**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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


EDWARD J. WHITFORD
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
Phone: (703) 693-0779
**Lead Counsel**
U.S.C.A.A.F. Bar No. 35234

CATHERINE L. BRANTLEY
Major, Judge Advocate
Branch Chief, Government Appellate Division
USCAAF Bar No. 35567

AMBER J. ROACH
Lieutenant Colonel, Judge Advocate
Acting Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 35224

## Index to Brief

## Table of Cases, Statutes, and Other Authorities

### Constitution of the United States



### Supreme Court of the United States



### United States Court of Appeals for the Armed Forces

**Courts of Criminal Appeals**



**Federal Circuit Courts of Appeal and District Courts**



**Uniform Code of Military Justice**

**Manual for Courts-Martial, United States, 2008 Edition**



**Scholarship**

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

## 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 IN 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 Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause

---

[1] Joint Appendix (JA) 1; UCMJ, art. 66(b), 10 U.S.C. § 866(b).

shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

## Statement of the Case

A military judge, sitting as a general court-martial, convicted appellant, pursuant to his conditional pleas under Rule for Courts-Martial (R.C.M.) 910(a)(2),[3] of one specification of disobeying a general order and one specification of possession of child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice.[4] 10 U.S.C. §§ 892, 934 (2006) (U.C.M.J.). The military judge also convicted appellant, pursuant to his unconditional pleas,[5] of additional charges of attempted larceny, larceny, and fraudulent claims, in violation of Articles 80, 121, and 132, UCMJ.[6] The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for 18 months, and to be discharged from the service with a bad-conduct discharge.[7] The convening authority approved only 17 months of confinement, but otherwise approved the sentence.[8] The Army Court affirmed the findings and sentence.[9]

---

[2] UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3).
[3] JA 155.
[4] JA 157.
[5] JA 155-156.
[6] JA 157-158.
[7] JA 159.
[8] JA 160.
[9] JA 5.

## Summary of Argument

**a. Factual Summary**

Appellant was wounded by a roadside bomb while serving in Iraq. He was medically evacuated to the United States. His personal effects remained in Iraq. His unit took possession of appellant's effects and shipped them to the Joint Personal Effects Depot ("JPED") in the United States. While the JPED knew that appellant wanted his personal effects back, they did not know who would accept the effects for appellant.

The JPED, following a written standard operating procedure, inventoried appellant's effects. As it did for every medically evacuated Soldier, the JPED examined the digital media in appellant's effects. The purpose of the examination is two-fold: 1) remove any classified material, 2) discover any items that might cause the recipient of appellant's effects additional sorrow or embarrassment. That material would be removed before forwarding appellant's effects. The JPED, while following standardized search criteria, discovered child pornography on appellant's laptop computer.

**b. The Military Judge Did Not Abuse His Discretion**

The military judge correctly applied Military Rule of Evidence (Mil. R. Evid.) 313(c) when he ruled that the "inventory of the accused's [personal effects] and, specifically, his personal computer, was conducted to accomplish

the JPED's administrative purpose and was not intended to discover any illegal activity or for the purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings."

The JPED has a legitimate and reasonable governmental interest in examining the digital media of medically evacuated Soldiers: to prevent the spread of classified material and to alleviate embarrassment and further sorrow of whoever receives appellant's effects. These rationales are reasonable, where the Army has taken possession of a wounded Soldier's effects, and must return them to whoever receives the effects. The scope of the inventory was reasonably related to achieve that purpose, and the examination was not a subterfuge to discover contraband.

**c. The Army Court, Testing Limits of Reasonableness, Did Not Create a New Exception to the Fourth Amendment.**

The Army Court did not create a new constitutional exception to the Fourth Amendment. The Army Court applied the correct law to the circumstances of the case - and then gave a hypothetical circumstance that might give rise to an unreasonable search. However, if the Army Court deviated from a legal rule in analyzing appellant's claim, this Court may pierce through that error and decide whether the military judge abused his discretion.

## Statement of Facts

### a. Appellant's Combat Injury and Evacuation from Iraq

On 28 April 2007, while deployed to Iraq, appellant was wounded when his convoy was struck by an exploding roadside bomb.[10] Appellant initially received medical treatment at the 28th Combat Support Hospital in Baghdad. Within a day, he was moved to Balad, Iraq and then Landstuhl, Germany for additional treatment.[11] Appellant was eventually moved to Fort Bragg, North Carolina for further medical treatment.[12]

### b. The Processing and Shipping of Appellant's Personal Effects from Iraq to the United States

Appellant's personal effects remained in Iraq after appellant was medically evacuated.[13] On 28 April 2007, First Lieutenant (1LT) Christopher Hull was appointed as the Summary Courts-Martial Officer (SCMO) for appellant.[14] The next day, 1LT Hull began the inventory process with two noncommissioned officers (NCOs).[15] Included in the inventory was a Compaq

---

[10] JA 118-119. *See also* JA 45. A second stipulation of fact was admitted as a defense exhibit because the defense offered it as an exhibit after appellant withdrew from his initial offer to plead guilty. The military judge only considered the stipulation of fact for purposes of determining the providence of the plea. *See* R. at 88, 171-180.
[11] JA 125-126.
[12] JA 126.
[13] JA 53.
[14] JA 53.
[15] JA 53.

Presario laptop belonging to appellant.[16] The computer's serial number was listed as CND4461245.[17] After collecting appellant's property, 1LT Hull locked and secured it.[18] On 2 May 2007, 1LT Hull delivered the property to Mortuary Affairs.

On 7 June 2007, the Joint Personal Effects Depot ("JPED") inventoried the contents of appellant's laptop. The JPED is located at Aberdeen Proving Ground, Maryland.[19] The JPED's mission is to process personal effects for medically evacuated, deceased, or missing Soldiers.[20]

**c. The JPED's Authority and Standard Operating Procedure**

*ALARACT 139/2006 and Army Regulation 638-2*

In July 2006, the United States Army issued All Army Activities ("ALARACT") 139/2006.[21] The ALARACT reminded commanders of the importance of accountability and timely movement of personal effects for all deceased, wounded, and medically evacuated personnel.[22] The ALARACT instructed commanders in theater to immediately appoint a summary court martial officer ("SCMO") upon notification of a death, missing

---

[16] *See* App. Ex. XIV.
[17] JA 53.
[18] JA 53.
[19] JA 29; *See also* All Army Activities Message 139/2006, SUBJECT: POLICIES AND PROCEDURES FOR THE HANDLING OF PERSONAL EFFECTS (PE) AND GOVERNMENT PROPERTY [hereinafter "ALARACT 139/2006"].
[20] JA 79.
[21] JA 161-164.
[22] JA 161.

status, or hospitalization.[23] The SCMO in theater would inventory and process the personal effects and military property belonging to the medically evacuated person.[24] The SCMO in theater follows the process outlined in the ALARACT and its references, including Army Regulation ("AR") 638-2, Care and Disposition of Remains and Disposition of Personal Effects, dated 22 December 2000.[25]

The ALARACT directed commanders and units to forward the personal effects of medically evacuated personnel to the JPED and established a process for doing so.[26] The ALARACT further stated that "[t]he JPED will clean, sort, and distribute PE[27] and personally owned OCIE to the individuals home of record, person eligible to receive effects or the individuals home station."[28]

Prior to the July 2006 ALARACT, the JPED only processed the personal effects of missing or deceased personnel.[29] Part II of AR 638-2 controls the disposition of personal effects of deceased and missing personnel. Paragraph 20-2 states that PE depots will comply with paragraphs 20-12, 20-13, 20-14 of AR

---

[23] JA 162.
[24] JA 162-163.
[25] JA 162-163.
[26] JA 163 (that process included Mortuary Affairs Control Points and a Theater Personal Effects Depot). *See also* JA 229-241.
[27] PE is an acronym for personal effects.
[28] JA 163.
[29] JA 82-83.

638-2. Paragraph 20-14 involves "Destruction of PE," and subparagraph (a) states:

> Inappropriate items that may cause embarrassment or added sorrow if forwarded to the recipient will be withdrawn and destroyed. Categories include, but are not limited to, items that are mutilated, burned, bloodstained, damaged beyond repair, obnoxious, obscene, or unsanitary. Correspondence (opened mail), papers, photographs, video tapes, and so forth must be screened for suitability. Exposed, but unprocessed, film must be processed to permit screening. Processing of exposed film to permit screening is authorized at Government expense using a DA Form 3903 (Visual Information Work Order). Unsuitable items will be removed and destroyed.

Paragraph 20-14 indicates that a personal effects depot will appoint its own SCMO. The JPED processed the personal effects of medically evacuated persons the same way as it did for the deceased.[30]

*The JPED Process Manual*

The JPED established the JPED Process Manual, a written standard operating procedure.[31] Chapter 2 stated that "Electronic Media such as Laptops, MP3 Players, Hard Drives, Thumb drives, Memory Cards, etc. will be screened for classified information and material not suitable that may cause more sorrow or embarrassment to the family of the servicemember."[32] Chapter 5 directs SCMOs to "remove all appropriate items that may cause

---

[30] JA 83.
[31] JA 243-260. Only the portions of the Process Manual in black ink were in effect in June 2007. *See* JA 114-115.
[32] JA 247.

added sorrow or embarrassment to the [person eligible to receive effects.]"[33]

A section entitled "Media Center" states that all media of a manner not be sent home will be stored and subdivided in the following categories: 1) military documents (including SITREPS and alpha rosters), 2) military pictures and videos (including pictures of the U.S. military engaging opposing forces), 3) inappropriate items that depict or describe acts of a vulgar nature, 4) gore (including pictures of dead bodies), and 5) pornography.[34]

The JPED personnel in the JPED's media center receive on-the-job training and also attend training at the Cyber Crime Forensic Academy.[35]

**d. The JPED's Inventory of Appellant's Personal Effects**

On 7 June 2007, Air Force SSgt Ramon Munoznuno, assigned to the JPED, received a case believed to belong to appellant. Inside was the Compaq Presario laptop, serial number CND4461245.[36] SSgt Munoznuno examined the digital contents of the computer as part of the JPED's "standard procedure."[37]

---

[33] JA 257. That sentence references AR 638-2, para. 20-14.
[34] JA 259.
[35] JA 69.
[36] JA 29.
[37] JA 29.

First, he looked for classified material.[38] Finding none, he looked for material in the following categories: "Gore, Inappropriate, and Porn."[39]

As a result, SSgt Munoznuno found files on appellant's computer that included young, fully nude children -- some involved in sexual acts.[40] SSgt Munoznuno contacted his supervisor, who contacted CID.[41] Eventually, 32 images and 2 videos of child pornography were discovered on appellant's computer.[42]

**e. Appellant's Motion at Trial and the Government's Response**

At trial, appellant moved to suppress the evidence discovered during the JPED's examination of appellant's computer.[43] The Government offered at least two theories of admissibility under Section III of the Military Rules of

---

[38] JA 29.
[39] JA 29.
[40] JA 29.
[41] JA 29; JA 32.
[42] Appellant's sole challenge at trial to CID's search of appellant's computer was that it was the fruit of the previous search at the JPED. (JA 44). Special Agent (SA) Alan Ubbens collected appellant's computer from the JPED. (JA 60). SA Brian Ferguson, the Fort Drum evidence custodian, received the computer from Aberdeen Proving Ground. (JA 56-57). SA Julie Kuykendall obtained a probable cause search authorization from a military magistrate. (JA 23-24). The Fort Drum CID office sent appellant's computer to the CID office at Fort Monmouth, New Jersey, for a forensic evaluation. (JA 56-57). Computer examiners conducted a forensic examination of appellant's computer and found child pornography. (JA 46).
[43] JA 16.

Evidence regarding the child pornography. In particular, the Government argued that the evidence was admissible as evidence discovered during an inventory under Mil. R. Evid. 313(c).[44] The Government, citing to Mil. R. Evid. 314(k), also argued that "the facts of the case more closely resemble the border search which would include a customs search, than a search requiring probable cause."[45]

The military judge denied appellant's motion to suppress.[46] Citing Mil. R. Evid. 313(c), the military judge held that the "inventory of the accused's [personal effects] and, specifically, his personal computer, was conducted to accomplish the JPED's administrative purpose and was not intended to discover any illegal activity or for the purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings."

**f. Appellant's Conditional Guilty Plea**

Appellant entered conditional pleas of guilty to the Specifications of Charges I and II.[47] He preserved his ability for appellate courts to consider the motion to suppress, which

---

[44] JA 36. While not citing to Mil. R. Evid. 313(b), the Government referred to the JPED's actions as an "inspection" and an "inventory and inspection."
[45] JA 36.
[46] JA 42-44.
[47] JA 155.

the military judge had earlier denied.[48] The Staff Judge Advocate, in accordance with service regulations, consented to these pleas.[49] The military judge also approved appellant's conditional pleas.[50]

## ISSUE 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.**

### Standard of Review

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion.[51] "Abuse of discretion" is a term of art applied to appellate review of the discretionary judgments of a trial court.[52] An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law.[53] "Further, the abuse of discretion standard of review recognizes that a judge has a range of

---

[48] JA 151-152.
[49] JA 152.
[50] JA 152.
[51] *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008).
[52] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).
[53] *Id.; See also United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007).

choices and will not be reversed so long as the decision remains within that range."[54]

Courts consider the evidence in the light most favorable to the prevailing party.[55]

**Law**

Inventory searches are a well-defined exception to the warrant requirement of the Fourth Amendment.[56] The Supreme Court has noted that "probable cause to search is irrelevant" in inventory searches because the salutary functions of a warrant simply have no application in that context; the constitutional reasonableness of inventory searches must be determined on other bases.[57]

---

[54] *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).
[55] *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).
[56] *Colorado v. Bertine*, 479 U.S. 367, 371 (1987), *citing Illinois v. Lafayette*, 462 U.S. 640, 643 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 367-376 (1976).
[57] *Lafayette*, 462 U.S. at 643-44, *citing United States v. Chadwick*, 433 U.S. 1, 10 n.5 (1977); *see also Opperman*, 428 U.S. at 371 n.5 ("The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.").

The President has partially codified the law relating to search and seizure.[58] In particular, Mil. R. Evid. 313(c) regulates inventories in the Armed Forces:

> Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 313(a) establishes that evidence obtained from an inventory is admissible at trial, notwithstanding other rules of evidence. The standard is reasonableness under all the facts and circumstances.[59]

***The Supreme Court's Examination of Inventories: Reasonableness in Purpose, Scope, and Discretion***

In analyzing inventories, the Supreme Court has examined the reasonableness of the government purpose for the inventory. For example, in *South Dakota v. Opperman,* the Court upheld a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances.[60] The Court noted that police routinely impound illegally parked

---

[58] *See Manual for Courts-Martial, United States* (2008 ed.) (*M.C.M.*), Appendix 22, Section III.
[59] *United States v. Jasper*, 20 M.J. 112, 114 (C.M.A. 1985).
[60] 428 U.S. at 365, 376.

vehicles as part of its community caretaking functions.[61] The Court then noted that police departments began inventorying and securing the vehicles' contents.[62] These procedures developed in response to three distinct needs: 1) protection of the owner's property while it remains in police custody, 2) protection of police against claims or disputes over lost or stolen property, and 3) the protection of police from potential danger.[63] The Supreme Court determined that these police inventories are noncriminal in nature.[64] The Court concluded that the police, by following standard operating procedures, was acting reasonably.[65]

The Supreme Court has emphasized that the scope of the inventory must be reasonable. In *Illinois v. Lafayette*, the police arrested a man carrying a purse-type shoulder bag.[66] Once at the police station, police inventoried that bag, because it was standard procedure to inventory "everything" in the possession of an arrested person.[67] The Supreme Court noted that the scope of a police station inventory is different than a search incident to arrest.

> The governmental interests underlying a stationhouse search of the arrestee's person and possessions may in

---

[61] *Id.* at 368.
[62] *Id.* at 369.
[63] *Id.*
[64] *Id.* at 370 n.5, n.6.
[65] *Id.* at 376.
[66] 462 U.S. at 641.
[67] *Id.* at 642.

> some circumstances be even greater than those supporting a search immediately following arrest. Consequently, the scope of a stationhouse search will often vary from that made at the time of arrest. Police conduct that would be impractical or unreasonable-or embarrassingly intrusive-on the street can more readily-and privately-be performed at the station. For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.[68]

The Court noted several governmental interests supporting such an inventory.[69] The Court held that this inventory, conducted in accordance with established inventory procedures, was reasonable under the Fourth Amendment.[70]

The Supreme Court has also emphasized the importance of standard operating procedures that limit the discretion of the inventorying officer. "A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involve in the specific circumstances they confront." (quotations and ellipses omitted).[71] In *Colorado v. Bertine*, the Supreme Court held, "[n]othing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on

---

[68] *Id.* at 645.
[69] *Id.* at 646.
[70] *Id.* at 649.
[71] *Id.* at 648.

the basis of something other than suspicion of evidence of criminal activity."[72] In *Florida v. Wells*, the Court held that "[t]he allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment."[73]

***Inventories in the Military Context***

In *United States v. Jasper*, the Court of Military Appeals upheld an inventory of an off-post private residence in Germany, where the accused was AWOL and the inventorying officer examined an opened piece of mail not addressed to either occupant.[74] The Court conducted a two-step analysis. First, it determined that there was an important governmental interest to enter the home and conduct an inventory.[75] Second, it determined that the scope of the inventory did not exceed the purpose.[76]

The Court of Military Appeals has also upheld inventories conducted in accordance with service regulations and customs, which provides some assurance that the inventory is not a mere

---

[72] 479 U.S. at 375.
[73] 495 U.S. 1, 4 (1990) (holding that an inventory search was unreasonable because there was no policy regarding opening closed containers.).
[74] 20 M.J. at 113.
[75] *Id.* at 114-115.
[76] *Id.* at 115 ("Because we have determined that Sergeant Kos was properly in appellant's apartment to conduct an inventory, we must next consider whether he exceeded the scope of that inventory by looking inside the envelope and reading the enclosed letter.")

pretext for a prosecutorial motive.[77] If proper inventory procedures are followed, even some suspicion that contraband will be found will not avoid an otherwise valid inventory search.[78] Inventories will often be governed by regulation.[79] However, in the absence of a procedural regulation, a military administrative need has justified inventorying and securing valuable property in automobile parked on military base when the owner was in pretrial confinement.[80]

**Argument**

The military judge correctly applied Mil. R. Evid. 313(c) when he ruled that the "inventory of the accused's PE and, specifically, his personal computer, was conducted to accomplish the JPED's administrative purpose and was not intended to discover any illegal activity or for the purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings."[81] His findings of fact are not clearly erroneous, and his conclusions of law are correct.

As a threshold matter, the JPED's process - including its examination of digital media - is an inventory, and Rule 313(c)

---

[77] *Id.* at 114, *citing United States v. Law*, 17 M.J. 229 (C.M.A. 1984); *United States v. Barnett*, 18 M.J. 166 (C.M.A. 1984); *United States v. Kazmierczak*, 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967).
[78] *Law*, 17 M.J. at 237.
[79] *M.C.M.*, Appendix 22, Rule 313(c).
[80] *Id.*, *citing United States v. Dulus*, 16 M.J. 324 (C.M.A. 1983).
[81] AE XXVII at 3.

is the correct law for this case. The JPED has a duty to clean, sort, and distribute personal effects of medically evacuated Soldiers.[82] These duties fit comfortably within the common understanding of an inventory. The JPED's examination of digital media is a reasonable component of that larger inventory process.

As discussed in greater detail below, the Government has a legitimate and reasonable interest in conducting that inventory process. In particular, the record is clear that the governmental interest is to avoid release of classified material and to remove items that might cause embarrassment or added sorrow to the recipient. The scope of the JPED's examination of digital media is reasonable in light of these interests.

Since the JPED's process is an inventory, Rule 313(c) is the controlling law.[83] This Court should use a framework similar to *Jasper* in determining whether the JPED's inventory was reasonable under all the facts and circumstances.

---

[82] JA 163.

[83] Appellant refers to a three-part test in *United States v. Kazmierczak*. (Appellant's Br. at 11). That opinion does not expressly announce such a test. Appellant's reliance on *Kazmierczak* appears based on a Military Law Review article. *See* Anderson, *Inventory Searches,* 110 Mil. L. Rev. 95, 107 (1985). *Kazmierczak*'s two-prong inquiry was appropriate to resolve the case given the state of the law in 1967. However, today, there are more precise methods of measuring reasonableness under the Fourth Amendment than *Kazmierczak*. *See* Mil. R. Evid. 313(c), *Jasper, Opperman, Lafayette, Bertine,* and *Wells, supra.*

**A. The Governmental Purpose is Administrative, Legitimate, and Reasonable.**

The military judge found as a matter of fact that the "primary purpose for the search of the accused's computer was to remove classified material, if any, and to discover any items which might cause the recipient of the accused's [personal effects] additional embarrassment or sorrow so that they might be removed before forwarding the accused's [personal effects.]"[84] The record supports this finding.[85] An officer at the JPED denied that one of the goals of the JPED is to collect evidence for use at a court-martial.[86] "No. We do not collect evidence."[87]

The governmental interest in avoiding further sorrow and embarrassment to whoever receives the personal effects is reasonable and legitimate in the context of a wounded Soldier. Appellant was wounded and was medically evacuated from Iraq. His personal effects remained back in Iraq. The Army acted reasonably in taking possession of appellant's personal effects. It is reasonable for the Army to clean, sort, and distribute those personal effects.[88]

---

[84] JA 44.
[85] *See, e.g.*, JA 84, 184, 237, 247, 257, 259.
[86] JA 63.
[87] JA 63.
[88] It is more reasonable for the Army to clean, sort, and distribute a wounded Soldier's personal effects than to

While the record shows that the JPED knew appellant wanted his personal effects back,[89] the record does not reflect who would receive those items.[90] Thus, the JPED acted in the context of a wounded Soldier who faced an uncertain recovery time. The JPED did not know who would accept appellant's personal effects – whether it be the wounded Soldier or a spouse, family member, confidant, or agent. The governmental interest in this context is distinct from governmental interests in a situation where a Soldier redeploys on schedule, having full possession of his or her own personal effects. Given the uncertainty of who would receive the personal effects, the governmental interest in alleviating sorrow and avoiding embarrassment in this context is real, legitimate, and reasonable.[91]

Citing to *Opperman*, appellant argues that inventories fulfill only three needs: 1) protection of owner's effects; 2) protection of the government against claims of lost or damaged effects; and 3) protection of government personnel from

---

distribute those personal effects in an uncleaned and unsorted state.

[89] JA 29.

[90] *See* JA 5.

[91] The governmental interest in protecting classified information is legitimate and reasonable for purposes of national security. *See United States v. Alleyne*, 13 M.J. 331, 335 (C.M.A. 1982) (discussing the importance of classified information in overseas locations not falling into the hands of potential enemies).

potential danger.[92] Those rationales are relevant to the inventory at issue in *Opperman*. They cannot be the exclusive factors for every conceivable inventory. "The standard is reasonableness under all the facts and circumstances."[93] The governmental interests in inventorying a wounded Soldier's personal effects differ from the interests in inventorying an illegally parked vehicle.

**B. The Scope of the Examination Is Reasonably Limited to Achieve the Governmental Purpose.**

The scope of the JPED's inventory was reasonable to accomplish the governmental interest. The military judge found as a matter of fact that the JPED's inventory "was not intended to discover any illegal activity or for the purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings."[94] This finding is not clearly erroneous.

Turning on and examining the computer was reasonably within the scope of the inventory. Although SSgt Munoznuno accessed appellant's laptop, that intrusion was necessary to find any classified or potentially embarrassing material. His actions are comparable to the NCO in *Jasper*, who viewed someone else's mail while conducting an inventory of property. Similarly, in

---

[92] Appellant's Br. at 14.
[93] *Jasper*, 20 M.J. at 114.
[94] JA 44.

*United States v. Law*, the command properly and reasonably inventoried the contents of a closed suitcase when the owner went on emergency leave.[95] Examining the contents of a computer is comparable to perusing another's mail or examining the contents of a closed suitcase. Put another way, when examining digital computer files, an examiner will necessarily access the computer.

The scope of this inventory is reasonable because the JPED Process Manual limited SSgt Munoznuno's discretion. His intrusion into the laptop was limited to finding classified information. He also checked the laptop for gore, inappropriate, and porn. His actions were entirely within the guidance of the JPED Process Manual. His specific and limited task cannot be compared to "general rummaging."[96]

The Army Court noted that the ALARACT cannot incorporate its guidance into AR 638-2.[97] The Army Court reasonably interpreted its regulations and this Court should adopt that interpretation.[98] Commanders were sending the effects of wounded Soldiers to the JPED. The JPED reasonably applied the

---

[95] 17 M.J. 229 (C.M.A. 1984).
[96] *See Wells*, 495 U.S. at 3.
[97] JA 3.
[98] *See United States v. Shavrnoch*, 49 M.J. 334, 338 n.2 (C.M.A 1998); *see also United States v. Roach*, 29 M.J. 33, 36 (C.M.A. 1989)("We defer to this service court's [Coast Guard Court of Military Review] construction of its own regulations. . . .").

provisions of AR 638-2 to those medically evacuated Soldiers. That regulation was drafted to apply to living Soldiers who are missing. It is reasonable to apply that regulation to living, wounded Soldiers.[99]

Contrary to appellant's argument, the record does not reflect that the JPED's examination was a pretext for an illegal search. In particular, the military judge made findings of fact on this point: "At the time of the JPED's review of the accused's computer, there is no evidence that any one in the chain of command, CID, the JPED, or any other government actor suspected the accused had any illegal items in any of his [personal effects]." As the record is totally absent of any evidence to the contrary, his finding is not clearly erroneous. Appellant was never suspected of any criminal activity until the child pornography was found on his computer; this inventory was not a subterfuge. Appellant was not singled out for a more thorough evaluation, and no person expected to find child pornography or any other contraband.

---

[99] Even if a regulation does not delineate the interest and scope of the inventory, the governmental interest can arise from the circumstances of the case. *See United States v. Dulus*, 16 M.J. 324, 326-327 (C.M.A. 1983). The scope in this case was limited by the JPED's SOP.

The inventory need not be limited to merely confirming the laptop's serial number.[100] Such a scope might be reasonable in the context of police caretaking and impounded vehicles, such as in *Opperman*. However, the JPED faced a different context. The JPED possessed the personal effects of a wounded Soldier, who faced an uncertain recovery. Appellant was wounded in combat. The Army has a reasonable interest in alleviating any further suffering or embarrassment for appellant, his family, and his loved ones. An inventory that sanitizes those materials, pursuant to a standard operating procedure, is reasonable in this case.

**C. The JPED Need Not Adopt the Least Restrictive Means**

Appellant argues that the JPED needs to determine who will receive the personal effects before it conducts its inventory process.[101] The Supreme Court has consistently rejected arguments that the Fourth Amendment mandates the least restrictive means. The real question is not what could have been achieved, but whether the Fourth Amendment *requires* such steps.[102] The reasonableness of any particular government

---

[100] Appellant's Br. at 15.
[101] "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." Appellant's Br. at 33.
[102] *Bertine*, 479 U.S. at 374, *citing Lafayette*, 462 U.S. at 637 (internal quotations omitted) (emphasis in original).

activity does not necessarily or invariably turn on the existence of alternative, 'less intrusive' means.[103]

The Fourth Amendment does not require appellant's suggestion in this case. The issue of a party accepting personal effects is necessarily fluid, changing, and fact-specific. The "who," "what, "how," "when," and "where" of that issue is different in every case. A Soldier has been medically evacuated from a combat zone and faces an uncertain recovery. Soldiers, families, and loved ones will react differently depending on each unique situation.

The JPED acted reasonably by applying a uniform standard, instead of making fine and subtle distinctions. In the context of police inventories, the Supreme Court has noted, "it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."[104] The JPED's uniform standard has the salutary effect of limiting the discretion of workers in the JPED.[105] Furthermore, the Supreme Court comments in *Lafayette* were made in the context of police officers conducting an inventory. While police are acting in their caretaking capacity when

---

[103] *Id.*
[104] *Lafayette*, 462 U.S. at 648.
[105] *See Wells*, 495 U.S. at 4.

conducting inventories, their primary professional duty is to investigate crime and ferret out evidence of crime. The primary administrative purpose of the JPED is not criminal investigation.

**D. Prejudice and Remedies**

If the military judge abused his discretion in evaluating the JPED's inventory process, the remedy is not immediate suppression. Rather, pursuant to R.C.M. 910(a)(2), appellant may withdraw his guilty plea.

At trial, the military judge only considered one of the Government's arguments, and did not reach the second Fourth Amendment exception. In particular, the Government argued that the JPED's actions were admissible under Mil. R. Evid. 314(k). Should this case return to the trial phase, the Government should be allowed to argue that the evidence is admissible under that rule.

Alternatively, this Court should affirm the decision of the trial court if correct for any reason, including one not considered below.[106] A number of Federal Circuit Courts also

---

[106] *United States v. Leiffer*, 13 M.J. 337, 345 n.10 (C.M.A. 1982), *citing United States v. Allen*, 629 F.2d 51, 57 (D.C. Cir. 1980); *see also Brown v. Allen*, 344 U.S. 443, 459 (1953) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").

follow this rule.[107] Thus, if the military judged deviated from a legal rule, appellant would not be prejudiced if his decision was correct for another reason.

The evidence was admissible under the catch-all exception of Mil. R. Evid. 314(k). Because it receives personal effects shipped from Iraq, the JPED serves as the functional equivalent of a border. At the same time, its inventory process is analogous to a warrantless inspection process in *New York v. Burger*.[108] Thus, the JPED has the qualities of two additional exceptions to the Fourth Amendment and does not fall under the traditional exceptions in Mil. R. Evid. 314.

The JPED's examination of appellant's effects was the functional equivalent of a border search. It is unassailable that a reasonable expectation of privacy is extinguished at a sovereign's borders, including military bases:

> That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.[109]

---

[107] *See United States v. Montgomery*, 377 F.3d 582, 585 (6th Cir. 2004) (in the context of a motion to suppress); *United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005) ("We may affirm a district court's denial of a motion to suppress on any basis supported in the record.").

[108] 482 U.S. 691 (1987).

[109] *United States v. Ramsey*, 431 U.S. 606, 616, 97 S.Ct. 1972, 1978, 52 L.Ed2d 617, 626 (1977).

The Court of Military Appeals (CMA) applied this border search rationale to the context of foreign bases in *United States v. Rivera*.[110] In 1982, the CMA applied this doctrine to exit searches at foreign bases.[111] Mil. R. Evid. 314(c) follows this long-standing precedent and gives commanders authority to conduct exit searches at military installations abroad. While that rule does not apply in this case, the principles justifying that rule do apply.

Border searches are not strictly limited to physical borders themselves, but can include the "functional equivalent" of a border.[112] The Army Court of Military Review held that a Soldier has "at best only the most minimal expectations of privacy" in crated household goods shipped from the United States and stored in a leased commercial warehouse in Germany.[113]

Appellant's expectation of privacy in the JPED is similarly, at best, only minimal.[114] His property was packed in

---

[110] 4 M.J. 215 (C.M.A. 1978).
[111] *Alleyne*, 13 M.J. 331.
[112] *See Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).
[113] *United States v. Williamson*, 28 M.J. 511, 519 (A.C.M.R. 1989) (internal quotations omitted). Although the *Williamson* Court rejected the border search rationale for the HHG in storage, its holding on the expectation of privacy is compelling in the instant case.
[114] Additionally, the government's initial seizure of the laptop was reasonable. ALARACT 139/2006 authorized the SCMO to seize and inventory the laptop in Iraq. The alternative would place the burden on deceased, missing, and medically evacuated

Iraq and flown across the sovereign border of the United States, where it remained in military control until it reached the JPED.

Additionally, any expectation of privacy is "particularly attenuated" within a closely regulated industry.[115] Therefore, the test put forth in *New York v. Burger* should control this Court's analysis. There, the Court upheld a warrantless inspection scheme of New York junkyards, so long as the following conditions were met:

> 1) There is a substantial government interest which supports warrantless regulatory inspection;
>
> 2) The warrantless inspection must be necessary to effectuate the government interest; and
>
> 3) The scheme of the inspection must provide a "constitutionally adequate substitute for a warrant."[116]

Here, the military has a substantial interest in preventing dissemination of classified digital media from a combat zone and a substantial interest in preventing embarrassment and further sorrow to those receiving PE. The inspection of the computer is necessary because digital material must be examined to know what its contents are. Additionally, the portability of digital

---

Soldiers (or their families or agents) to bring PE home from combat.

[115] *Burger*, 482 U.S. at 700. The closely regulated industry of *Burger* was a junkyard. It is hard to imagine that a junkyard would be more closely regulated than armed forces engaged in combat in Iraq.

[116] *Id.* at 702, 708.

media makes it foreseeable that thousands of classified or inappropriate files could be transported on a single hard drive or DVD.

Lastly, the JPED process provides a constitutionally adequate substitute for a warrant. In *Burger,* the Court gave great weight that the inspections were conducted pursuant to a statute, which placed the operator on notice of the inspections and who would conduct them.[117] Here, AR 638-2 and ALARACT 139/2006 were published and put appellant on notice that the JPED would be reviewing material on his computer.[118]

The Court in *Burger* also inquired into the "time, place, and scope" of the intrusion. Here, the limitations of the JPED are well-established. The JPED's authority to search is limited to materials within the JPED itself; JPED personnel do not knock down random doors in a barracks. The time limitation is that the JPED can only inspect items so long as they are within the control of the JPED. The JPED process manual also limited SSgt Munoznuno's discretion to searching for classified or otherwise inappropriate material.

---

[117] *Id.* at 711.

[118] Appellant does not allege that the regulations and ALARACT at issue were improperly published. *See United States v. Tolkach,* 14 M.J. 239 (C.M.A. 1982) (An accused is presumed to have knowledge of a regulation when that regulation is received by the official repository for such publications and when it is available for reference by all personnel).

This Court should find the government examination of appellant's laptop was reasonable. The balance between appellant's at best minimal expectation of privacy against the substantial governmental interest in preventing dissemination of classified and inappropriate material weighs in favor of the government. As a constitutional matter, the Fourth Amendment is not implicated. As a matter of admissibility, the child pornography was admissible under the catch-all provision of Mil. R. Evid. 314(k). As such, appellant cannot prevail on his claim.

## ISSUE II

**WHETHER THE ARMY COURT ERRED IN 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.**

### Law and Argument

The Army Court did not create a new exception to the Fourth Amendment when it decided appellant's case.[119] Appellant argues that the Army Court rejected the reasonableness standard in favor of a "certain" or an "absolute cl[arity]" standard.[120] However, that paragraph at issue shows a court applying the

---

[119] The paragraph at issue in the Army Court's decision is located at JA 5.
[120] Appellant's Br. at 28.

correct law and testing the limits of reasonableness, rather than creating new exceptions to the Constitution. Appellate judges of the Courts of Criminal Appeals are presumed to know and follow the law, absent clear evidence to the contrary.[121]

The Army Court applied the reasonableness standard required in Fourth Amendment cases. Its citation to *United States v. Jasper* reflects this application of reasonableness. "The standard is reasonableness under all the facts and circumstances."[122] In the paragraph at issue, the Army Court was testing the limits of reasonableness in this case.[123]

The Army Court had determined that "we do not find that it was clear that the personal effects would be going to him directly or through a [person eligible to receive effects.]"[124] Thus, the Army Court was analyzing the reasonableness of the JPED's actions when the JPED did not know who would receive appellant's effects. The paragraph in question is an inquiry into when the Government's rationale for the inventory and the scope of the JPED's inventory would become unreasonable. This judicial inquiry into the outer limits of reasonableness is

---

[121] *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997).
[122] 20 M.J. at 114, *citing* Mil.R.Evid. 313(c); *Cady v. Dombrowski*, 413 U.S. 433 (1971).
[123] *See* JA 5.
[124] JA 5.

within the Army Court's discretion.[125] The paragraph reflects the Court analyzing the circumstances extant in the record. It is not clear evidence of the Army Court creating a new Constitutional exception.[126]

Should this Court determine that the Army Court erred in creating a new exception to the Fourth Amendment, appellant has suffered no harm from it.[127] The primary issue is the first issue presented: whether the military judge abused his discretion in denying appellant's motion to suppress. In reviewing this issue, this Court pierces through the intermediate level of appellate review and examines the military judge's ruling directly.[128] If the Army Court deviated from a legal rule in analyzing appellant's claim, this Court may pierce

---

[125] Courts, in analyzing Fourth Amendment and other constitutional claims, occasionally discuss the outer limits of reasonableness and rights. *See United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993) ("We need not determine the outer limits of appellant's "reasonable" expectation of privacy..."); *see also Carey v. Population Services International*, 431 U.S. 678, 684 (1977) (noting that "the outer limits" of the right to privacy "have not been marked.").

[126] The Army Court did not expressly create a new constitutional exception. Any new exception would need to be implied from the decision. The decision does not present "clear evidence" of an implied new exception. The record shows an Army Court applying the correct law to the circumstances of the case - and then giving a hypothetical circumstance that might give rise to an unreasonable search.

[127] *See* Article 59(a), UCMJ.

[128] *United States v. Baker*, 70 M.J. 283, 288 (C.A.A.F. 2011); *see also United States v. Meghdadi*, 60 M.J. 438, 441 (C.A.A.F. 2005); *United States v. Siroky*, 44 M.J. 394, 398-399 (C.A.A.F. 1996).

through that error and decide whether the military judge abused his discretion.

As a matter of logic, appellant cannot suffer a material prejudice to his substantial rights if this Court resolves the first issue presented. If the military judge did not abuse his discretion, there is no error of law to which to apply a prejudice test. If the military judge abused his discretion to appellant's prejudice, then this Court may grant appropriate relief. In both cases, this Court need not decide the second issue as to whether the Army Court erred.

## Conclusion

The Government respectfully requests this Court affirm the Army Court's decision, and approve the findings and sentence in this case.

EDWARD J. WHITFORD
Captain, U.S. Army
Appellate Government Counsel
U.S.C.A.A.F. Bar No. 35234

CATHERINE L. BRANTLEY
Major, U.S. Army
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35567

AMBER J. ROACH
Lieutenant Colonel, U.S. Army
Acting Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35224

**CERTIFICATE OF COMPLIANCE WITH RULE 24(d)**

1. This brief complies with the type-volume limitation of Rule 24(d) because:

This brief contains 8,197 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

This brief has been typewritten in 12-point font, mono-spaced courier new typeface in Microsoft Word Version.

EDWARD J. WHITFORD
Captain, Judge Advocate
Attorney for Appellee
November 30, 2012

**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on November 30, 2012 and contemporaneously served electronically on appellate defense counsel, Captain Ian Guy at ian.guy@us.army.mil.

Tiffani W. Cox

TIFFANI W. COX
Paralegal Specialist
Government Appellate
Division