No. 17-701

IN THE

Supreme Court of the United States

JAMES W. RICHARDS, IV,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent attempts to deny the existence of a circuit split by glossing over the significant disparities in how the circuits treat the issue of particularization, and lumping all circuits together as approaching the issue in a contextual manner. Brief in Opposition at 13–14 ("Opp'n Br.") ("Like the CAAF and the other civilian courts of appeals, the Sixth Circuit generally holds that the degree of specificity required in a warrant must be judged on a "case-by-case basis."). However, this oversimplification ignores the fact that the circuits employ significantly different analytical approaches in these cases.

Respondent also tries to confuse the particularity issue clearly presented by this case by arguing that an oral search authorization in the context of a military investigation transforms the case into a poor vehicle to address the question. *Id.* at 12–13 ("The proper focus of the particularity analysis in this case is … the military magistrate's oral authorization, not the written form prepared the following day.") However, no such vehicle problem exists because the CAAF opinion relied on the *written* warrant, and did not recognize additional restrictions imposed by any oral authorization. Pet. App. at 11a (referencing "the authorization and the accompanying affidavit"). Nor did the CAAF opinion rely exclusively, or even primarily on military court precedents. Rather, that court based its decision on federal circuit court opinions. *Id.* at 7a–11a (citing precedent from the 3rd, 4th, 6th, 7th, 9th, and 10th circuits).

Finally, respondent contends that even if the search authorization was overbroad, both the inevitable discovery and good faith exceptions apply. Opp'n Br. at 17–18. However, respondent has not satisfied its bur-

den to show that the evidence recovered during the illegal search would inevitably have been discovered through legal means, and the record does not support a finding of good faith and this question was not passed upon by CAAF in this case.

I. DESPITE RESPONDENT'S CHARACTERIZATION, A SPLIT EXISTS AMONG THE CIRCUITS REGARDING THE EFFECT OF TEMPORAL LIMITATIONS ON PARTICULARITY.

Respondent contends that the Sixth Circuit analyzes temporal limitations in search authorizations on a "case-by-case" basis, rather than applying a categorical rule. Opp'n Br. at 13a–15a. This misstates the specific legal rule, which the Sixth Circuit first established in *Ford* and later reaffirmed in *Abboud* and *Lazar*: "Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." *United States* v. *Ford*, 184 F.3d 566, 576 (6th Cir. 1999). See also *United States* v. *Abboud*, 438 F.3d 554, 571 (6th Cir. 2006) (citing *Ford* in invalidating a search authorization for its failure to limit the search to the relevant "three-month period"); *United States* v. *Lazar*, 604 F.3d 230, 238 (6th Cir. 2010) (citing *Ford* in invalidating a search authorization in which "the government … referenced … most importantly, no time frame."). Moreover, the narrow exception carved out in *Ford* does not convert the Sixth Circuit's clear requirement for temporal limitations into a "case-by-case" approach. Specifically, while *Ford* upheld the portion of the authorization for the "fruits and evidence of gambling," *id.* at 578, a time frame would have been inapplicable in that instance because those types of items are not dated. As such, the decision to uphold this portion of the search authorization did

not negate the Sixth Circuit's clearly stated rule requiring a temporal limitation where a date range is known and applicable to the items listed in the authorization.

Additionally, in contending that the decisions of the Fourth and Seventh Circuits are not implicated in this case, Opp'n Br. at 15–16, respondent disregards the distinct analytical approach these two circuits have adopted in assessing temporal limitations in search authorizations. See *United States* v. *Mann,* 592 F.3d 779, 780 (7th Cir. 2010); *United States* v. *Williams,* 592 F.3d 511, 514–16 (4th Cir. 2010). Specifically, while *Mann* and *Williams* focus on the *execution* of the search authorization, both decisions establish that the Fourth and Seventh Circuits consider temporal limitations in search authorizations to be optional, even where a time frame was known by law enforcement when the authorization was issued and the items sought were necessarily dated.

In *Mann,* the Seventh Circuit upheld a search authorization for "images" that lacked any temporal limitation even though the images sought were taken by the defendant during a month-long time frame that was known to the police at the time the search authorization was issued and the images would be time-stamped. 592 F.3d at 780. Likewise, the Fourth Circuit in *Williams* upheld a search authorization for "[i]nstrumentalities indicat[ive] of … Harassment by Computer … Threats" without any temporal limitation even though law enforcement knew the month in which the email harassment began and the emails would be dated. 592 F.3d at 515. Like the images sought in *Mann* and the emails at issue in *Williams,* the communications sought in the case at hand were dated, and law enforcement had full knowledge of the relevant time frame that could have been incorpo-

rated into the search authorization. Thus, in upholding the search authorization for "any … electronic media" without referencing the known time frame of the communications sought, CAAF aligns with the Fourth and Seventh Circuits and against the Sixth Circuit.

II. NEITHER THE ORAL SEARCH AUTHORIZATION NOR THE MILITARY CONTEXT MAKE THIS CASE A POOR VEHICLE TO ADDRESS THE QUESTION PRESENTED.

Respondent broadly asserts "the military context" and the "oral search-authorization procedure" would make this case an unsuitable vehicle for providing guidance on the application of the particularity requirement. Opp'n Br. at 16. To the contrary, there is nothing about the "military context" that makes this case unsuitable.

The military magistrate determined that probable cause existed and provided verbal authorization for search, which was then memorialized in writing. Although oral search authorizations are permitted under Military Rule of Evidence 315, in the context of government searches of digital media conducted by forensic examiners located in a distant laboratory, the inefficacy of an oral authorization is obvious. Indeed, the forensic examiner who searched appellant's hard drive never received an oral authorization. Instead, as in other cases dealing with searches of digital media, the search authorization here was relayed to the forensic examiner in writing. See Pet. App. at 171a–172a. An oral authorization offers no cure to the constitutional problem here.

In upholding the written search authorization (warrant) in this case, notwithstanding its lack of a temporal limitation, the CAAF relied upon the writ-

ten warrant and accompanying affidavit when it created a new position in an unsettled area of law, and thereby entered the three-way circuit split which groups six circuits in one camp, the Sixth Circuit in another, and the Fourth Circuit, Seventh Circuit and the CAAF in a third. Specifically, the CAAF relied on Fourth Circuit and Seventh Circuit precedent in holding the warrant and accompanying affidavit in this case were sufficiently particularized despite allowing for "a search of the unallocated space and through potential communications materials that did not have an immediately clear date associated with them." Pet. App. at 11a.

Similarly, the lower appellate court, the Air Force Court of Criminal Appeals (AFCCA) relied upon the written warrant and accompanying affidavit when deciding this issue. In its opinion, the AFCCA looked to case law from the circuit courts and ultimately concluded that "courts have demonstrated a trend toward granting investigators latitude in the manner in which computer searches are conducted" and that "[b]ecause computers and other electronic devices with internal digital storage have the capacity to store tremendous amounts of intermingled data, there may not be a practical substitute for briefly examining many, if not all, of the contents." Pet. App. at 55a–56a. Thus, the warrant for all electronic media becomes the modern equivalent of a general warrant.

III. NEITHER THE "INEVITABLE DISCOVERY" NOR "GOOD FAITH" EXCEPTIONS APPLY.

The inevitable discovery doctrine does not require admission of the evidence discovered during the course of the illegal search. Respondent acknowledges that "The CAAF expressly stated … that files with apparent dates earlier than 'approximately April

2010' were 'outside the scope of the search authorization.'" Opp'n Br. at 11 (quoting Pet. App. at 12a). However, respondent then argues that the unallocated data is somehow exempt from this limitation.

The government has the burden of proof to demonstrate that the evidence from the unallocated folder would inevitably have been discovered absent the unlawful search. *United States* v. *Vasquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998) ("It is the government's burden to show that the evidence at issue would have been acquired through lawful means….").

Respondent attempts to satisfy this burden through the use of a confession that petitioner never made: "Petitioner does not appear to dispute that the search authorization was valid to the extent it allowed the AFOSI agents to search for evidence of his communications with AP by examining files that were dated after April 2010 *or that lacked readily apparent dates*." Opp'n Br. at 18 (emphasis added). However, Lt Col Richards does not concede that the *unallocated* data fell within the search authorization in this case. Rather the petition acknowledged only that adopting a rule requiring search warrants to include temporal limitations when known would not prevent the search of unallocated data altogether but "would simply require law enforcement to secure an additional broader warrant if it becomes clear that the amount of unallocated data makes it impossible to conduct an effective search while adhering to temporal constraints." Cert. Pet. at 20.

Respondent makes this assertion because based on the record it simply cannot show that the illegally seized evidence would inevitably have been discovered. Such a contention rests on an assumption, not supported in the record, that at least some of the unallocated images came from the laptop with the shut-

down date of 2011. Opp'n Br. at 18. ("The CAAF concluded that the first image of child pornography at issue here either was discovered, or inevitably would have been discovered, during a search limited to such materials."). But as the CAAF opinion states "Neither Agent Nishioka nor trial counsel indicated any obvious delineation between materials found on individual devices in their description of what was contained on FDE #1." Pet. App. at 12a. Because the record indicates that the sources of the unallocated material could not be distinguished, it is entirely unclear which images came from the laptop and which came from the hard drives (which petitioner contends were illegally searched).[1]

Respondent failed to establish a clear record detailing the source of the unallocated images. In light of this failure, a finding that investigators would have inevitably discovered the images uncovered during the search of FDE #1, would require exactly the type of speculation, this Court prohibited in *Nix*. See *Nix* v. *Williams*, 467 U.S. 431, 444 n.5 (1984) ("[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and

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[1] An Exhibit Report provided by the government in response to a 404(b) motion in limine, does attribute some images from to the laptop. Gvt. Resp. to Mot. in Lim. at 42–49 (filed Nov. 5, 2012). However, the record does not indicate how these images were linked to the laptop. Additionally, the included images consist only of "damaged household items" and images of AP, the individual whose association with Lt Col Richards began in 2010 and provided the exact temporal limitations left out of the search warrant. *Id.* at 42, 47–49. Therefore, even if the search of the laptop was valid, the images discovered would not "inevitably" lead to searches of the external hard drives with shut down dates prior to 2010.

does not require a departure from the usual burden of proof at suppression hearings.")

Nor should the good faith exception prevent this Court from granting Lt Col Richards' petition. Even if the law enforcement officials involved in executing the search acted in good faith, the sweeping importance of the question presented—whether the type of search authorization at issue here requires temporal limitations when known—counsels review by this Court. Indeed, the prevalence and importance of digital information to law enforcement activities strongly suggests that the particularity issue raised in this case is one that will most certainly recur. And although the "capable of repetition, yet evading review" line of authority has traditionally been applied as an exception to the mootness doctrine, *S. Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911), the policy considerations invoked by that exception apply equally here. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam) ("'capable of repetition, yet evading review'" doctrine applicable when "there was a reasonable expectation that the same complaining party would be subjected to the same action again.").

Indeed, several circuit courts of appeals have applied the "capable of repetition, yet evading review" exception to challenges rooted in the Fourth Amendment. See *Bourgeois* v. *Peters*, 387 F.3d 1303, 1309 (11th Cir. 2004); *Williams* v. *Alioto*, 549 F.2d 136, 142–43 (9th Cir. 1977). The very confusion caused by differing treatments of temporal limitations always creates a good faith exception unless this Court clarifies the appropriate standard.

Moreover, the question of whether the officers in this case acted in good faith is a question for the appellate court to consider on remand, and should not

prevent this Court from granting the petition in this case. Neither the CAAF, nor the AFCCA passed on the issue of whether the search of the unallocated data was conducted in good faith. See Pet. App. at 11a–12a, 30a–39a, 47a–49a. See*, e.g.*, *Rodriguez* v. *United States*, 135 S. Ct. 1609, 1616–17 (2015) (holding in a similar context that a traffic stop which was extended for ten minutes while police brought a drug dog to the scene could not be justified as a *de minimis* extension of the traffic stop, but remanding to the appellate court to determine whether reasonable suspicion existed because the appellate court never ruled on the issue).

Had the lower courts addressed good faith directly, respondent would have been required to show that the warrant was not facially deficient under the fourth prong of *United States* v. *Leon*, 468 U.S. 897, 923 (1984) (opining that some warrants are "so facially deficient—*i.e.,* in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."). Here, the investigators should have known that the lack of any restrictions at all to their search—despite knowledge of a specific date range of the alleged activity—rendered the search authorization patently overbroad and invalid.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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