No. 20-_____

IN THE

Supreme Court of the United States

JASON M. BLACKBURN,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

At trial, the military judge found probable cause did not exist where federal agents searched for and seized a personal computer from Petitioner's home. The military judge made this determination because the search affidavit did not directly tie Petitioner's camcorder to any other digital media belonging to him, nor was there evidence presented to the magistrate to suggest Petitioner was involved in the viewing or transmitting of child pornography beyond the allegation that he may have used his camcorder to videotape his 12-year-old step daughter while she was naked in the bathroom. The military judge, however, found the good faith exception applied. The Air Force Court of Criminal Appeals (AFCCA) disagreed and set aside Petitioner's conviction. The U.S. Court of Appeals of the Armed Forces (Court of Appeals) subsequently overturned the AFCCA's decision, finding the good faith exception applicable because the federal agent did not act with a reckless disregard for the truth when seeking the search authorization.

The Question Presented is:

Whether the Court of Appeals erred in holding the good faith exception applied to the search and seizure of Petitioner's computer?

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PETITION FOR A WRIT OF CERTIORARI

Air Force Staff Sergeant Jason M. Blackburn respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted in the Appendix at Pet. App. 3a. The opinion of the AFCCA is not reported. It is reprinted in the Appendix at Pet. App. 27a.

JURISDICTION

The Air Force Judge Advocate General certified Respondent's case to the Court of Appeals, which decided the case on July 24, 2020. *United States* v. *Blackburn*, 2020 CAAF LEXIS 405 (C.A.A.F. 2020) (mem.). This Court, therefore, has jurisdiction under 28 U.S.C. § 1259(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Procedural History

Petitioner, a Staff Sergeant in the Air Force, pled not guilty to but was convicted of sexual abuse of a child in violation of Article 120b of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 910(b) and indecent recording in violation of Article 120c, UCMJ, 10 U.S.C. §, 920c. He was sentenced to a bad conduct discharge, five years of confinement, and a reduction to the grade of E-1. Because his sentence included a punitive discharge and more than one year of confinement, the Judge Advocate General referred the case to the AFCCA, before which Petitioner argued that the evidence admitted by the Government was searched for and seized in violation of the Fourth Amendment.
10 U.S.C. § 866(b)(1).

On August 22, 2019, a three-judge panel set aside the charge of indecent recording. (Pet. App. 53a.) Respondent then requested the AFCCA reconsider the decision *en banc*, which was denied. The Air Force Judge Advocate General subsequently ordered the case sent to the Court of Appeals for review.

After full briefing and oral argument on the merits of Respondent's challenge, the Court of Appeals held that the AFCCA erred in ruling the good faith exception did not apply to the search and seizure of Petitioner's property and remanded the case to the AFCCA for further review.

II. Factual History

On April 20, 2016, Technical Sergeant (TSgt) D.D., formerly of the Air Force Office of Special Investigations (OSI), learned that Petitioner allegedly

videotaped his stepdaughter, E.S., while she was in the shower. (Pet. App. 5a.) TSgt D.D. interviewed E.S.'s biological father, Mr. J.S., and listened to E.S.'s interview where she alleged Petitioner previously requested a nude photograph of E.S. (Pet. App. 5a.) There was no indication TSgt D.D. asked E.S. or Mr. J.S. if the video involved any sexual acts, nor did he ask E.S. to describe what kind of activities occurred in the video besides E.S.'s presence in the bathroom. TSgt D.D. merely understood that E.S. found a small camcorder with a flip out screen, which was recording in the bathroom. (Pet. App. 5a.) TSgt D.D. later testified:

> [T]ypically with devices such as that people don't use them to watch what they recorded, for purposes of maybe reviewing to make sure they captured the actual image. Typically, in my own personal experience with a camera like that, it would be uploaded to a computer.

(Pet. App. 42a.) However, TSgt D.D. had not received any specialized training with regard to computer crimes or child pornography other than the basic OSI training on electronic storage regarding the typical practices of child pornographers. (Pet. App. 43a.)

TSgt D.D. sought authorization to conduct a search of Petitioner's electronic devices. (Pet. App. 5a.) He approached the military magistrate and briefed her on the reasons why a search should be authorized. (Pet. App. 30a.) TSgt D.D. testified that he believed all the information he verbally shared with the magistrate was included in a written affidavit that TSgt D.D. provided her. (Pet. App. 42a.) The magistrate concurred that TSgt D.D. included all information discussed in the written affidavit. (Pet. App. 42a.)

In the search affidavit he provided the magistrate, TSgt D.D. stated:

> Based on my experience, training and the facts listed above, I believe evidence proving [Petitioner's] intent to manufacture child pornography is located within his residence. Therefore, I respectfully request authorization to search and seize any and all cameras or electronic media to include hard drives, SD cards, compact discs, computers and tablet computers that could contain evidence of child pornography within [Petitioner's] residence . . .

(Pet. App. 30a.) During the subsequent search, over 300 items were seized, including two camcorders, one external hard drive, seven hard drives, three digital cameras, one thumb drive, three laptop computers, one tablet, one SD card, two tower computers, and a bag with sixteen screws and a rechargeable battery. (Pet. App. 5a.) TSgt D.D. executed the warrant and collected over 200 of the 300 items seized. (Pet. App. 5a.)

TSgt D.D. did not brief the magistrate regarding any technical specifications of the camcorder E.S. described, such as the memory capacity of the camcorder or if there were any files on the camcorder. (Pet. App. 42a.) Additionally, TSgt D.D. did not provide any information to the magistrate as to whether files on the camcorder were transferable to a computer or that Petitioner had actually connected that camcorder to a computer. (Pet. App. 42a.) TSgt D.D. did not brief the magistrate as to whether any child pornography was known to be on Petitioner's computer, or whether he visited any child

pornography websites. (Pet. App. 42a.) Finally, TSgt D.D. did not recall mentioning to the magistrate his belief that individuals typically do not watch videos on camera, or that files on cameras can be transferred to computers. (Pet. App. 42a.)

The magistrate testified she authorized the broad search of Petitioner's electronic devices due to her understanding Petitioner had asked for photos in the past and held a camera over a shower curtain on a previous date. (Pet. App. 42a.) She also believed that, based on her personal preference, people generally back up files thought to be valuable. (Pet. App. 42a.) However, the magistrate acknowledged she did not have any technical communications training with regard to the backing up or transferring of files. (Pet. App. 42a.)

On August 14, 2017, the Defense submitted a motion to suppress the evidence obtained during the search of Petitioner's home. (Pet. App. 5a.)

The military judge agreed with the Defense that the search affidavit was deficient. He explained the affidavit did not

> directly tie the camcorder to any other digital media belonging to [Petitioner], nor was there evidence presented to the magistrate to suggest [Petitioner] 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.

(Pet. App. 43a.) The military judge additionally asserted the facts in Petitioner's case were "very similar" to those in the binding authority of *United States v. Nieto* due to the lack of a "particularized

nexus between the camcorder and the accused's laptop or other electronic media devices." (citing 76 M.J. 101 (C.A.A.F. 2017)).(Pet. App. 44a.) Further, the affidavit in Petitioner's case "provided even less of a generalized profile than the federal agent in the *Nieto* case."(Pet. App. 44a.) Therefore, the military judge ruled "the military magistrate had no substantial basis for finding probable cause even after according the military magistrate great deference." (Pet. App. 44a.)

However, the military judge found that even though the military magistrate "did not have a substantial basis for determining the existence of probable cause, all the elements of the good faith exception have been satisfied." (Pet. App. 44a.) The military judge based his assessment on the following: (1) "the magistrate had the authority to issue the search authorization"; (2) the request for the search authorization was supported by an affidavit which was detailed, balanced, and not bare bones; and (3) the military magistrate applied "common sense belief and understanding regarding the likelihood of an individual transferring data from a camcorder to another media device." (Pet. App. 57a.) The military judge further concluded that the federal agents executing the authorization had a reasonable belief the military magistrate had a substantial basis for finding probable cause "given that the *Nieto* case was only published approximately two months prior to the execution of this search."(Pet. App. 44a.)

III. Legal Background

The Fourth Amendment protects individuals from unreasonable governmental intrusion into an individual's reasonable expectation of privacy. "The

basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967). The Court of Military Appeals held 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). Mil. R. Evid. 315(f) codified this holding, providing 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." Further, Mil. R. Evid. 315(e)(2) provides, "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."

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) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The Fourth Amendment prohibits general warrants; in order to prevent the police from undertaking a general, exploratory rummaging through a person's belongings, a warrant must give a "particular description" of the things to be seized. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 196 (1927). This Court reiterated in *Riley v. California* that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" 273 U.S. 373, 407 (2014).

Instituting this Court's decision in *United States v. Leon*, 468 U.S. 897 (1987) through Mil. R. Evid. 311(c), four exceptions are enumerated for the admission of evidence at a court-martial that is obtained from an unlawful search and seizure: (1) impeachment, (2) inevitable discovery, (3) good faith, and (4) reliance on statute. Under Mil. R. Evid. 311(c)(3), "[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 (quoting Mil. R. Evid. 311(c)(3)).

This Court has identified situations where the "good faith" exception does not apply:

> (1) False or reckless affidavit--Where the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";
>
> (2) Lack of judicial review--Where the magistrate "wholly abandoned his judicial role" or was a mere rubber stamp for the police;
>
> (3) Facially deficient affidavit--Where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and
>
> (4) Facially deficient warrant--Where the warrant is "so facially deficient --

> i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid."

United States v. Carter, 54 M.J. 414, 419-20 (C.A.A.F. 2001) (quoting *Leon*, 468 U.S. at 923). "The second prong [of Mil. R. Evid. 311(c)(3)] addresses the first and third exceptions noted in *Leon*, i.e., the affidavit must not be intentionally or recklessly false, and it must be more than a 'bare bones' recital of conclusions." *Id*. at 421.

"'Substantial basis' as an element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization." *Id*. at 422. This is satisfied "if the magistrate authorizing the search had a substantial basis, in the eyes of a reasonable law enforcement official executing the search authorization, for concluding that probable cause existed." *United States v. Perkins*, 78 M.J. 381, 387 (C.A.A.F. 2019) (citation omitted).

While the decision of the magistrate with regard to probable cause is given deference, it is not boundless. *Leon*, 468 U.S. at 914. "It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." *Id*. at 914. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239 (1982). "Suppression therefore remains an appropriate remedy if the magistrate or judge in

issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 at 923.

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

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Misapplied the Good Faith Exception

The Court of Appeals erred in their findings. The federal agent acted with a reckless disregard for the truth in at least three significant ways. First, when obtaining the search authorization, the federal agent obtained no technical specifications of the camcorder he was searching for, despite having access to this information. This included the federal agent failing to seek out any information as to whether files were transferrable from the camcorder to other electronic devices, and whether Petitioner was known to do so. Further, he used this camcorder as the basis of a

broad search authorization for "any cameras or electronic media to include hard drives, SD cards, compact discs, computers and tablet computers that could contain evidence of child pornography." Based on the allegation made by E.S. involving a single camcorder, federal agents seized over 300 items from Petitioner's house. This lack of a nexus between the camcorder and other electronic devices extinguished probable cause under the ruling of the military judge.

The lack of knowledge and reckless disregard for the truth is further shown by the agent's refusal to obtain any technical specifications of the camcorder through E.S. and Petitioner's wife, M.B., to whom he had access. Second, while briefing the magistrate in advance of obtaining the search authorization, the federal agent provided no technical specifications of the camcorder to the magistrate due to his lack of knowledge. Therefore, any inference made by the magistrate as to the capabilities of the electronics was unreasonable. Indeed, any inference the magistrate made regarding whether Petitioner was likely to back up his files was based solely on her own subjective views on what may be considered valuable, rather than on any factual basis provided by the federal agent as a result of his investigation. The third error was the misstatement by the federal agent of the alleged crime as the intent to "manufacture" child pornography where there was absolutely no evidence of E.S. being captured by the camcorder in a state of nudity, let alone in a manner which arose to sexually explicit conduct.

The Court of Appeals indicated counsel who advised the magistrate did not object during the meeting with the magistrate for the federal agent to obtain the search authorization. However, the

attorney who advised the magistrate was provided the same misleading information with regard to the lack of technical specifications known by the federal agent and the unsupported basis of intent to manufacture child pornography as was relayed to the magistrate. Therefore, he was unable to object to the erroneous information, as he was unaware of it at the time of the authorization.

In addition, the Court of Appeals only briefly addressed how the federal agent's belief that the magistrate had a substantial basis existed in this case. In doing so, the Court of Appeals distinguished this case from their previous decision in *Nieto*, only stating that the magistrate and federal agent had a "common sense knowledge" that files could be transferred from camcorders to computers and the ownership of the computer was not in question. However, the Court of Appeals ignored *Leon*, which states "Reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause.'" 468 U.S. at 915 (citation omitted); *see also United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988) ("The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate."). Here, a factual basis was lacking, as noted by the Court of Appeals when it stated that the magistrate and the federal agent shared a "common sense knowledge." In Petitioner's case, at no point prior to requesting the search were the federal agents aware of the type of camcorder implicated. All the federal agents could confirm was that it was a small camcorder with a "flip out screen." At the time the search affidavit was approved, the federal agents and the magistrate were

unaware of whether it was even a digital camcorder which would allow for the inference that it could be connected to the computer. Without this information, neither the magistrate nor the federal agents would have had a reasonable belief that the camcorder could be connected to any other electronic devices to transfer files, which was the sole basis of the search.

II. The Importance of This Case

The erroneous analysis by the Court of Appeals will undermine Fourth Amendment jurisprudence by enabling military magistrates to rely on mere conjecture from federal agents when approving search warrants involving any electronic devices.

This speculation will have compounding implications as technology continues to evolve and develop. Finding that there is no requirement for any knowledge of technological specifications to buttress the commonsense understanding of electronics causes the good faith doctrine to become the exception that swallows the rule, allowing the probable cause requirement to become impotent.

The ruling in Petitioner's case will allow law enforcement agents to claim they have generic understandings of nearly all electronics without requiring federal agents to know what the device is and what its capabilities are. This will undermine the protections of the Fourth Amendment that no warrant shall issue but upon probable cause. If the good faith exception is utilized to save warrants which fail to properly demonstrate a nexus, as occurred in Petitioner's case, law enforcement agents are given substantially more power in applying for search warrants and in their execution of search warrants. Allowing law enforcement agents to rely on their

commonsense knowledge rather than on the actual technical capabilities of the electronics in question will undermine the probable cause mandate. This is in direct contrast with the Court of Appeal's own ruling in *Nieto*.

Further, as the substantial basis requirement examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization, this erroneous ruling ignores the federal agent's complete lack of knowledge. By allowing law enforcement agents to act with reckless disregard by failing to obtain any specifications for the electronics for which they seek a search warrant, law enforcement agents will be able to claim a nexus to other items sought to be seized without a basis.

This will allow law enforcement agents to obtain negligible information in the preparation for requesting a search authorization. When this lack of information results in a search being determined to lack probable cause due to the lack of nexus between the two items, the government will be able to use the good faith exception as a shield to protect the law enforcement agent's lack of knowledge. This should not be permitted, particularly when the same law enforcement agent touches each step of the investigation--collecting the information for the search authorization, obtaining approval from the magistrate and searching the property, as is held in *Pavulak*, 700 F.3d at 665, and *Cordero-Rosario*, 786 F.3d at 72-73. This is especially true in Petitioner's case, where the same federal agent touched each step of the investigation, and his reckless disregard for the truth was condoned by the Court of Appeals through its application of the good faith exception.

To apply the good faith exception to avoid suppression of this evidence dramatically expands the concept of the good faith doctrine, emboldening investigators to seize and search any electronic item in a person's house, regardless of whether the item holds some nexus to the alleged crime, merely because the person allegedly used a separate electronic device in or for an alleged crime. Under that logic, U.S. citizens categorically lose their Fourth Amendment protections for all of their electronic devices merely because they are accused of using one electronic item in the commission of an alleged crime; however, this cannot be the standard. By suppressing this evidence, this Court would send a strong but appropriate and ultimately common-sense message to law enforcement: if you want to seize and search electronic devices, ensure there is some demonstrable nexus to the alleged crime.

Allowing the Court of Appeals' decision to stand will result in service members facing substantially diminished Fourth Amendment protections when compared to their civilian counterparts. Law enforcement agents must have a particularized nexus between the offense committed and the item to be seized for the probable cause standard to be met. However, the Court of Appeals used the Good Faith Doctrine to irradiate this requirement. It did so by finding the federal agent had a reasonable belief the military magistrate had a substantial basis for finding probable cause where the federal agent touched every step of the case, indicating his complete awareness of the lack of information and nexus he provided to the magistrate. Where circumstances similar to Petitioner's are permitted, there is no need for law enforcement agents to aim to obtain probable cause,

as they will nearly always be able to rely on the belief of the magistrate, regardless of how little information they collect or how many baseless inferences they lead the magistrate to make. Granting the petition for a writ of certiorari will demonstrate the right of service members to be free from unreasonable search and seizure is as important and valued as it is for their civilian counterparts.

CONCLUSION

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

Respectfully submitted,

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