No. 17-701

In the Supreme Court of the United States

JAMES W. RICHARDS, IV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a military magistrate's oral authorization to search electronic devices found in petitioner's residence on a military base satisfied the Fourth Amendment's particularity requirement, where the form memorializing the authorization did not expressly limit the dates of the electronic files that could be examined.

2. Whether either 10 U.S.C. 973(b) or the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars a military officer from serving simultaneously as a presidentially appointed judge on the United States Court of Military Commission Review and an appellate military judge on the United States Air Force Court of Criminal Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-13a) is reported at 76 M.J. 365. The decision of the Air Force Court of Criminal Appeals (Pet. App. 14a-165a) is not published in the Military Justice Reporter but is available at 2016 WL 3193150.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces (CAAF) was entered on July 13, 2017. On September 28, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 10, 2017. The petition was filed on November 9, 2017. The jurisdiction of this Court is invoked (Pet. 1) under 28 U.S.C. 1254(1), but jurisdiction does not lie under that provision. The Court's jurisdiction would instead rest on Section

1259(3), which authorizes the Court to review "decisions of the [CAAF] in * * * [c]ases in which the [CAAF] granted a petition for review under [10 U.S.C.] 867(a)(3)."

STATEMENT

Petitioner, an officer in the United States Air Force, was convicted by a general court-martial of one specification of possessing child pornography and five specifications of engaging in indecent acts with a male under 16 years of age, all in violation of 10 U.S.C. 934 (Article 134, Uniform Code of Military Justice (UCMJ)), and four specifications of failing to obey a lawful order, in violation of 10 U.S.C. 892 (Article 92, UCMJ). Petitioner was sentenced to dismissal, 17 years of confinement, and forfeiture of all pay and allowances. The convening authority approved the sentence, and the Air Force Court of Criminal Appeals (AFCCA) affirmed. Pet. App. 14a-165a. The United States Court of Appeals for the Armed Forces (CAAF) granted a petition for review and affirmed. *Id.* at 1a-13a.

1. In April 2011, the Air Force Office of Special Investigations (AFOSI) at Tyndall Air Force Base in Florida initiated an investigation of petitioner based on information from the National Center for Missing and Exploited Children (NCMEC). NCMEC reported that one of petitioner's former "little brothers" from the Big Brothers Big Sisters program had alleged that petitioner sexually abused him between 1993 and 1997. During its investigation, AFOSI learned that petitioner had recently and repeatedly signed a 17-year-old boy onto the base. The boy, AP, stated in an interview with AFOSI agents and investigators from the local sheriff's office that he and petitioner had met online, developed

a sexual relationship, and continued to communicate online as their relationship evolved. Pet. App. 3a.

AFOSI used information from AP's statement to make a telephonic request for authorization to search petitioner's on-base residence "for items used to electronically communicate with AP." Pet. App. 3a-4a, 169a-170a. A military magistrate found that probable cause existed and orally granted the requested authorization. *Id.* at 47a, 166a; see Military R. Evid. 315(a), (b)(1), and (g) (permitting the admission of evidence obtained through a search based on "[a] search warrant or search authorization" and defining a "search authorization" as "express permission, written or oral, issued by competent military authority to search a person or an area"). On the same day, agents acting pursuant to the authorization seized a number of electronic devices from petitioner's residence. Pet. App. 4a. The next day, the sheriff's office arrested petitioner and seized a laptop he was carrying. *Ibid.* The sheriff's office then turned the laptop over to AFOSI. *Ibid.*

The magistrate who had orally authorized the search memorialized that authorization on a printed form the next day. Pet. App. 166a-167a. The form stated that petitioner was under investigation for violating "Florida Statute Section 847.0135 Computer Pornography; Travelling to meet a minor"[1] and that "seizure of the following specified property" had been authorized: "All

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[1] Section 847.0135 defines "traveling to meet a minor" to include traveling within the State, or causing another person to travel within the State, for the purpose of engaging in unlawful sexual conduct with a child under the age of 18 "after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage" to "seduce, solicit, lure, or

electronic media and power cords for devices capable of transmitting or storing online communications." *Id.* at 166a (emphasis omitted).

The written authorization form directed that a "record should be kept of the information given to the authorizing officer, on which that officer base[d] the authorization, for possible use in courts martial." Pet. App. 166a-167a (capitalization altered). Consistent with that direction, an AFOSI agent prepared an affidavit documenting the information orally given to the magistrate in support of the request. *Id.* at 168a-170a. The affidavit, which was signed by the magistrate and which accompanies the authorization form, "detailed the investigation into [petitioner's] relationship with AP, including the fact that the sexual relationship had been ongoing since April 2011 with sexually explicit online communications starting about a year earlier." *Id.* at 4a; see *id.* at 168a-170a.[2]

AFOSI agents later sent electronic media they had obtained during their investigation to a Department of Defense forensics lab, which extracted data for AFOSI's examination. Pet. App. 4a-5a. In the course of examining that data, an AFOSI agent discovered an image that appeared to be child pornography. *Id.* at 6a. He stopped his examination to seek an additional authorization to search for child pornography, which he obtained. *Ibid.* A search of the remainder of the data pursuant to that additional authorization revealed thousands of suspected images of child pornography. *Ibid.*

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entice a child" to engage in such conduct. Fla. Stat. § 847.0135(4) (2014) (emphasis omitted); see Pet. App. 4a n.4.

[2] The affidavit is incorrectly dated April 7, 2010. Pet. App. 170a. The record indicates that it was signed on November 10, 2011. See CAAF App. 218, 241.

Those images formed the basis for additional search authorizations, which resulted in the discovery of still more child pornography and other incriminating evidence. *Ibid.*

2. Petitioner moved to suppress the evidence derived from the searches. Pet. App. 6a-7a. As relevant here, he argued that the original search authorization was unconstitutionally overbroad in describing the items to be seized and the data to be examined. *Id.* at 23a. The military judge denied the motion to suppress. CAAF App. 640. The judge found that AFOSI had informed the magistrate that petitioner "met [AP] online," that he "engaged in sexually explicit conversations with [AP] over a period of about one year," that he then "involved [AP] in a sexual relationship," and that he "used his computer to entice [AP] onto Tyndall Air Force Base." *Ibid.* The judge concluded that "[t]hese details provided a 'substantial basis' to search for the items [AFOSI] requested, which included 'all electronic media . . . capable of transmitting or storing online communications.'" *Ibid.* The judge further concluded that that the authorization had "enough particularity to sufficiently guide and control the agen[ts'] judgment in selecting what to seize and search." *Ibid.* Finally, the judge held that suppression would not be appropriate in any event because "[t]he officials seeking and executing the authorization reasonably and with good faith relied on the issuance of the authorization." *Ibid.*

Petitioner was subsequently convicted. Pet. App. 2a. The military judge sentenced him principally to 17 years of confinement, and the convening authority approved the sentence. *Ibid.*

3. The AFCCA affirmed. Pet. App. 14a-165a. As relevant here, the AFCCA rejected petitioner's claim

that the search authorization violated the particularity requirement of the Fourth Amendment's Warrant Clause. *Id.* at 49a-60a. The AFCCA recognized the "importan[ce]" of particularity in the context of authorizations to search computers, which have the "ability to store and intermingle a huge array of one's personal papers in a single place." *Id.* at 53a (citation omitted). But the AFCCA also explained that because "computer evidence is easily mislabeled or disguised," authorizations to search for evidence on electronic devices "may necessarily require somewhat broad terms to ensure investigators may locate evidence of a crime." *Id.* at 53a-54a.

"Based on these legal principles," the AFCCA found "no constitutional overbreadth concern with * * * the terms of the search authorization." Pet. App. 57a. The AFCCA explained that "the military magistrate used the available information to define the scope of the search authorization." *Ibid.* "At the time it sought the search authorization," the AFCCA observed, "AFOSI was primarily relying on AP's statement that he and [petitioner] had engaged in protracted sexual communications online." *Ibid.* The AFCCA explained that "[b]y specifically referring to [the Florida statute that petitioner was suspected of having violated], and by mirroring [the statute's] language * * * in defining the items to be seized, the magistrate was granting authorization to AFOSI to search the devices for any communications between [petitioner] and AP that would violate the state law." *Id.* at 57a-58a. The AFCCA reasoned that the affidavit accompanying the search authorization, which "consistently referenced communications between [petitioner] and AP leading up to their sexual relationship," further "solidifie[d] the position that AFOSI's search

was to be limited to evidence of communications that violated the state statute." *Id.* at 58a. Accordingly, although the AFCCA acknowledged that "the affidavit and search authorization [form] could have been clearer," it concluded that "the search authorization was not constitutionally overbroad." *Ibid.*

4. The CAAF granted a petition for discretionary review limited to two questions: (a) "whether the panel of [the] AFCCA that heard [petitioner's] case was improperly constituted" and (b) whether the search authorization "was overbroad in failing to limit the dates of the communications being searched, and if so, whether the error was harmless." 76 M.J. 45 (capitalization altered). The CAAF then affirmed. Pet. App. 1a-13a.

a. The CAAF did not address the merits of petitioner's claim that the AFCCA panel was improperly constituted. Instead, it stated that the issue was "moot" in light of its decision in *United States* v. *Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016), cert. granted, 138 S. Ct. 53 (2017) (No. 16-961), which had vacated a grant of review and denied a petition raising a similar challenge after concluding that the case did not squarely present the relevant question. 76 M.J. at 367 n.1.[3]

b. On the Fourth Amendment question, the CAAF agreed with the AFCCA that the search authorization "was sufficiently particularized" to satisfy the particularity requirement. Pet. App. 2a. The CAAF rejected petitioner's contention that the authorization was overbroad because it did not expressly restrict the dates of

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[3] The quoted sentence was added after the CAAF initially issued its opinion and does not appear in the version of the opinion reprinted in the petition appendix. See Letter from Jeffrey T. Green to the Clerk of the Court (Dec. 7, 2017).

the electronic files that investigators were authorized to examine. *Id.* at 11a. The CAAF explained that "[t]hough a temporal limitation is one possible method of tailoring a search authorization, it is by no means a requirement." *Ibid.* In this case, the CAAF concluded, "the authorization and accompanying affidavit did not give authorities carte blanche to search in areas clearly outside the scope of the crime being investigated." *Ibid.* Rather, the CAAF explained, the authorization permitted AFOSI "to search [petitioner's] electronic media for any communication that related to his possible violation of the Florida statute in his relationship with AP," including communications falling within the time frame described in the affidavit and "communications materials that did not have an immediately clear date associated with them." *Ibid.* The CAAF thus concluded that the search authorization "was sufficiently particularized to avoid any violation of [petitioner's] Fourth Amendment rights." *Id.* at 13a.

The CAAF noted that the first image of child pornography identified by the AFOSI agents may have been "outside the scope of the search authorization" because it may have originated on a device that had been shut down in 2006 or 2008, "years before [petitioner] initiated his relationship with AP." Pet. App. 12a. But the CAAF concluded that this uncertainty did not require suppression because images of child pornography were also found in undated files from "[a] laptop[] with a last shutdown date of 2011," and were therefore within the scope of the authorization. *Ibid.* The CAAF thus held that the AFOSI agents "either did discover or inevitably would have discovered child pornography that validly lay within the scope of the search." *Ibid.*

ARGUMENT

Petitioner principally contends (Pet. 9-21) that the military magistrate's search authorization did not satisfy the particularity requirement because the form memorializing the authorization did not include an express limitation on the dates of the files to be searched. The CAAF correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. In addition, this case would be a poor vehicle in which to consider the question presented. Further review of the first question presented is thus unwarranted.

Petitioner also contends (Pet. 21-22) that the panel of the AFCCA that decided his appeal was improperly constituted because one of the judges also served as a presidentially appointed judge on the United States Court of Military Commission Review (CMCR). This Court has granted review to address the same question in *Dalmazzi* v. *United States*, cert. granted, No. 16-961 (Sept. 28, 2017), *Cox* v. *United States*, cert. granted, No. 16-1017 (Sept. 28, 2017), and *Ortiz* v. *United States*, cert. granted, No. 16-1423 (Sept. 28, 2017). The Court should therefore hold the petition for a writ of certiorari pending its decision in those cases and then dispose of the petition accordingly.

1. Petitioner's Fourth Amendment claim does not warrant further review.

a. The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue" without "particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; see *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). That requirement serves "to prevent general searches"

that "take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). It is satisfied if the description in the warrant "is such that the officer * * * can with reasonable effort ascertain and identify" the warrant's objects. *Steele* v. *United States*, 267 U.S. 498, 503 (1925).

The CAAF correctly held that the search authorization at issue here satisfied the particularity requirement and was not overbroad. The form prepared by the magistrate to memorialize the authorization stated that petitioner was under investigation for violating a Florida statute criminalizing the use of a computer device to entice a minor to engage in an illegal sex act. Pet. App. 4a & n.4, 166a. The CAAF also relied on the accompanying affidavit, which was signed by the authorizing magistrate and which "detailed the investigation into [petitioner's] relationship with AP, including the fact that the sexual relationship had been ongoing since approximately April 2011 with sexually explicit online communications starting about a year earlier." *Id.* at 4a; see *id.* at 168a-170a.

The CAAF concluded that the authorization, as evidenced by the subsequently prepared form and affidavit, limited the agents to seizing electronic media capable of transmitting or storing petitioner's communications with AP and searching that media "for any communication that related to his possible violation of the Florida statute in his relationship with AP." Pet. App. 11a. The CAAF construed that authorization to limit the search to files with dates relevant to petitioner's communications with AP and files "that did not have an immediately clear date associated with them." *Ibid.* And the CAAF correctly held that the authorization, so

construed, "particularly describ[ed] the place to be searched, and the persons or things to be seized" and was not overbroad. U.S. Const. Amend. IV; see Pet. App. 11a.

b. Petitioner does not appear to deny that the search authorization was valid if it was limited to potential evidence of his electronic communications with AP, including files dated after his relationship with AP began or files with no apparent date. Instead, petitioner's criticism of the CAAF's decision rests almost entirely on the premise that the CAAF upheld an authorization in which "the only restriction on the scope of the search consisted of listing the Florida statute being investigated." Pet. 18; see, *e.g.*, Pet. i, 13. That criticism is misplaced for two reasons.

First, the decision below did not adopt the holding that petitioner attacks. Contrary to petitioner's characterization (Pet. 18), the CAAF did not conclude that the particularity requirement would have been satisfied by an authorization in which "the only restriction" on the scope of the search was a specification of the statue being investigated. Instead, the CAAF upheld the authorization at issue here only after concluding that the authorized search was limited to "any communication that related to [petitioner's] possible violation of the Florida statute in his relationship with AP" in 2010 and 2011. Pet. App. 11a. The CAAF expressly stated, for example, that files with apparent dates earlier than "approximately April 2010" were "outside the scope of the search authorization." *Id.* at 12a.

Petitioner's challenge to the CAAF's decision thus rests in critical part on his contention (Pet. 13 n.1) that the CAAF erred in relying on the AFOSI agent's affi-

davit to construe and limit the scope of the search authorization. But that argument, which petitioner advances only in a single footnote, is not fairly encompassed within the question presented. See Pet. i. And a case-specific question about the proper interpretation of the particular oral search authorization at issue here would not warrant this Court's review even if petitioner had properly raised it.

Second, and in any event, petitioner's challenge to the CAAF's interpretation of the search authorization lacks merit. Petitioner relies (Pet. 13 n.1) on this Court's decision in *Groh* v. *Ramirez*, 540 U.S. 551 (2004), which involved a written warrant that "failed altogether" to specify the evidence sought; instead, "[i]n the portion of the [warrant] form that called for a description of the 'person or property' to be seized, [the officer] typed a description" of the house to be searched. *Id.* at 554, 557. In that case, the Court concluded that the warrant application's description of the things to be seized "d[id] not save the warrant from its facial invalidity" because "the warrant did not incorporate [the application] by reference" and the application did not "accompany the warrant." *Id.* at 557-558 (emphasis omitted).

This case differs from *Groh* in a critical respect: It involved an oral search authorization, not a written warrant. The oral authorization procedure is expressly permitted under Military Rule of Evidence 315, and courts have long held that, in the military context, a procedure for "oral affidavits and oral authorization of search warrants without contemporaneous writings" is "free from any constitutional infirmity." *United States* v. *Brown*, 784 F.2d 1033, 1037 (10th Cir. 1986). As those courts have explained, "the military search authorization procedure"—including oral search authorizations—"is a

finely tuned accommodation of the servicemember's privacy interests grounded in the Fourth Amendment and the specific needs, dictated by military necessity, for good order and discipline in the armed forces." *United States* v. *Chapman*, 954 F.2d 1352, 1369 (7th Cir. 1992). Petitioner does not argue otherwise, and does not challenge the use of the oral authorization procedure here.

The proper focus of the particularity analysis in this case is thus the military magistrate's oral authorization, not the written form prepared the following day. While the form provides evidence as to the scope of the oral authorization, so too does the accompanying affidavit. The affidavit refers to the authorization form and was signed by the military magistrate. Pet. App. 168a, 170a. Like the form, the affidavit thus serves to memorialize the oral authorization. Accordingly, in determining whether the authorization was sufficiently particular, the CAAF, the AFCCA, and the military judge all correctly considered both the authorization form and the "accompanying affidavit." *Id.* at 11a; see *id.* at 57a-58a (citing *Groh*, 540 U.S. 557-558).

c. Petitioner contends (Pet. 9-11) that the CAAF's decision conflicts with decisions of the Sixth Circuit. That is not correct. 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." *United States* v. *Richards*, 659 F.3d 527, 539 (2011), cert. denied, 566 U.S. 1043 (2012). Contrary to petitioner's characterization, the Sixth Circuit has not adopted any categorical rule requiring that a warrant contain an express temporal limitation whenever such a limitation could be ar-

ticulated. For example, in the decision most prominently cited by petitioner (Pet. 9-10), the Sixth Circuit expressly held that some portions of the warrant were "sufficiently particular * * * even though those portions d[id] not contain a time limitation." *United States* v. *Ford*, 184 F.3d 566, 578 (1999), cert. denied, 528 U.S. 1161 (2000). The court explained that the warrant's "subject-matter limitation (fruits and evidence of gambling) fulfill[ed] the same function as a time limitation would have done, by limiting the warrant to evidence of the crimes described in the affidavit." *Ibid.* That holding is entirely consistent with the CAAF's decision, which similarly held that the statutory reference on the authorization form and the information regarding the timing of petitioner's relationship with AP served to limit the scope of the authorization and thus fulfilled the same function as an express temporal restriction. Pet. App. 11a-12a.

The other Sixth Circuit decisions petitioner cites (Pet. 10-11) likewise do not adopt any categorical rule mandating express temporal limitations and do not otherwise conflict with the decision below. In *United States* v. *Lazar*, 604 F.3d 230 (2010), cert. denied, 562 U.S. 1140 (2011), the court upheld portions of warrants authorizing the seizure of documents and records related to patients named in lists that were "presented to the issuing Magistrate Judge" and "effectively incorporated into the search warrants"—even though the warrants did not limit the dates of such records. *Id.* at 236; see *id.* at 234. The portion of the warrant deemed overbroad not only failed to specify a "time frame," but also "referenced no specific patients" and "no specific transactions." *Id.* at 238. And in *United States* v. *Abboud*,

438 F.3d 554, cert. denied, 549 U.S. 976 (2006), the problem was not that the warrant failed to include a temporal restriction; it was instead that the express date range specified in the warrant was overbroad. *Id.* at 576 (explaining that the warrant authorized a "search for records from January 1996 to May of 2002" even though the fraud under investigation occurred only during "a three-month period in 1999").[4]

Petitioner also asserts that the decision below conflicts with decisions of civilian courts of appeals that have held that "the lack of a known temporal limitation may render a warrant overbroad if no other sufficient restrictions are included." Pet. 12; see Pet. 11-12. That assertion rests on a misreading of the CAAF's decision. Like the civilian courts of appeals, the CAAF recognized that the particularity requirement is not a question of "bright line rules." Pet. App. 9a. Thus, the CAAF observed that "a temporal limitation is one possible method of tailoring a search authorization," and held only that such an express limitation is not "a requirement" in every case, so long as the warrant is otherwise "sufficiently particularized." *Id.* at 11a.

Finally, petitioner asserts (Pet. 12-13, 15-16) that decisions of the Fourth and Seventh Circuits have disregarded the particularity requirement and approved overbroad search warrants, and that some district

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[4] Petitioner also relies (Pet. 10-11) on a decision by the Delaware Supreme Court. But that decision specifically declined to "prescribe rigid rules," such as a categorical rule requiring express temporal limitations. *Wheeler* v. *State*, 135 A.3d 282, 305 (Del. 2016). Moreover, as petitioner acknowledges (Pet. 10-11), the decision rested in part on the Delaware Constitution, which "affords * * * protections somewhat greater than those of the Fourth Amendment." 135 A.3d at 298.

courts have followed those decisions. But any circuit conflict created by the Fourth and Seventh Circuit's decisions would not be implicated here, because the CAAF upheld the search authorization at issue in this case only after concluding that it was limited to files potentially relevant to petitioner's communications with AP in 2010 and 2011. Pet. App. 11a-12a. And in any event, petitioner's characterization of the law in the Fourth and Seventh Circuits is incorrect. The decisions on which he principally relies (Pet. 16) did not address particularity challenges, but instead involved claims that officers exceeded the scope of warrants authorizing searches of computers. See *United States* v. *Williams*, 592 F.3d 511, 519 (4th Cir.), cert. denied, 562 U.S. 1044 (2010); *United States* v. *Mann*, 592 F.3d 779, 782 (7th Cir.), cert. denied, 561 U.S. 1034 (2010).

d. Even if the first question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it. This case involves an oral search authorization granted by a military magistrate under Military Rule of Evidence 315. The CAAF decided the case on the premise that the search authorization was required to comply with the Warrant Clause's particularity requirement, and—as explained above—its decision is consistent with the decisions of civilian courts of appeals applying the particularity requirement to written warrants issued by civilian judges. But the military context and the oral search-authorization procedure would make this case a unsuitable vehicle for providing guidance on the application of the particularity requirement to more typical written warrants.

e. This case would also be a poor vehicle in which to consider the first question presented because petitioner

would not be entitled to relief even if he prevailed on that question. That is true for two independent reasons.

First, even if this Court held that the search authorization was overbroad, suppression would not be warranted because the AFOSI agents relied on the search authorization in good faith. When officers act pursuant to a warrant later held to be invalid, "the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant." *Herring* v. *United States*, 555 U.S. 135, 142 (2009) (quoting *United States* v. *Leon*, 468 U.S. 897, 922 (1984)). That is because suppression is an "extreme sanction" that "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 916, 919. In this case, the military judge correctly held that the good-faith exception applied because the AFOSI agents "reasonably and with good faith relied on the issuance of the authorization," which was issued by a competent official who had "a substantial basis for determining the existence of probable cause." CAAF App. 640.

Second, even if the good faith exception did not apply, petitioner still would not be entitled to relief because "the remedy for an overbroad warrant is to sever the overbroad portions of the warrant from those portions that are sufficiently particular," not to suppress "all the evidence seized." *Ford*, 184 F.3d at 578. "[A]ll federal circuits have followed th[is] doctrine," which is variously termed "severability," "severance," "redaction," or "partial suppression." *United States* v. *Sells*, 463 F.3d 1148, 1150 n.1 (10th Cir. 2006) (citations omitted), cert. denied, 549 U.S. 1229 (2007).

Courts have applied the partial-suppression doctrine where, as here, a warrant is allegedly overbroad because it authorized the seizure of items without a sufficient (or any) limitation on timeframe. For example, in *United States* v. *Flores*, 802 F.3d 1028 (2015), cert. denied, 137 S. Ct. 36 (2016), the Ninth Circuit declined to decide whether a warrant "was overbroad for lack of a temporal limit" because the evidence introduced at trial "fell well-within even the narrowest of temporal limits." *Id.* at 1045-1046; see, *e.g.*, *Abboud*, 438 F.3d at 576 ("[A]ll evidence seized irrelevant to the three-month period in 1999 should have been suppressed, while evidence relevant to this period should be upheld."); *United States* v. *Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents ($92,422.57)*, 307 F.3d 137, 151 (3d Cir. 2002) (Alito, J.) (holding that even if a warrant was temporally overbroad because it covered periods as to which probable cause may not have existed, "the proper remedy for this putative defect [i]s simply to excise the years for which there was no probable cause").

The partial-suppression doctrine would foreclose petitioner's claim here. 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. 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. Pet. App. 12a. The remainder of the evidence at issue was found pursuant to subsequent search authorizations based on that initial image. *Id.* at 6a-7a. Petitioner thus would not be

entitled to the suppression of that evidence even if the search authorization was overbroad in some respects.[5]

2. Petitioner separately contends (Pet. 21-22) that the panel of the AFCCA that decided his appeal was improperly constituted because one of the judges, Colonel Martin Mitchell, also served as judge on the CMCR. According to petitioner (*ibid.*), 10 U.S.C. 973(b) and the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibit a military officer from serving simultaneously as a presidentially appointed judge on the CMCR and as an appellate military judge. This Court has granted review of that question in *Dalmazzi*, *Cox*, and *Ortiz*. Accordingly, the petition for a writ of certiorari should be held pending the Court's decision in *Dalmazzi*, *Cox*, and *Ortiz* and then disposed of as appropriate in light of the Court's decision in those cases. In any remand proceedings following such a hold, the lower courts would have the opportunity to consider in the

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[5] Petitioner briefly criticizes the CAAF's inevitable-discovery holding in the Statement of the petition for a writ of certiorari (at 9). But petitioner has not sought this Court's review of that holding, and petitioner's criticism would not in any event alter the conclusion that the evidence at issue was admissible under the partial-suppression doctrine. Petitioner asserts (*ibid.*) that the AFOSI agents did not actually limit their search based on the dates of the files they examined. But even if that were correct, it would still be the case that child pornography was found in a portion of petitioner's laptop computer that could have been searched pursuant to an authorization containing the sort of express temporal limitation that petitioner claims was required. That is the dispositive point. See, *e.g.*, *Flores*, 802 F.3d at 1045-1046 (upholding the admission of evidence seized under an assertedly overbroad warrant because the evidence "fell well-within even the narrowest of temporal limits").

first instance any potential case-specific obstacles to relief, including whether petitioner has adequately preserved the relevant legal arguments.

CONCLUSION

With respect to the second question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Dalmazzi* v. *United States*, cert. granted, No. 16-961 (Sept. 28, 2017), *Cox* v. *United States*, cert. granted, No. 16-1017 (Sept. 28, 2017), and *Ortiz* v. *United States*, cert. granted, No. 16-1423 (Sept. 28, 2017), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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