IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF OF *AMICI CURIAE*
Appellee,	)	MICHELLE BEHAN, PAUL BENNETT
	)	DAVID POTTS AND MATTHEW
V.	)	RANDLE IN SUPPORT OF
	)	APPELLANT
Staff Sergeant (E-6)	)	
BRUCE KELLY, USA	)	Crim. App. No. 20090809
	)	
Appellant.	)	USCA Dkt. No. 12-0524/AR

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ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO SUPPRESS EVIDENCE OF CHILD PORNOGRAPHY DISCOVERED ON APPELLANT'S PERSONAL COMPUTER IN THE COURSE OF A WARRANTLESS AND AN UNREASONABLE SEARCH CONDUCTED UNDER THE GUISE OF AN INVENTORY AFTER APPELLANT WAS WOUNDED IN IRAQ AND MEDICALLY EVACUATED TO THE UNITED STATES

II.

WHETHER ANY EXCEPTION TO THE WARRANT REQUIREMENT IS AVAILABLE TO EXCUSE THE ARMY'S WARRANTLESS AND UNREASONABLE SEARCH OF APPELLANT'S PERSONAL COMPUTER

STATEMENT OF JURISDICTION

Amici Curiae adopt Appellant's Statement of Jurisdiction as set forth on pages 1-2 of Appellant's Final Brief.

STATEMENT OF THE CASE

Amici Curiae adopt Appellant's Statement of the Case as set forth on pages 2-3 of Appellant's Final Brief.

STATEMENT OF THE FACTS

Amici Curiae adopt Appellant's Statement of Facts as set forth on pages 3-7 of Appellant's Final Brief. Additional facts in the record will be referenced where appropriate.

SUMMARY OF ARGUMENT

At the time the Joint Personnel Effects Depot (JPED) search SSG Kelly's computer, there were no written policies which authorized JPED to search the effects of a wounded soldier as if he were deceased or missing. The only written policy applicable to the personal effects of a wounded warrior was not followed in this case. Instead, JPED personnel unreasonably extended and applied the policies governing searches of a deceased or missing soldier's computer to searches of a computer belonging to a wounded and medically evacuated soldier. This extension was unreasonable under Fourth Amendment and the laws governing inventory searches, and, as such, renders the search unlawful and the fruits thereof inadmissible.

Despite the government's assertions to the contrary, there were no other applicable exceptions to the Fourth Amendment's probable cause and warrant requirements that would authorize this search. Neither the border search nor inspection exception is available. Further, SSG Kelly's reasonable expectation of privacy cannot hinge on whether or not the personnel at the JPED were certain that he would be receiving his effects back. A lack of "certainty" in a third party is a subjective standard which allows an intrusive search based on an absence of knowledge. Allowing a search *unless* a government official is

certain that personal effects will be returned puts an undue burden on a wounded warrior to assert his or her privacy interests and opens the door for fishing expeditions. The Fourth Amendment requires more than a lack of information before the government can intrude upon an individual's effects.

In sum, the JPED's actions in this case constitute an unlawful search, and the military judge abused his discretion in denying the appellant's motion to suppress the evidence obtained in the unlawful search.

ARGUMENT

POINT I. AN INVENTORY SEARCH IS INVALID IF CONDUCTED OUTSIDE THE SCOPE OF *SOUTH DAKOTA V. OPPERMAN*

The Fourth Amendment of the United States Constitution protects individuals against unreasonable searches and seizures.[1],[2] U.S. Const. Amend. IV; *Katz v. U.S.*, 389 U.S. 347, 350 (1967. Specifically, "for the purposes of military law, a Fourth Amendment search is a government intrusion into an individual's reasonable expectation of privacy." *United States*

[1] Searches conducted without a warrant are presumptively unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *see also U.S. v. McMahon*, 58 M.J. 362, 366 (C.A.A.F. 2003) (applying *Katz* to searches of a residence)

[2] The proper remedy for an unreasonable search is the suppression of its findings. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961).

v. Michael, 66 M.J. 78, 80 (C.A.A.F. 2008) (quoting *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004)) (citations omitted).

In particular, individuals have a reasonable expectation of privacy in password-protected electronic files. *U.S. v. Long*, 64 M.J. 57, 62-64 (C.A.A.F. 2006). There, this Court held that the appellee, who had been convicted of several drug offenses based on e-mail communications, had a reasonable expectation of privacy in her e-mail communications sent via a Marine Corps server. *Id.* This Court found the password protection of the e-mail account to be a dispositive fact that established a constitutionally protected expectation of privacy and, thus, suppressed the warrantless search. *Id.*

Here, because the defendant's computer was password-protected, the defendant had a reasonable expectation of privacy in its contents. In fact, the privacy interest in this case is even stronger than that in *Long*, as there was no warning that the defendant's private computer files may be monitored or that they may be searched if he were wounded. The examination of the defendant's computer files was thus a Fourth Amendment search. Because it was conducted without a warrant, the search is presumptively unreasonable. Unless the search falls into one of the "few specifically established and well-delineated

exceptions" to the warrant requirement, the findings of the search must be suppressed. *Katz v. U.S.*, 389 at 350.

A. A Proper Inventory Search Requires Standard Procedures to Which the Government Strictly Adheres. The Standard Procedures must Reflect a Legitimate Government Purpose

An inventory of belongings under the control of the government or police is one such exception to the warrant requirement of the Fourth Amendment. *South Dakota v. Opperman*, 428 U.S. 364 (1976). To qualify for a Fourth Amendment exception as an inventory search, the search must be conducted pursuant to one of three purposes:

> safeguarding the property while it is in the Government's custody[;] for protecting the Government against claims or disputes arising from the loss or theft of the property[;] and for protecting Government personnel against the potential hazards which might result should the Government unknowingly come into possession of dangerous substances.

Id. (citations omitted). Additionally, in order to prevent inventory searches from becoming "a ruse for a general rummaging ... to discover incriminating evidence," they must be regulated and controlled through "standardized criteria, or established routine." *Florida v. Wells*, 495 U.S. 1, 3-4 (1990). Further, "[t]he policy or practice governing inventory searches should be designed to produce an inventory." *Id.*

The search in question – a viewing of SSG's password protected computer files -- does not safeguard property, nor does it safeguard against fraudulent claims or potential

violence against the police. It thus fails to meet any of the *Opperman* criteria necessary to exempt the search from requirements of the Fourth Amendment.

JPED personnel bypassed SSG Kelly's password through a software program designed for law enforcement purposes and, then, conducted multiple forays into the stored data. (JA-72). Such actions can hardly be claimed as necessary to protect against claims of theft or loss, nor were such actions necessary to protect the property of either the owner or the government.

This is particularly true since the JPED conducted a pre-processing inventory of all the materials shipped from Camp Stryker to the JPED, thus ensuring all documented property was received. (JA-80). Additionally, given that the JPED x-rayed the computer prior to conducting the search, activating the computer and viewing the files and folders therein certainly was not a result of any protective need. (JA-80).

In sum, the JPED's actions were not conducted pursuant to any of the criteria established in *Opperman*, and therefore do not constitute a valid inventory search under that standard.

The inventory exception has been applied in a military context in *United States v. Jasper*, 20 M.J. 112, 115 (C.M.A. 1985) where the Court of Appeals announced a two-prong test. First, the Court considered whether there was legitimate governmental purpose for conducting the inventory. Second, the

Court evaluated whether the scope of the inventory exceeded the legitimate purpose.

The results here, when analyzed under *Jasper*, do not produce a different outcome from the analysis under *Opperman*. Here, the government adopted the rationale for searching the personal computers of deceased or missing soldiers to wounded soldiers facing evacuation. Relying on its manual for dealing with the personal effects of deceased personnel, the government advances two primary purposes to justify the intrusion under the *Jasper* framework. JA-247; Brief of Appellee at p. 19.

First, the government has asserted its need for an inventory search to prevent the unauthorized dissemination of any classified materials potentially stored on the computer and the removal of embarrassing items. (JA 44). This makes perfect sense for the computer of a deceased soldier whose effects will be shipped home and who no longer has an expectation of privacy. JA-247. While the search of a deceased soldier's computer may serve a legitimate governmental purpose, the search of the computer of a wounded soldier fails under *Florida v. Wells, supra.*

Indeed, this justification for an inventory search is derived from a procedure that produces no inventory. JA-247. No inventory list is created during the JPED searches of computers belonging to dead or missing soldiers. (JA-17; JA 43).

Instead, JPED personnel simply purge the information and forward the computer on to the soldier's representative. *Id.* Since the deceased soldier has no expectation of privacy and faces no criminal exposure, the government's intrusion is reasonable. However, applying the rationale for a non-inventory procedure to the search of a living soldier's computer is more akin to the general rummaging that *Wells* prohibits[3],[4]. Id.

Further, the government relies on its existing policies at the time of the search to invoke the inventory exception. Brief of Appellee, pg. 26. The lower court rejected the SSG Kelly's argument that a failure to promulgate policies to govern the JEPD's new responsibilities invalidated the search, and instead simply declared the use of existing policies to be "reasonable." (JA 44). There are three reasons why this is clearly erroneous.

First, the extension of existing policies beyond their intended scope is not reasonable. Testimony provided by MAJ Rafferty from the JPED indicates that the JPED's workload had

[3] In *United States v. Mossbauer*, 44 C.M.R. 14, 17 (1971) the Court pointed to the lack of documentation of items other than those submitted for evidence in a criminal proceeding as a major component in its decision to suppress evidence uncovered during an inventory.

[4] Additionally, the Operations Officer for the JPED testified that the searches for potentially embarrassing materials were left entirely up to the discretion of the individual conducting the search (JA 84-85). Allowing each investigator to determine on their own what to search for is not "standardized criteria, or established routine" as required in *Florida v. Wells*, 495 U.S. at 3-4.

quadrupled almost overnight after the Army decided to send all the wounded warrior personal effects there for processing. *Id.* The JPED, overwhelmed by its new responsibilities, simply elected to follow the same procedures[5] that were in place for the effects of those soldiers dead or missing without adopting new rules and without considering the difference in situations – the most important of which is that a deceased soldier could never be prosecuted for materials found on his or her computer (JA 87). Use of these procedures is not a reasonable extension of the military's responsibility to process the effects of its wounded personnel and is instead government action without justification.

Second, the existing "policy" in place at the time of the search clearly delineated a different operating procedure for wounded soldiers than for deceased soldiers. As a threshold matter, AR 638-2 specifically states that its provisions do not apply to personnel in medical treatment facilities. JA-175; AR 638-2, Ch. 17, Sec. 17-1(b)(7).

Instead, the government has invoked the measures of the ALARACT message – an internal email providing guidance to

[5] It should be noted that the procedures in place at the time of the search required a written inventory of the items removed. This did not take place as it usually would specifically because the person who owned the computer was alive and available for criminal prosecution. As such, the images were left on the computer, and the computer was turned over to the Army Criminal Investigative Division.

theater commanders on the disposition of personal effects belonging to wounded warriors -- to assert the existence of a policy permitting the search of SSG Kelly's computer. (JA 161-164). However, there is nothing about the ALARACT email message which changes or supersedes the provisions published Army Regulation AR 638-2, declaring that the personal effects of personnel in medical treatment facilities should be treated differently. (JA 161-164). As such, at the time the JPED conducted the search of SSG Kelly's computer, the procedures relied upon by JPED to process the computer were inapplicable to him, rendering the JPED's reliance upon these procedures unreasonable.

Contrary to the language in the lower court's opinion, the ALARACT message did not supersede the instructions in Regulation 638-2, but rather was incorporated therein. *Id.* Nothing in ALARACT declares that the procedures used for examining the computers of deceased or missing soldiers should be applied to wounded soldiers. *Id.* In fact, ALARACT message states that the medically evacuated soldier can take his personal effects with him if he is medically able to and the effects are portable. (JA-164 – ALARACT Sec. 7).

SSG Kelly testified he was in the hospital for at least 18 hours before medical evacuation.(JA 125). Further, Kelly testified that, when speaking with his command representative,

he requested that his personal effects accompany him to the medical treatment facility. (JA 120). Since the only applicable written policy in effect at the time of the medical evacuation permitted the soldier to transport his own belongings except in cases involving security reasons, there was never a reason for the Army to send SSG Kelly's computer to JPED for processing.

Finally, despite its declaration of legitimate purpose, the proffered motivations behind the search are insufficient to trump the reasonable expectation of privacy that a wounded soldier maintains in his personal effects. The personal effects of a service member who is either dead or missing, if found to contain any "pornography (child and adult) ... will be sanitized … and forwarded onto next of kin" (JA 20). JPED's search of SSG Kelly's computer pursuant to existing policy was not so save him embarrassment but to search for incriminating evidence. As such the search was unreasonable. *U.S. v Long*, supra at 66.

Although the lower court believed that a case-by-case processing procedure would be untenable for the Army in dealing with wounded warriors, the ALARACT message suggests exactly that: if the service member's injuries are not too extensive to prohibit his ability to maintain control of his or her belongings, the service member may have them. (JA 164). SSG Kelly had an injury to his knee. He was cogent and alert at the

time of his evacuation. There is nothing about his injury that would have required his portable personal effects be sent to JPED.

Even if it were assumed that the government's purpose met the first prong of *Jasper*, it failed to stay within the scope requirement of the second prong. The search performed at the JPED yielded nothing of a classified nature. At that moment, the scope of a search which has a purpose of safeguarding classified materials had reached its maximum effective range.

Although the Army's generally accepted administrative purpose of preventing further anguish to family members of soldiers killed or missing established the basis for JPED's procedures, it was not applicable in this case. Appellant was wounded, in the United States, and under the care of military doctors in a military treatment facility. An inventory which sought to prepare his personal effects for transfer to an authorized recipient was neither authorized under the existing policies at the time of the search nor was it necessary for any administrative purpose. It was, therefore, well outside of the scope of an inventory authorized under the framework of *Jasper*.

Thus, whether this Court applies the standards of *Opperman* or *Japser,* the outcome is the same: The JPED's conduct in this case does not constitute a valid inventory search. Without another exception to the Fourth Amendment to validate the

search, the results of the search are inadmissible fruit of the poisonous tree. *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

POINT II. NO OTHER FOURTH AMENDMENT EXCEPTION JUSTIFIES THIS SEARCH. NEITHER THE BORDER SEARCH NOR INSPECTION EXCEPTIONS APPLY.

The border search exception to the Fourth Amendment's probable cause and warrant requirement does not apply in this case. First, the border search exception permits border control agents to conduct suspicionless searches of individuals and personal effects at the time the individual or the effects cross the border. *U.S. v. Ramsey*, 431 U.S. 606 (1977). Thus, to be a valid search under the border exception rule, the material has to be crossing between sovereigns. *Id*. at 617-19 ("Border searches ... have been considered to be reasonable by the single facts that the person or item in question had entered into our country from outside."). In this case, the material never left an area outside of the exclusive jurisdiction and control of the United States. The computer was seized at Camp Stryker, a U.S. military installation, and was delivered to JPED at the Aberdeen Proving Ground in Aberdeen, MD, another U.S. military installation. (JA 79-80). As such, the border search exception is inapplicable.

Another possible exception to the warrant requirement is an inspection. *See* Mil. R. Evid. 313(b). "Military inspections, traditionally, have been a tool for a commander to use in

insuring the overall fitness of [his] unit to perform its military mission." *U.S. v. Turner*, 33 M.J. 40, 41 (C.M.A. 1991). However, the search of SSG Kelly's computer was not an inspection. *See* Mil. R. Evid. 313(b). Under the Mil. R. Evid. 313(b):

> An "inspection" is an examination of the whole or part of a unit, organization,[or] installation ... including an examination conducted at entrance and exit points, conducted as an incident of command **the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle**[6].

(emphasis added).

In this case, however, the primary purpose of the search was *not* "to determine and to ensure the security, military fitness, or good order and discipline of the unit." Instead, the purpose of the search was for pornography and gore. Moreover, SSG Kelly was actually *leaving* the unit because he was injured, so the search cannot have been to ensure he was fit to perform his military mission.

Amicus curiae will explore this argument further in the supplemental brief ordered by this Court. In brief, however, SSG Kelly's computer was not searched so that his commander could ensure the fitness of his unit, and because the search did

[6] Random urinalysis of members of a military unit is an inspection, as it is an official examination to determine the fitness or readiness of the members of the unit. *U.S. v. Denaro*, 62 M.J. 663, 665 (Coast Guard Crim. App. 2006).

not fall into the limited purposes outlined by Mil. R. Evid. 313(b), the search was not an inspection.

POINT III. A REASONABLE EXPECTATION OF PRIVACY CANNOT HINGE ON THE KNOWLEDGE OF THE PERSONNEL CONDUCTING THE SEARCH.

Both parties have addressed whether the military judge carved out a new exception to the Fourth Amendment when the Court relied upon testimony that JPED personnel were uncertain whether SSG Kelly was going to receive his computer directly. Lack of knowledge or uncertainty cannot legitimately provide the basis for invasion of Fourth Amendment protections, and should not have been considered.

The rule for analyzing the government's warrantless searches of property belonging to its military personnel cannot hinge on such knowledge. The Court's declaration that Fourth Amendment protections are only available to those soldiers whom the JPED is absolutely "certain" are receiving the effects personally, impermissibly places an undue burden upon a wounded individual to assert a reasonable expectation of privacy in his or her own belongings. Rather than requiring probable cause to intrude into a wounded soldiers personal effects, a "not certain" standard authorizes intrusive searches based on a lack of knowledge and is not reasonable under the Fourth Amendment.

The proper test should involve the same protections of Fourth Amendment rights set forth in *Katz*. To permit searches

in the face of all but absolute certainty that the soldier is to receive his or her own effects is to provide the government with the blanket authority to search that the Fourth Amendment was designed specifically to prevent. Indeed, a citizen's reasonable expectation of privacy in personal effects should not be so easily cast aside, able to be defeated with the mere claim of, "I didn't know for sure who would get the computer back." The Fourth Amendment requires more.

CONCLUSION

The JPED exceeded its authority under their policies and procedures when it unreasonably applied the dictates of Regulation 638-2 and the ALARACT message to the personal effects of SSG Kelly. By their actions, the JPED personnel exceeded the scope of a valid inventory search, and may not use the exception to cure the taint of the illegal intrusion. With no other applicable Fourth Amendment exception, JPED personnel violated SSG Kelly's constitutional right to be free from unreasonable searches at the hands of government officials. This is true whether or not JPED knew that SSG Kelly would be receiving his computer back directly. Under the circumstances, the military judge abused his discretion in denying the motion to suppress. For the foregoing reasons, this Court should reverse the decision of the Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)for an amicus brief because it does not exceed 7,000 words. This brief contains 3,897 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that, in accordance with Order of the Court of July 22, 2010, the foregoing brief was electronically filed with the Court on February 13, 2013, and that copy of the foregoing brief was electronically sent to the following person on February 13, 2013:

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