualify for the good faith exception under the plain language of the rule's second prong, the person issuing the authorization must have had a substantial basis for finding probable cause. This is inconsistent with *Leon*, which held that a search might qualify for the good faith exception even if the magistrate did not have a substantial basis for his determination, so long as the police executing the warrant themselves acted in good faith.
>
> The difference could not be elegantly harmonized. To make it work, the *Carter* court recast the rule's second prong. Where the rule asks whether the *person issuing the* ***[*41]*** *authorization* had a substantial basis for finding probable cause, *Carter* changes the question to ask whether *the police executing the search* reasonably believed that the magistrate had a substantial basis for finding probable cause.

United States v. Perkins, 78 M.J. 550, 559-60 (N.M. Ct. Crim. App. 2018).

In *Perkins*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the different standards resulted in different results as to the existence of a substantial basis to find probable cause. NMCCA assessed that *Carter* was inconsistent with the plain language of Mil. R. Evid. 311(c), yet *Hoffmann*'s plain-language approach was inconsistent with *Carter*. Additionally, *Hoffmann* was the more recent decision, yet the CAAF had favorably cited *Carter* and not *Hoffmann in United States v. Darnall, 76 M.J. 326, 332 (C.A.A.F. 2017)*. The NMCCA determined that *Carter* was binding precedent and ultimately ruled that although the military judge erred in determining the magistrate had a substantial basis for his probable cause determination, the agent executing the search reasonably and with good faith relied on the issuance of the authorization. *Perkins, 78 M.J. at 561*.

In light of the "tension" between *Carter* and *Hoffmann*, and the CAAF's recognition without resolution of said "tension" in *Nieto*, the NMCCA "respectfully suggest[ed] that the CAAF resolve the tension between *Carter* ***[*42]*** and *Hoffmann* in favor of *Hoffmann* and the plain language of Mil. R. Evid. 311(c)(3)." *Id. at 565*. The Navy Judge Advocate General certified the case and the CAAF issued its opinion approximately three months ago. *United States v. Perkins (Perkins II), 78 M.J. 381 (C.A.A.F. 2019)*.

The CAAF concluded that the NMCCA properly followed the *Carter* decision, and affirmed the NMCCA decision that the military judge did not abuse his discretion in denying the motion to suppress evidence obtained from the search of Perkins' home. *Id. at 383*.

Explaining the decision in *Hoffmann*, the CAAF stated "[t]he opinion did not address the possibility, recognized in *Carter*, that the good faith exception could be satisfied if the agents executing the search had an objectively reasonable belief that the magistrate had a substantial basis for determining the existence of probable cause, even if the magistrate did not have such a basis." Furthermore, the opinion states:

> The most sensible understanding of *Hoffmann* is that the Court simply did not consider the reasonable beliefs of the agents executing the search. In their briefs in *Hoffmann*, the parties neither cited *Carter* nor addressed the law enforcement agents' beliefs. The Court's opinion in *Hoffmann* likewise did not cite *Carter* or consider Carter's interpretation **[*43]** of M.R.E. 311(c)(3)(B). The *Hoffmann* opinion also did not recognize or address the interpretive problem, explained above, that reading M.R.E. 311(c)(3)(B) literally would render the provision a nullity and eliminate the good faith exception as a practical matter.
>
> To be sure, when precedents conflict, we typically follow the more recent decision. *See United States v. Hardy, 77 M.J. 438, 441 n.5 (C.A.A.F. 2018)*. But in this case, we see strong reasons to adhere to *Carter*. *Carter* contains a thorough consideration of a complicated issue, giving effect to all parts of [Mil. R. Evid.] 311. *Hoffmann* does not. In addition, *Carter* is a longstanding precedent, while *Hoffmann* is not. We have recognized that "[w]e will not overturn 'precedent . . . [that] has been treated as authoritative for a long time . . . unless the most cogent

> reasons and inescapable logic require it.'" *United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018)* (alterations in original) (citation omitted). Accordingly, we disapprove the decision in *Hoffmann* to the extent that it differs from *Carter*.

*Perkins II, 78 M.J. at *388* (alterations in original).

3. Analysis

Unlike the prediction made in Judge Ohlson's dissent in *Perkins II*, this court does not conclude that a commander's probable cause determination—no matter how meritless—is, for all intents and purposes, immune from appellate review. *See* *Perkins II, 78 M.J. at *395*. We agree with the military **[*44]** judge's finding that there was no substantial basis to establish probable cause. 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." 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. Consequently, we find the military judge abused his discretion in denying the motion to suppress.

The military judge appropriately determined that TSgt DD provided sufficient detail regarding ES's allegation to support the search and seizure of the camcorder. However, as was the case in *Nieto*, TSgt DD did not provide a particularized nexus between his request to seize and search more than just the device used to record, in this case the camcorder, and a computer or other electronic device. The failure to provide the necessary nexus was not inadvertent considering the fact that TSgt DD had no knowledge of whether Appellant owned any computers or other electronic devices.

Having determined there was no substantial basis for probable cause, we must address whether there was any exception to the exclusionary rule which would **[*45]** support the decision not to suppress the evidence found on Appellant's computer. Again, we agree with the military judge's determination that the inevitable discovery exception did not apply in this case. There was no evidence that the AFOSI agents possessed or were actively pursuing evidence or leads that would have inevitably led to the discovery of the computer. In addition to the basic fact that AFOSI had no knowledge of whether Appellant owned a computer, they had no evidence that if he did, Appellant routinely connected the camcorder to the computer or could have linked the camcorder or any SD card found in the camcorder to Appellant's computer.

We find the facts of this case do not establish all of the elements of the good faith exception to the exclusionary rule. Starting with Mil. R. Evid. 311, we agree that the magistrate had the authority to issue the search authorization. Having already determined the magistrate had no substantial basis for probable cause, we are left with the third element contained within Mil. R. Evid. 311, whether "the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization" or the restatement of this element **[*46]** 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.'" We find the evidence does not establish this element.

The military judge found that TSgt DD did not recklessly omit or misstate any information. We disagree 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 Appellant's home. None of the information available to the AFOSI agents supported a conclusion that the images captured on the camcorder depicted ES naked. The record also establishes that the AFOSI agents asked ES whether she ever sent any naked photos of herself to Appellant and she responded she did not. The record is clear that at trial, ES testified that she never sent any nude photos and no nude photos were found. *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." **[*47]** *Article 134, UCMJ, 10 U.S.C. § 934*. The offense for which Appellant was charged and convicted involves *indecent* recording, which does not require sexually explicit images (pornography), but images of naked or underwear clad genitalia, anus, buttock, or female areola or nipple. We find the distinction significant, and the fact that the search authorization in this case was premised on the search for child pornography impacts our analysis.

Injecting a reference to child pornography into the request for search authorization at best skewed the facts that were known at the time, and at worst amounted to a reckless misstatement of those facts. Under these circumstances, it is not objectively reasonable for those same law enforcement agents who mischaracterized the predicate evidence, together with others who were briefed that search authorization had been granted, to then reasonably and with good faith rely on the issuance of the search authorization (Mil. R. Evid. 311), or could reasonably believe the magistrate had a substantial basis to authorize the search when she had been misled about the nature of the evidence (*Carter*/*Perkins II*). We believe that the facts of this case fall squarely within the elements of *Leon*

that **[*48]** would exclude the application of the good faith exception based on reckless or facially deficient affidavits used to establish probable cause.

Appellant made this same argument at trial, asserting that the offense charged was not child pornography and the affidavit did not mention any evidence of sexually explicit conduct. The military judge stated:

> [t]o me the issue is probable cause, nexus. What's specifically charged, criminally, is not as critical as . . . what we're talking about here as far as nexus and probable cause. And factually, the act of recording someone in a way that they shouldn't be recorded is similar enough that I'm - again, you [don't] need to spend - any time on that.

While we agree that indecent recording, as charged, is a crime, ***HN18***[↑] application of the nexus requirement is directly related to the evidence of the crime presented to the magistrate and the likelihood of Appellant acting in conformance with others who commit that type of crime. The case law concedes that a law enforcement officer's professional experience may be useful in establishing such a nexus—such as profiles of how those engaged in child pornography generally do not delete files, they maintain them—as **[*49]** SA MD testified and TSgt DD explicitly included in his affidavit. *See* *Leedy, 65 M.J. at 215-16*; *United States v. Macomber, 67 M.J. 214, 220 (C.A.A.F. 2009)* (profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search or seize).

In *Nieto*, the accused was reported to be using his cell phone to film or take pictures of individuals in bathroom stalls and the SA informed the magistrate that Soldiers generally download their photos to their laptops so that when they get to a place with Internet capability they can post them or share them. Additionally, the SA informed the magistrate as to the specific model of phone Nieto owned. There was no mention of Nieto owning a laptop. The CAAF held that a generalized profile without—at a minimum—evidence that Nieto actually downloaded images, illicit or otherwise, from his cell phone to his laptop provided no basis, substantial or otherwise, for the magistrate to conclude that probable cause existed to seize the laptop. *Nieto, 76 M.J. at 103*.

Here, TSgt DD had no knowledge that Appellant owned any computers, 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 **[*50]** media it relied on to store images, or if or how those images could be downloaded. Moreover, TSgt DD had no evidence that any images on the camcorder depicted ES naked, let alone engaged in sexually explicit conduct. Nevertheless, TSgt DD discussed with and later provided a written affidavit to the magistrate asserting that he believed evidence of Appellant's intent to manufacture child pornography was located in his residence.

Despite the absence of any direct evidence, TSgt DD sought search authorization for not just "the" camcorder, but any camera or electronic media that could contain evidence of child pornography. This conduct embodies the very language of *Leon* establishing where the good faith exception would not apply—recklessly omitting or misstating the information to obtain the authorization. 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. The dissent relies on the fact that both TSgt DD and the magistrate **[*51]** reasonably inferred that Appellant would download videos from his camcorder onto another device. That reasonable inference would require knowledge that Appellant had a device to download the camcorder to and there was no such evidence at the time the search authorization was sought and approved. Without any knowledge that Appellant possessed a computer, the inference that he was manufacturing child pornography was unreasonable. Under Mil. R. Evid. 311 and *Carter*/*Perkins II*, the elements of the good faith exception to the exclusionary rule are not met in this case and the evidence should have been suppressed.

Having found the military judge abused his discretion in denying the defense motion to suppress, Appellant is entitled to relief only if he can show material prejudice to a substantial right. *Article 59(a), UCMJ, 10 U.S.C. § 859(a)*.

The error here is of a "constitutional dimension." *Hoffmann, 75 M.J. at 128*. ***HN19***[↑] Constitutional error is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quoting *Mitchell v. Esparza, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003)*). The burden is on the Government to prove the constitutional error was harmless. *See* *Hoffmann, 75 M.J. at 128*. An error that "did not contribute to the verdict" is one which was "unimportant **[*52]** in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* (quoting *Yates v. Evatt, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)*).

The search of Appellant's home yielded evidence that the Government used to establish Appellant's guilt to the indecent recording charge and specification. Based on the testimony of

ES, she never saw a recording when Appellant was alleged to have held the camcorder over the shower curtain and knew that a video was on the camcorder on 20 April 2016. Accordingly, we find that the erroneous admission of evidence prejudiced Appellant with regard to the indecent recording charge and its specification.

D. Post-Trial Processing Delay

1. Additional Facts

Appellant's court-martial concluded on 2 September 2017. The convening authority took action on 27 December 2017 and the case was docketed with the court on 29 January 2018.

2. Law

HN20[↑] In *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*, the CAAF established a presumption of a facially unreasonable delay when "the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action[,]" and when "appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court **[*53]** of Criminal Appeals."

Where there is such a delay, we examine the four factors set forth in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review and appeal; and (4) prejudice." *Moreno, 63 M.J. at 135* (citations omitted). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id. at 136* (citing *Barker, 407 U.S. at 533*).

In *Moreno*, the CAAF identified three types of cognizable prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. *63 M.J. at 138-40* (citations omitted).

In *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*, the CAAF recognized ***HN21***[↑] this court has the *de novo* power and responsibility to disapprove any portion of a sentence that it determines, on the basis of the entire record, should not be approved, even absent any actual prejudice.

3. Analysis

In this case there was a facially unreasonable delay of three days from action to docketing and three weeks from docketing to our decision. Appellant did not raise the action to docketing delay and as such asserts no prejudice and we find none. Appellant has also not asserted **[*54]** his right to speedy appellate review. We are mindful of the delay in issuing our opinion. As the CAAF themselves noted in *Nieto*, there was "tension" created by the *Hoffmann* and *Carter* opinions, and *Perkins II*, decided only three months ago, greatly impacted the completion of our appellate review. In light of the fact that further review will be required, we do not address the prejudice aspect at this time.

III. CONCLUSION

The finding of guilty to the Specification of Charge I and to Charge I is **AFFIRMED**. The finding of guilty to the Specification of Charge II and to Charge II is **SET ASIDE**. The sentence is **SET ASIDE** and the case is returned to the Judge Advocate General for further processing consistent with this opinion. A rehearing is authorized. *Article 66(e), UCMJ, 10 U.S.C. § 866(e)*.

Concur by: LEWIS (In Part)

Dissent by: LEWIS (In Part)

Dissent

LEWIS, Judge (concurring in part and dissenting in part and in the result):

I agree with my esteemed colleagues that (1) Appellant's trial defense counsel team effectively represented him when they elected not to file a speedy trial motion pursuant to Rule for Courts-Martial (R.C.M.) 707; (2) the military judge committed no error when he declined to perform an *in camera* review pursuant to Mil. R. Evid. 513; and (3) Appellant was not prejudiced **[*55]** and his due process rights were not violated by a facially unreasonable delay in the docketing of his case with this court.

Contrary to the majority opinion, I conclude the military judge did not abuse his discretion when he denied the Defense

motion to suppress under the *Fourth Amendment*.[1] I find the military judge properly applied the good faith exception and permitted the Prosecution to introduce into evidence videos recovered from Appellant's computer that showed Appellant indecently recorded his 12-year-old stepdaughter, ES, on divers occasions.

Before the military judge denied the motion to suppress, he made extensive findings of fact in his 10-page written ruling. His ruling was also orally read into the record. His findings of fact are well supported by the record and not clearly erroneous. *See United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)* (citations omitted). I would adopt them in total. The majority opinion disagrees with the military judge's conclusion that there was "no evidence" that TSgt DD recklessly omitted or misstated any information in the affidavit. I believe the military judge did not misapprehend the law on the good faith exception when he determined that TSgt DD did not recklessly omit or misstate any information in his affidavit. **[*56]**

In my view, the military judge's ruling carefully considered the applicability of the good faith exception. His ruling correctly stated the four circumstances when the good faith exception cannot apply. *See United States v. Carter, 54 M.J. 414, 419 (C.A.A.F. 2001)* (quoting *United States v. Leon, 468 U.S. 897, 923, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984))*. Of the four circumstances set forth in *Leon*, only two—the first and third—are at issue in this appeal:

> (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 for the truth"; . . .
>
> (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"; . . .

Id.[2] I will address these two circumstances in turn.

1. *False or reckless affidavit*

In evaluating whether the affidavit contained known false information or information the affiant knew was false, the military judge considered the sworn testimony of the affiant, Technical Sergeant (TSgt) DD, then an Air Force Office of Special Investigations (AFOSI) agent. The military judge characterized the affidavit as "balanced" with no "bad faith or illegality" by the **[*57]** participants. I agree with the military judge's characterizations of the affidavit and the affiant.

In contrast, the majority opinion finds TSgt DD's assertion in the affidavit that Appellant's home "could contain evidence of child pornography" to notably impact the analysis of the good faith exception. I come to a different conclusion and believe the best approach is to address whether the magistrate was misled by information that either (1) TSgt DD knew was false; or (2) would have known was false except for TSgt DD's reckless disregard for the truth. As the majority opinion only concludes that TSgt DD acted recklessly, I only address the second part of the above test.

On the second part, I cannot determine that TSgt DD acted with a reckless disregard for the truth. His affidavit used caveats like "alleged" offense, and "could" contain child pornography. TSgt DD indicated he was seeking evidence of Appellant's "intent" to manufacture child pornography. In the affidavit, TSgt DD did not exaggerate or mischaracterize the facts that ES reported. At best, TSgt DD's word choice of "child pornography" constituted mere negligence in understanding the elements of the offenses being investigated. **[*58]** In essence, TSgt DD's affidavit shows a poor understanding of when a depiction of a 12-year-old girl in some state of undressing or depicted showering would meet the legal definition of sexually explicit conduct.[3] In my view, this does not rise to the level of a reckless disregard for the truth.

Even if the majority opinion is correct that TSgt DD acted with a reckless disregard for the truth, this does not end the inquiry. The magistrate must also be misled by the information provided in the affidavit. The military judge dedicated a half page of his findings of fact to the military magistrate, Colonel (Col) SA. Col SA was trained by the legal office on her magistrate duties and over a two-year period participated in two search authorizations per month with law enforcement and judge advocates. During her motion testimony, Col SA recalled Appellant's alleged actions with

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[1] *U.S. Const. amend. IV*.

[2] Mil. R. Evid. 311(c)(3)(B)'s language "the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause" has been interpreted by the CAAF as addressing the first and third prongs of *Leon*. *See Carter, 54 M.J. at 421*. Additionally, the CAAF recently described *Carter's* discussion of the good faith exception as a "thorough consideration of a complicated issue, giving effect to all parts of [Mil. R. Evid.] 311." *United States v. Perkins, 78 M.J. 381, 388 (C.A.A.F. 2019)*.

[3] *See, e.g., United States v. Piolunek, 74 M.J. 107, 109 (C.A.A.F. 2015)* (citing *United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986))*.

ES correctly. Col SA had the impression that Appellant's behavior with ES spanned a period of time, that more than one incident involving a recording device occurred, and that Appellant asked ES to send him pictures of her unclothed. I find no indication that a poorly worded affidavit that described the alleged **[*59]** offense as involving "child pornography" in the affidavit misled this experienced military magistrate.

2. ***Facially deficient affidavit***

The next question is whether the affidavit so lacked in indicia of probable cause as to render official belief in its existence entirely unreasonable. The facial deficiency litigated at trial, and at issue on appeal, centers around the failure of the affidavit to establish a nexus between Appellant's camcorder[4] and a computer where the videos were ultimately found. The challenge is not to the affidavit as a whole, but to a specific portion of it. *See* *Carter, 54 M.J. at 421* (stating the affidavit must be more than a bare bones recital of conclusions).

The military judge looked closely at *United States v. Nieto*, where the United States Court of Appeals for the Armed Forces (CAAF) found the Government had not met its burden of establishing the good faith exception by a preponderance of the evidence. *76 M.J. 101, 108 (C.A.A.F. 2017)*. In *Neito*, there was no specific and particular nexus between a cellular phone and a laptop computer. *Id.* In his written ruling, the military judge recognized his ruling on the good faith exception was a "very close call" and that it "may appear inconsistent with the holding of the **[*60]** CAAF in *Nieto*." The military judge reviewed both Col SA's perspective as the magistrate and TSgt DD's perspective before concluding "[t]he agents who executed search[5] would be objectively reasonable in believing [Col SA] had a 'substantial basis' for concluding there was probable cause . . . ." (Footnote added).

The military judge determined that Col SA applied "her own common sense belief and understanding regarding the likelihood of an individual transferring data from a camcorder to another media device . . . ." Col SA had already consulted with TSgt DD and a judge advocate before concluding Appellant "had likely backed up the video from the camera onto other devices." Backing up such material seemed reasonable as her impression was that Appellant's behavior "spanned a period of time" and "included more than one instance with the camcorder" and because Appellant asked for naked pictures of ES. Additionally, Col SA testified "based on my personal knowledge of electronic devices in general and including camcorders, I would expect that someone would back up videos or pictures taken on a camcorder, just as a rule."

The military judge also made findings of fact about TSgt DD's personal **[*61]** experience[6] that "camcorders were not typically used to watch videos." For that reason, TSgt DD "believed [Appellant] may have transferred videos onto other media devices."

The military judge ultimately concluded "there is no evidence that the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *See* *Leon, 468 U.S. at 923*. The military judge rejected the challenge that the affidavit was facially deficient.

In my view, the military judge's decision on whether the affidavit was facially deficient was a very close call. *Nieto* is important precedent on the application of the good faith exception to digital evidence and the CAAF published *Nieto* two months prior to Appellant's trial. But the electronic device in *Nieto* was different and to me that matters to the analysis of whether the good faith exception applies.

Both Col SA and TSgt DD independently believed it was common sense for Appellant to connect a camera or camcorder to another media device, like a computer. Col SA deemed this inference reasonable when she granted the search authorization. A judge advocate was present for the telephone discussion with **[*62]** Col SA and TSgt DD. The record shows no objections by this attorney. The military judge found the affidavit was not "so lacking in indicia of probable cause" for it to be objectively "entirely unreasonable." So too, I cannot conclude that a reasonably well-trained officer would have known that the search of a computer found inside

[4] The affidavit uses the word "camera" consistent with the AFOSI interview notes of ES. The military judge's ruling uses "camera," "video camera," and "camcorder" in different portions of his findings of fact. During motion practice, SA MD recalled ES describing the "camera" as a "small handheld camcorder" and "small camcorder with a flip out screen." TSgt DD similarly described the "camera" as a "small camcorder with the flip out screen."

[5] During the search of Appellant's home, TSgt DD seized the computer from which the videos were eventually recovered.

[6] SA MD's motion testimony described a discussion at the AFOSI detachment on the scope of the search authorization. "We wanted to search for obviously the camcorder, but we also wanted to search for anything that could contain digital media because we felt it was likely that -- most camcorders, you have to attach them to a computer or other storage device to save videos." The military judge did not reference this testimony in his findings of fact. I include it only to provide context to the findings of fact the military judge made about TSgt DD's personal experience.

Appellant's home near a camcorder was illegal despite the magistrate's authorization in light of all of the circumstances. *See* *Leon, 468 U.S. at 922 n.23*. Therefore, in my view, the military judge did not abuse his discretion in denying the defense motion to suppress and applying the good faith exception.

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