IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20090809
Staff Sergeant (E-6) **BRUCE L. KELLY,** United States Army, Appellant	)	USCA Dkt. No. 12-0524/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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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 AN UNREASONABLE SEARCH CONDUCTED TO FIND CONTRABAND AFTER APPELLANT WAS WOUNDED IN IRAQ AND MEDICALLY EVACUATED TO THE UNITED STATES.

II.

WHETHER THE ARMY COURT ERRED BY CREATING A NEW EXCEPTION TO THE FOURTH AMENDMENT WHEN IT HELD THAT THE GOVERNMENT'S SEARCH OF APPELLANT'S PERSONAL COMPUTER WAS REASONABLE BECAUSE THE GOVERNMENT WAS NOT "CERTAIN" OR "ABSOLUTELY CLEAR" THAT IT WOULD BE RETURNED TO THE WOUNDED-WARRIOR APPELLANT.

Statement of Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §

866 (2008). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On April 20, May 28, and August 10 and 13, 2009, a military judge sitting as a general court-martial at Fort Drum, New York, tried Staff Sergeant (SSG) Bruce L. Kelly. Pursuant to his conditional pleas under Rule for Courts-Martial [hereinafter R.C.M.] 910(a)(2), the military judge convicted SSG Kelly of disobeying a general order and possession of child pornography, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 992, 934 (2008). Pursuant to his additional pleas, the military judge also convicted SSG Kelly of attempted larceny, larceny of military effects, and fraud, in violation of Articles 80, 121, and 132, UCMJ, 10 U.S.C. §§ 880, 921, 932 (2008).

The military judge sentenced SSG Kelly to reduction to the grade of Private E-1, confinement for eighteen months, and a bad-conduct discharge. The convening authority approved only so much of the sentence as provided for reduction to the grade of Private E-1, confinement for seventeen months, and bad-conduct discharge. The convening authority deferred automatic forfeitures and reduction of rank on September 21, 2009, until Action. At Action, the convening authority waived automatic forfeitures for a period of six months and directed that the

funds be paid to SSG Kelly's wife for the benefit of his family members.

The Army Court affirmed the findings and the approved sentence on March 27, 2012. (JA 1-7). Appellant was subsequently notified of the Army Court's decision. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on May 25, 2012. On September 19, 2012, this Court granted appellant's petition for review.

Statement of Facts

On April 28, 2007, SSG Kelly departed Camp Striker, Iraq, with a four vehicle convoy. Staff Sergeant Kelly's convoy subsequently struck an improvised explosive device (IED) that destroyed his vehicle and seriously wounded the driver, the gunner and SSG Kelly. (JA 53-55, 118). Staff Sergeant Kelly was conscious and ambulatory, but he was medically evacuated from the battlefield with the other wounded soldiers because he required surgery. (JA 119-26). Staff Sergeant Kelly and the two other wounded soldiers received immediate treatment at the 28th Combat Support Hospital in Baghdad. (JA 53-55, 119). Within twenty-four hours, SSG Kelly was moved first to Balad, Iraq, then to Landstuhl, Germany, for additional medical treatment. (JA 119, 125-26). On May 5, 2007, SSG Kelly was

admitted to Womack Army Medical Center, Fort Bragg, North Carolina. (JA 126).

On April 28, 2007, Captain (CPT) Christopher Hull[1] was appointed to serve as the Summary Courts-Martial Officer (SCMO) who would inventory and ship SSG Kelly's personal effects (PE). (JA 53-55). On May 3, 2007, CPT Hull delivered appellant's PE to Mortuary Affairs at Sather Air Base, Baghdad, Iraq. (JA 45-55). Staff Sergeant Kelly's PE included a Compaq Presario, which was SSG Kelly's password protected personal laptop computer. (JA 45-55, 121).

Nearly six weeks after SSG Kelly sustained his injuries, Staff Sergeant (SSgt) Ramon Munoznuno, U.S. Air Force, a computer examiner assigned to the Joint Personal Effects Depot's (JPED)[2] Media Center, received SSG Kelly's Compaq Presario laptop computer for the purpose of searching for classified material, pornography, gore, and anything else the examiner believed was "inappropriate." (JA 29-33). At the time government agents searched SSG Kelly's computer, JPED computer examiners routinely searched the contents of digital media found in the PE of deceased, or missing, soldiers. (JA 81-85). The JPED forensic examiners have methods for bypassing a computer's password. (JA

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[1] At the time of his SCMO appointment, CPT Hull held the rank of First Lieutenant. He was promoted by the time he provided a statement to Special Agent (SA) William Cook on July 11, 2007.
[2] The JPED is located at the U.S. Army's Aberdeen Proving Ground, near Aberdeen, Maryland.

72). The JPED Forensic Media Center non-commissioned officers [hereinafter NCO's] that conduct searches are trained by law enforcement at the Department of Defense Cyber Crime Forensic Academy. (JA 69).

Upon receiving SSG Kelly's computer, Second Lieutenant Irizarry Efrain explicitly told SSgt Munoznuno that this was a "rush case because it was a wounded Soldier and that *he needed his [PE]* back." (JA 29-31) (emphasis added). No one from JPED ever contacted SSG Kelly to request the computer's password.[3] (JA 121). Even though SSgt Munoznuno knew that SSG Kelly was only wounded and that SSG Kelly would likely be the one to receive the computer, he searched the computer for classified material, and found none. (JA 29-31). After finding no classified material on appellant's computer, SSgt Munoznuno then conducted a second search for "[g]ore, [i]nnappropriate, [sic] and [p]orn." (JA 29-31). During this second search for materials that would constitute illegal contraband in Iraq, SSgt Munoznuno discovered images and videos of adult pornography and child pornography and notified his supervisor, Master Sergeant (MSG) Nelson J. Delgado-Martinez. (JA 29-33). Master Sergeant Delgado-Martinez reviewed one image and one video and notified Criminal Investigation Command [hereinafter CID]. (JA

[3] The JPED had the ability to override passwords. (JA 72). However, the record is not clear about who overrode the password on SSG Kelly's computer.

32-33). Special Agent (SA) Alan A. Ubbens took a sworn statement from SSgt Munoznuno and collected SSG Kelly's computer as evidence. (JA 60). During his search of SSG Kelly's computer, SSgt Munoznuno never attempted to inventory the files on the computer, he only annotated the serial number listed on the outside of the computer.

On June 19, 2007, Fort Drum CID Evidence Custodian, SA Brian Ferguson, received SSG Kelly's computer from Aberdeen Proving Grounds. (JA 56-57). While the exact date is unknown, between June 19 and 28, 2007, SA Julie Kuykendall submitted an affidavit to the Fort Drum Military Magistrate, Captain (CPT) John M. Dejak, alleging that probable cause existed to believe that child pornography would be found on SSG Kelly's computer. (JA 23-24). In her affidavit, SA Kuykendall incorrectly stated that the child pornography was discovered during a search for "classified and propaganda information, as part of their redeployment standard operating procedure for injured Soldiers." (JA 23-24). Based solely on SA Kuykendall's affidavit, CPT Dejak authorized a search of SSG Kelly's computer. (JA 23-24).

On June 20, 2007, SA Kuykendall attempted to examine the contents of SSG Kelly's computer, but was unsuccessful. (JA 56-57). Between July 3 and 9, 2007, someone from the Fort Drum CID office sent SSG Kelly's computer to the CID office at Fort Monmouth, New Jersey, for the purpose of forensic examination.

(JA 56-57). On April 15, 2008, computer examiners at the U.S. Army Criminal Investigation Laboratory (USACIL) conducted a forensic examination of SSG Kelly's computer and "discovered" child pornography. (JA 46).

With the consent of the government and the military judge, SSG Kelly entered a conditional plea of guilty to the Specification of Charge I and Charge I (possession of child pornography) and the Specification of Charge II and Charge II (possession of adult pornography in violation of General Order No. 1). (JA 151-53, 155-56). By entering a conditional plea, SSG Kelly preserved the right to withdraw from his plea of guilty to those specifications if an appellate court reverses the military judge's denial of the defense's motion to suppress (Appellate Exhibit I). (JA 16-22, 151-53).

Summary of the Argument

The government violated Staff Sergeant Kelly's Fourth Amendment right to be free of unreasonable searches when it searched his personal computer without a lawful search authorization or a recognized exception. The government conducted this search under the auspices of an inventory intended to prevent the transportation of classified material from theater. After an initial search, the government agent conducting the search found no classified material. Subsequently, the government agent conducted a second search for

unlawfully possessed pornography. This search, conducted without suspicion or a search authorization, resulted in the discovery of adult pornography in violation of General Order Number 1 and child pornography in violation of Article 134, UCMJ. The government never inventoried the contents of SSG Kelly's computer.

The government's only justification for searching SSG Kelly's personal computer was the erroneous application of the regulations and procedures Summary Courts-Martial Officers follow to search for, and remove, "embarrassing" material from the personal effects of deceased, or missing, soldiers. The government failed to follow the regulations and procedures that regulate the inventory of the personal effects of living, injured soldiers.

The military judge and the Army Court erroneously determined that the government's actions amounted to an inventory and found legitimate government interests to support the suspicionless search. The Army Court found that the government had a legitimate interest in searching the personal effects of wounded soldiers to protect others from viewing or receiving embarrassing material. The Army Court reasoned that a suspicionless and warrantless search of a wounded soldier's property is lawful unless the government agent conducting the search is "certain" that the wounded soldier will be the

recipient of the personal effects. In doing so, the Army Court violated SSG Kelly's right to be secure in his effects in contradiction of the Fourth Amendment by creating a new exception to the Fourth Amendment in order to sustain the conviction.

Issues Presented and Argument

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Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citation omitted). Findings of facts are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. *Id.* A military judge abuses his discretion on a motion to suppress if the factual findings are clearly erroneous or if the law is applied incorrectly. *Id.*

Law

"The Fourth Amendment of the Constitution protects individuals, including servicemembers, against unreasonable

searches and seizures." *United States v. Long*, 64 M.J. 57, 61 (C.A.A.F. 2006). A search is "an official governmental intrusion into an individual's reasonable expectation of privacy." *Id.* The threshold question is whether an individual's subjective expectation of privacy is objectively reasonable. *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990). Soldiers have a reasonable expectation of privacy in files kept on their personal computers. *United States v. Conklin*, 63 M.J. 333, 336-37 (C.A.A.F. 2006); *see also United States v. Maxwell*, 45 M.J. 406, 418-19 (C.A.A.F. 1996) (holding that there is a reasonable expectation of privacy from police intrusion into private, non-government, email systems). Official intrusions into protected areas in the military require search authorization supported by probable cause. *Long*, 64 M.J. at 61; *see* Military Rule of Evidence [hereinafter Mil. R. Evid.] 314(k); *see also United States v. Poundstone*, 22 U.S.C.M.A. 277, 279-80, 46 C.M.R. 277, 279-80 (1973) (holding that government searches of servicemembers in war zones must still comply with probable cause requirements); *United States v. Huntzinger*, 69 M.J. 1, 5 (C.A.A.F. 2010) (holding that there is no general exception to the Fourth Amendment for searches and seizures conducted in combat zones). Exceptions to probable cause searches include inspections, inventories, and consent searches. Mil. R. Evid. 313(b) and (c); Mil. R. Evid. 314(e).

An inventory of effects under government control is an exception to the Fourth Amendment's protection against a warrantless search. *South Dakota v. Opperman*, 428 U.S. 364 (1976). Standardized procedures must regulate inventories—"general rummaging" as a ruse "to discover incriminating evidence" is not permitted. *Florida v. Wells*, 495 U.S. 1, 4 (1990). These procedures fulfill three distinct needs: protection of the owner's effects; protection of the government against claims of lost or damaged effects; and the protection of government personnel from potential dangers. *Opperman*, 428 U.S. at 369.

In *United States v. Kazmierczak*, the Court of Military Appeals established the test to determine the constitutionality of inventory procedures. 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967). Courts must determine: "(1) [If] the regulation, providing for an inventory of the effects of a person . . . , on its face [is] violative of the Fourth Amendment . . . [. and] (2) [i]f the regulation is valid on its face, was it used as a pretext to conduct a search[.]" *Id.* at 599, 37 C.M.R. at 219. An administrative inventory conducted in the absence of a procedural regulation can be upheld as reasonable depending on the circumstances. *United States v. Dulus*, 16 M.J. 324 (C.M.A. 1983).

Army Regulation 638-2 implements 10 U.S.C. § 4712 (Disposition of Effects of Deceased Persons by Summary Court-Martial), and applies only to deceased and missing personnel. Army Reg. 638-2, Deceased Personnel: Care and Disposition of Remains and Disposition of Personal Effects [hereinafter AR 638-2], Summary, para. 18-1 (Dec. 22, 2000). Before forwarding a deceased or missing soldier's PE to a "person eligible to receive effects," AR 638-2 permits a SCMO to search for and remove "[i]nappropriate items that may cause embarrassment . . . [to] include . . . items that are obscene[.]" AR 638-2, para. 20-14. A "person eligible to receive effects" (PERE) is defined by AR 638-2 as "the person to whom the Army will deliver or ship the deceased or missing person's PE." *Id.* at para. 19-1. Army Regulation 638-2, Chapter 17, Personal Effects, expressly states that "[t]he provisions of this chapter do not apply to . . . the PE of soldiers who are patients in medical treatment facilities and not deceased (*see* AR 40-400)." *Id.* at para. 17-1b.

Army Regulation 40-400 dictates procedures for handling the PE of injured soldiers receiving care at military treatment facilities (MTF). Army Reg. 40-400, Medical Services: Patient Administration [hereinafter AR 40-400], para. 4-5 (Oct 13, 2006). The inventory of PE is limited to the accounting of physical effects. *See* AR 40-400, para. 4-5. The handling of a soldier's PE under the provisions of AR 638-2 occurs only when a

soldier dies or absents himself while their PE are at an MTF. AR 40-400, para. 4-5c.

Multi-National Division-Center (MND-C) General Order Number 1 [hereinafter GO#1] dated April 4, 2007, prohibited the possession of "[p]ornographic or sexually explicit photographs, videotapes, movies, drawings, books, or magazines" by U.S. servicemembers under the command of MND-C while in Kuwait or Iraq. (JA 261-62). General Order Number 1 also prohibited soldiers from "[p]ossessing, distributing, transferring, or posting of visual images depicting detainees or casualties." (JA 261-62). General Order Number 1 was punitive in nature and violations of it were subject to punishment under the UCMJ. (JA 261-62).

The Manual for Courts-Martial provides for the entry of conditional pleas of guilty:

> With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty.

R.C.M. 910(a)(2).

Argument

The government's search of SSG Kelly's personal computer was unreasonable. There was no probable cause, no regulation or commander authorized the search, and the search was not necessary to inventory SSG Kelly's PE. In addition, government agents did not conduct the search pursuant to any applicable government regulation, statute, procedure, or custom of the service. The military judge and the Army Court's conclusion, that the search was an "inventory," is not supported by the circumstances in this case. In searching SSG Kelly's personal computer, the government's purpose was to root out evidence of a crime and the government made no efforts to carry out the purposes of a lawful administrative inventory.

A. The purpose of JPED's search of SSG Kelly's computer was not an inventory

The military judge's conclusion of law that the search of SSG Kelly's laptop was an "inventory" is not supported by the record. (JA 42-44). A lawful inventory fulfills three distinct needs: (1) protection of the owner's effects; (2) protection of the government against claims of lost or damaged effects; and (3) the protection of government personnel from potential dangers. *Opperman*, 428 U.S. at 369.

In this case, the government's express purpose in searching electronic material at the JPED was "to safeguard classified

material" and ensure that it is "not sent home to persons eligible to receive the effects." (JA 63). This does not fall into any of the three acceptable purposes for an inventory. In addition, the JPED never claimed it was conducting an inventory of the files on SSG Kelly's computer. As such, the government accomplished the acceptable purpose of an inventory when personnel at JPED confirmed that the serial number of SSG Kelly's laptop matched the inventory sheet the SCMO produced in theater.

The government's search for illegally possessed classified information in the absence of probable cause, or even some lesser form of suspicion, was unlawful. However, assuming *arguendo* that the government's search of the personal effects—of a living soldier—for classified information was lawful, SSgt Munoznuno's second search is still unlawful. The government's stated objective—to prevent the unauthorized dissemination of classified materials—was completed the moment SSgt Munoznuno conducted his first search of SSG Kelly's computer which revealed no classified material. (JA 29).

Staff Sergeant Munoznuno only discovered contraband pornography when he engaged in a second search for "[g]ore, [i]nnappropriate, [sic] and [p]orn." (JA 29). Since SSG Kelly was alive and subject to the punitive sanction of GO#1 at the time his computer was removed from Iraq, this second search had

no other purpose than to look for evidence of a crime.[4] Even if the first search of SSG Kelly's computer for classified material is somehow lawful, the second search does not constitute an inventory, nor does it fall under any other exception to the warrant requirement. "Only so long as the scope of the search is reasonable, taking into consideration the three interests to be protected by the inventory, will it be held to be a constitutionally permissible intrusion." *United States v. Edwards*, 577 F.2d 883, 893 (5th Cir. 1978). The government did not search the contents of SSG Kelly's computer to protect SSG Kelly's effects, protecting itself from future claims, or to guard personnel from danger. As a result, the government's search of SSG Kelly's computer was not a proper inventory. *See Opperman*, 428 U.S. at 369.

1. The government's actions went beyond the accepted purposes of an inventory

In *United States v. Eland*, the Navy Court held that a master chief conducting an inventory of a deserter's locker overstepped the purposes of an inventory when he read the contents of several notebooks found the locker. 17 M.J. 596, 597-99 (N.M. Ct. Crim. App. 1983). The Navy Court found no justification in the inventory process for the master chief's

[4] General Order Number 1 prohibited soldiers from possessing photographs of casualties. Photographs of casualties would likely fall within the category of "gore." Possession of adult pornography also violated GO#1. (JA 261-62).

reading of the notebooks, noting that it was not necessary to read the notebooks to ensure that any valuables located inside were accounted for.

When a government agent opened SSG Kelly's computer files, he acted outside of the inventory process, just as in *Eland*. Ownership of the computer was not in issue and there was no assertion that it was necessary to peruse SSG Kelly's computer files to ensure that it did not contain any valuable items. The reasonableness of an inventory must be assessed by taking into consideration the three purposes of inventories as laid out in *Opperman*. *See Edwards*, 577 F.2d at 893. Since the purpose of the government's actions do not fall with any of those set out in *Opperman*, the search was not reasonable.

B. The manner that JPED searched SSG Kelly's computer does not satisfy the test for inventories as set out in *United States v. Kazmierczak*

When relying on the inventory exception to the warrant requirement as the basis for a search, "courts have attached significance to the existence of and compliance with established regulations and standardized procedures for inventories." *United States v. Law*, 17 M.J. 229, 237 (C.M.A. 1984). This ensures that inventories are what they purport to be. *Id.* This Court should conduct a two-part inquiry to determine whether military inventories are lawful: "(1) [If] the regulation, providing for an inventory of the effects of a person . . . , on

its face [is] violative of the Fourth Amendment . . . [. and] (2) [i]f the regulation is valid on its face, was it used as a pretext to conduct a search[.]" *Kazmierczak*, 16 U.S.C.M.A. at 599, 37 C.M.R. at 219. As to the second question, this Court must determine: (1) if the inventory process was invoked "as a pretext to ferret out possible evidence of a crime," and (2) even if the government made a good faith decision to conduct an inventory, did the "conduct of the parties [conducting the inventory] amount[] to an illegal search for evidence . . . of a crime." *Id.* at 599, 37 C.M.R. at 221.

1. The inventory was not conducted pursuant to any applicable regulation

Under the *Kazmierczak* test, this Court must determine if the inventory regulation violates the Fourth Amendment on its face. There is no regulation that supports the government's search of living soldiers' PE at the JPED. Accordingly, the government's processing and searching SSG Kelly's personal computer was not supported by any law, regulation, or established procedures. While the military judge and JPED personnel relied on AR 638-2 as a basis for the search, AR 638-2 only allows for the processing of PE of deceased or missing soldiers.

In this case, the government also relied on ALARACT 139/2006 as authority for the JPED to process and search the

personal effects of living, but wounded, soldiers. (JA 161-64). The military judge found that ALARACT 139/2006 gave the JPED "regulatory" authority to process and inventory the personal laptop of SSG Kelly. (JA 42-44). However, the Army Court correctly found that the military judge's reliance on the ALARACT was misplaced when it found that the ALARACT could not change an Army regulation. *United States v. Kelly*, ARMY 20090809, slip op. at 3 n.5 (A. Ct. Crim. App. Mar. 27, 2012) (mem. op.). Even if ALARACT 139/2006 had the effect of changing AR 638-2 and made the mission of JPED applicable to living soldiers, the search of SSG Kelly's computer would still be unconstitutional under the Fourth Amendment. The actions of JPED do not amount to an inventory; an inventory catalogs things, it does not search for specific contraband items.

Administrative inventories conducted in the absence of a procedural regulation can be upheld as reasonable depending on the circumstances. *Dulus*, 15 M.J. at 326-27 (holding that an inventory of a pretrial confinee's car was reasonable to secure his property when it was conducted to achieve the purposes of an inventory as set forth in *Opperman*). In this case, the government attempted to apply AR 638-2 to living soldiers. Even if AR 638-2 applied to living soldiers it would violate the Fourth Amendment on its face because the government's attempt to conduct an "inventory" of living–but wounded–soldiers' PE was

not aimed at any of the purposes outlined by the Supreme Court in *Opperman*. The JPED did not conduct an inventory and seek to protect SSG Kelly's effects, protect the government from claims of loss or damage, or protect its personnel from potential dangers.

Instead, government agents conducted the second search purportedly to prevent the release of "embarrassing" material to PERE. To reach that end, the JPED employed an arbitrary methodology to conduct the search, which, instead of being conducted under clear guidelines or limits, was left to the agents' complete discretion. (JA 84-85). Notably, there is no evidence that JPED attempted to create a catalogue or inventory of SSG Kelly's computer files. *See United States v. Mossbauer*, 20 U.S.C.M.A. 584, 587, 44 C.M.R. 14, 17 (1971) (finding that an inventory was used as a pretext to search for evidence of crime, noting unfavorably that several items were not listed on an inventory sheet). In this case, SSgt Munoznuno's conduct amounted to the "general rummaging" the Fourth Amendment prohibits. *Wells*, 495 U.S. at 4.

2. Government agents utilized an "inventory" as a pretext to conduct a warrantless search of SSG Kelly's personal computer for evidence of criminal activity

The second part of the *Kazmierczak* test examines whether, if the inventory regulation is valid on its face, was it nonetheless used as a pretext to conduct a search. 16

U.S.C.M.A. at 599, 37 C.M.R. at 219. As noted above, the government did not rely on any regulation that allowed an inventory of SSG Kelly's PE at JPED. However, even if the government acted pursuant to a facially valid inventory regulation or in furtherance of recognized purpose of administrative inventories, the government's actions would not pass muster under the second prong of the *Kazmierczak* test and its two subcomponents.

a. The inventory process was invoked as a pretext to ferret out possible evidence of a crime

The government could not conduct an "inventory" search for classified information or pornography on a wounded soldier's computer without it being a pretext to discover evidence of a crime. Due to applicable statutes, regulations, and punitive orders that applied to SSG Kelly at the time government agents searched his computer, any "inventory" to discover classified information[5] or any form of pornography amounts to government action seeking evidence of a crime. These acts remove this type of search from the inventory exception of Mil. R. Evid. 313(c).

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[5] Army Regulation 380-5, Security: Department of the Army Information Security Program [hereinafter AR 380-5], para. 7-6 prohibits the storage of classified information at personal residences, either on or off a military installation. AR 380-5, para. 1-21, authorizes punitive action under the UCMJ for violations of provisions of AR 380-5. Additionally, 18 U.S.C. § 1924 criminalizes the unauthorized removal and retention of classified material.

As noted above, even if the government had a legitimate purpose in searching SSG Kelly's computer for classified information, that purpose disappeared once agents discovered there was no classified information on it. The reason for the second search, to prevent sorrow or embarrassment to a PERE, did not exist in this case. Any invocation of an inventory was nothing more than a pretext to conduct a search for possible evidence of a crime. "In most cases the inventory will not uncover any matter relevant to a criminal prosecution. This circumstance alone tends to the conclusion that it was not designed as a subterfuge for a search without probable cause." *Kazmierczak,* 16 U.S.C.M.A. at 600, 37 C.M.R. at 220. However, due to the applicability of GO#1 and AR 380-5, any government search of SSG Kelly's computer for pornography or classified information that found such files would constitute direct evidence of crime.

b. Even if the JPED acted in good faith in searching SSG Kelly's computer, its actions amounted to an illegal search for evidence of a crime

Due to the manner the search was executed, this search fell far outside the bounds of a proper inventory. An inventory "is administrative in nature" and is to "be conducted in a reasonable fashion." Mil. R. Evid. 313(c). The military judge found that the search was conducted for inventory purposes; however, that conclusion is not supportable. If the search were

purely an inventory, then the then the government's actions would have ceased once it confirmed the make, model, serial number, and condition of SSG Kelly's laptop computer. The government accessed the computer and searched through the laptop's contents when it had no intention of conducting an inventory of the computer's contents and an inventory of the computer's contents would not even have necessary to achieve any cognizable purpose of inventories. (JA 29-31).

Further, the government did not conduct its search in a reasonable manner. The government did not use regular servicemembers without specialized training; instead the government utilized personnel trained by law enforcement to seek evidence of cyber crime. (JA 69). Staff Sergeant Kelly's computer required a password to access his computer. (JA 121). Major Jackson, the JPED's chief of security, testified that JPED would often seek passwords from wounded soldiers instead of trying to bypass the password. (JA 72-73). However, agents never asked SSG Kelly to disclose his password. (JA 121). The existence of a password on SSG Kelly's computer demonstrates that he had an expectation of privacy with regards to his computer. Given that this was his personal laptop computer, SSG Kelly's expectation of privacy is reasonable. *See Conklin*, 63 M.J. at 336-37. If the purpose of inventorying a living soldier's PE is to protect property, and to protect the

government from claims of lost or damaged effects, then any method of inventory that requires hacking into a password-protected computer to search electronic files amounts to an illegal search.

In assessing the government's actions, government personnel are afforded some latitude when conducting an inventory, but their actions "should be designed to produce an inventory" and must not be allowed to turn the inventory into a search to discover "'evidence of a crime.'" *Wells*, 495 U.S. at 4 (quoting *United States v. Bertine*, 479 U.S. 367, 376 (1987)). Here, SSgt Munoznuno's actions are not entitled to any latitude. He intentionally searched for evidence of a crime, after bypassing SSG Kelly's password, knowing that SSG Kelly was a living soldier subject to GO#1 and retained Fourth Amendment protections. Contrary to Mil. R. Evid. 313(c), the only purpose for the government's second search was to look for evidence of a crime.

C. The search of SSG Kelly's computer was not authorized under any other exception to a probable cause search

Besides the misapplication of AR 638-2, JPED personnel had no other applicable regulations or procedures authorizing or governing their "inventory" of the contents of SSG Kelly's

computer.[6] (JA 83-84, 88). There is no evidence that this was a consent search under Mil. R. Evid. 314(e). Nor was this search an inspection[7] under Mil. R. Evid. 313(b). For a search to qualify as a lawful inspection, a commander with proper authority must order it. *See* Mil. R. Evid. 313(b). Further, the purpose of this search was not "to determine and ensure the security, military fitness, or good order and discipline of [a] unit, organization, [or] installation" as required by Mil. R. Evid. 313(b). *Id.*

Since the search was not supported by any regulation allowing an inventory or a legitimate interest, the military judge's conclusion of law that the search was an inventory is erroneous.

D. Summary

The military judge found that the search of SSG Kelly's computer was "conducted in a reasonable manner." (JA 42-44). However, the government's actions do not amount to a proper inventory of SSG Kelly's computer. Instead, the government's

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[6] The military judge found that the JPED Process Manual did not authorize searching a living soldier's personal effects. (JA 42-44).

[7] The Army Court uses the term "inspection" in its recitation of the facts. *Kelly*, ARMY 20090809, slip op. at 2. However, this does not support a finding that an inspection was conducted by JPED, nor did the government argue that this search was an inspection at trial or the Army Court.

actions were unreasonable and amount to "general rummaging." *Wells*, 495 U.S. at 1.

The government had no legitimate purpose to search for pornography or any other embarrassing material in this case. The government knew that SSG Kelly was only wounded and not deceased. (JA 29-31). The government also knew, or should have known, that SSG Kelly would likely be the recipient of his personal effects at this was a "rush case" because SSG Kelly wanted his PE back.[8] (JA 29-31). This obviated the need to protect SSG Kelly from his own "embarrassing" material. Once government agents knew that SSG Kelly was alive, a search for any type of pornography would necessarily be a search for evidence of a crime because possession violated GO#1. Even if the government has a legitimate interest in protecting the reputations of deceased soldiers and preventing embarrassment to a deceased's loved ones, SSG Kelly did not fall into that category. While the Fourth Amendment does not apply to deceased individuals, SSG Kelly always retained his Fourth Amendment rights.

The military judge's finding that the search of SSG Kelly's computer was an inventory is not supported by the law or facts. The government's search of SSG Kelly's computer was a violation

[8] There was no regulation in effect that authorized any person other than SSG Kelly to receive his personal effects.

of his Fourth Amendment rights and the military judge's failure to suppress evidence of the search was an abuse of discretion.

Government agents searched SSG Kelly's computer without regard to established procedures, regulations, and the Fourth Amendment. The government treated SSG Kelly, and other wounded warriors, in the same manner that they processed deceased soldiers who have no Fourth Amendment protections. Because SSG Kelly's computer was searched in violation of the Fourth Amendment, all evidence produced from the illegal search, and any subsequent searches, must be suppressed and is inadmissible against SSG Kelly. *See* Mil. R. Evid. 311(a)(1)-(2).

WHEREFORE, SSG Kelly respectfully requests this Honorable Court set aside the findings of guilty as to the Specification of Charge I and Charge I and the Specification of Charge II and Charge II, and return his case to The Judge Advocate General for a sentence rehearing.

II.

WHETHER THE ARMY COURT ERRED BY CREATING A NEW EXCEPTION TO THE FOURTH AMENDMENT WHEN IT HELD THAT THE GOVERNMENT'S SEARCH OF APPELLANT'S PERSONAL COMPUTER WAS REASONABLE BECAUSE THE GOVERNMENT WAS NOT "CERTAIN" OR "ABSOLUTELY CLEAR" THAT IT WOULD BE RETURNED TO THE WOUNDED-WARRIOR APPELLANT.

The Army Court held that a wounded soldier had no protections from government searches of their personal effects

unless the government is "certain" or "it [is] absolutely clear" that the effects would be returned directly back to the wounded soldier. *Kelly*, ARMY 20090809, slip op. at 5. The Army Court's holding—that the actions of the JPED were reasonable because the government was not "certain" that SSG Kelly would personally receive his personal effects—is not supported by the Fourth Amendment or applicable case law. *Id.* In fact, this new "certain" or "absolute[] cl[arity]" standard gives the government *carte blanche* to violate a soldier's expectation of privacy merely because he or she is a wounded warrior and evacuated to the United States.

The Fourth Amendment does not protect against all searches, rather it only prohibits unreasonable searches. *Kazmierczak*, 37 C.M.R. at 214. "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973). Thus, the applicable standard to determine if a search is lawful is reasonableness, *not absolute cl[arity]* that a soldier will in fact receive their property. *See Kelly*, ARMY 20090809, slip op. at 5 (emphasis added).

In this case, it must first be determined whether SSG Kelly possessed a sufficient expectation of privacy in his computer files to trigger Fourth Amendment protection. *Eland*, 17 M.J. at 598 (citing *Smith v. Maryland*, 442 U.S. 735 (1979)). The test in this case is: (1) whether SSG Kelly exhibited an actual

expectation of privacy in the files on his computer, and (2) whether SSG Kelly's "expectation of privacy is one society is prepared to recognize as reasonable under the circumstances." *Id.*

The Army Court's decision did not analyze or weigh SSG Kelly's reasonable expectation of privacy in his computer files. Under the two part test in *Smith v. Maryland*, SSG Kelly had an expectation of privacy in his computer files and the government's search triggered the protection of the Fourth Amendment. *See Smith*, 442 U.S. at 740. First, SSG Kelly had an actual expectation of privacy in the contents of his computer as shown by his usage of a password. (JA 121). Second, SSG Kelly's expectation of privacy is one that our society is prepared to recognize as reasonable. *See, e.g., Conklin*, 63 M.J. at 336-37 (holding that soldiers have a reasonable expectation of privacy in files kept on their personal computer). Further, SSG Kelly should not lose his reasonable expectation of privacy merely because he was wounded in combat. Nor did SSG Kelly lose his Fourth Amendment protections simply because he was deployed to a combat zone. *See Huntzinger*, 69 M.J. 1 (holding that there is no general exception to the Fourth Amendment in deployed locales).

Instead of determining the reasonableness of SSG Kelly's expectation of privacy or the search itself, the Army Court

found that SSG Kelly—or other wounded warriors like him—would *only* have grounds to challenge a search in circumstances where the wounded soldier in SSG Kelly's position presented himself or herself at the door of the JPED. *Kelly*, slip op. at 5. The Army Court used this rationale to determine that the "inventory" was conducted reasonably under all of the circumstances. *Id.* The Army Court cites to no other facts or circumstances surrounding the "inventory" to declare it reasonable, except that SSG Kelly was not present at the JPED.

The Army Court cites *United States v. Jasper* to support its conclusion that the inventory was conducted reasonably. *Id.* However, the facts in *Jasper* do not lend themselves to the analysis in this case. Jasper was stationed in Germany, and he chose not to return from leave in the United States. 20 M.J. 112, 113 (C.M.A. 1985). When he failed to return from leave, Jasper's commander ordered an inventory of Jasper's off-post apartment. *Id.* The commander relied on an Army regulation which required an inventory to be conducted on the personal property of a soldier dropped from rolls. *Id.* at 114. During the inventory, a previously opened envelope with an insured sticker was found that was not addressed to Jasper. *Id.* at 113. The NCO conducting the inventory read the letter inside of the envelope, which indicated that a gold necklace was sent along with the letter. *Id.* The necklace was no longer in the

envelope at the time of the inventory. *Id.* The court held that the purposes of the inventory were reasonable under the circumstances because the government had a legitimate interest to protect Jasper's military-issued property from falling into the hands of terrorists and to protect itself against future claims of damage or loss. *Id.* at 115. The court held that the NCO's reading of the letter was reasonable since he was charged with inventorying only Jasper's property and there was some question as to whether the envelope belonged to Jasper. *Id.* at 115.

In the present case, the Army Court's reliance on *Jasper* is misplaced. Even if the Army had a legitimate interest in protecting against the unauthorized dissemination of classified material, that objective was complete once SSgt Munoznuno found that there was no classified material on SSG Kelly's computer. In this case, there was no regulation directing the inventory of the computer files, there was no need to search the files to determine ownership, and there was no risk of damage or loss to files inside the computer.

The Army Court correctly concluded that no regulation permitted or authorized an inventory of SSG Kelly's personal effects. *See Kelly*, slip op. at 4. While the Army Court held that the government has a legitimate interest in searching the personal effects of wounded "soldiers [due to] the likelihood

that those effects will go to PERE instead of directly back to the injured soldiers," this conclusion is not supported in the record or in any regulation. *Id.* A "person eligible to receive effects" (PERE) is defined by AR 638-2 as "the person to whom the Army will deliver or ship the deceased or missing person's [personal effects]." AR 638-2, para. 19-1. Thus, by regulation a PERE will not receive a soldier's personal effects *unless* the soldier is missing or deceased. Therefore, if the soldier is alive, albeit wounded and receiving care in a medical treatment facility, then he or she is to receive their own personal effects.

The Army Court's rationale that the search was pursuant to a legitimate government interest[9] (i.e., because soldiers are often wounded and never return to the battlefield) is wrong for at least two reasons. First, the facts of this case show that the government was aware that SSG Kelly would assuredly be the

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[9] The Army Court's stated legitimate purpose is more akin to a reason supporting an inspection as ordered by a commander under Mil. R. Evid. 313(b). Conducting any search to find property that can create a specific kind of effect (e.g., cause embarrassment or cause sorrow to loved ones) does not conform with the purposes of an inventory. Instead, conducting an administrative search with a purpose to find contraband that can create a specific kind of effect is similar to an inspection. *See* Mil. R. Evid. 313(b) (inspections authorized to search for property or contraband that can impact unit readiness, sanitation, and fitness for duty). However, there is no evidence that the search on SSG Kelly's computer was conducted as a valid inspection, and the government has not argued as such.

person to receive his personal effects since he requested his property and stated that he needed it. (*See* JA 29-31). Second, the applicable regulations do not support a finding that a different PERE can even receive the personal effects of a wounded soldier. In fact, during the six weeks that the JPED held SSG Kelly's computer, the JPED never identified a PERE, which indicates that no one other than SSG Kelly was to receive his personal effects. In finding a legitimate government purpose to conduct the "inventory" the Army steps away from the purposes for inventories as stated in *Opperman* to create limitless search authority of wounded warriors' property.

The Army Court's holding that the government's search of SSG Kelly's computer was reasonable because the government was not "certain" or "absolutely clear" that SSG Kelly would receive his computer is the creation of a new exception to the Fourth Amendment. The Army Court's decision places an undue burden on SSG Kelly—and future wounded soldiers—to notify the government that he would receive his own personal effects in order to maintain his reasonable expectation of privacy already granted by the Fourth Amendment. This new exception shifts the burden from the government even though the government is conducting the search and is in the best position to know, or at least discover, who will receive the wounded soldier's PE. The Army Court's decision is dangerous as it condones the JPED's practice

of—under a cloak of ignorance—invading the reasonable expectation of privacy of wounded soldiers who have no protection against the government's actions unless they take the overly burdensome step of presenting themselves at the door of JPED.

WHEREFORE, SSG Kelly respectfully requests this Honorable Court set aside the findings of guilty as to the Specification of Charge I and Charge I and the Specification of Charge II and Charge II, and return his case to The Judge Advocate General for a sentence rehearing.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court grant the requested relief.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,055 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New, using 12-point type with no more than ten and ½ characters per inch.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Kelly, Crim. App. Dkt. No. 20090809, Dkt. No. 12-0524/AR, was delivered to the Court and Government Appellate Division on October 19, 2012.

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