

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

U N I T E D	S T A T E S,) APPELLEE'S BRIEF OF SPECIFIED
	Appellee) ISSUE
)
	v.)
) USCA Dkt. No. 12-0524/AR
Staff Sergeant (E-6))
BRUCE L. KELLY,) Crim. App. Dkt. No. 20090809
United States Army,)
Appellant)
)

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

ANSWER TO SPECIFIED ISSUE

WHETHER THE EXAMINATION OF THE CONTENTS OF APPELLANT'S
COMPUTER WAS AN UNLAWFUL INSPECTION UNDER M.R.E.
313 (b)

STATEMENT OF THE CASE

The examination of appellant's computer was a lawful inspection under Mil. R. Evid. 313(b). The collection, inventorying, and safeguarding of a wounded soldier's personal effects are the command's responsibility. The use of the existing regulatory guidelines and standard operating procedures already in place for missing or soldiers killed in action is a reasonable and efficient manner to complete the required task. The command was involved in the process by appointing the Summary Court Martial Officer (SCMO) that conducted the initial inventory before sending the gear to the Joint Personal Effects Depot (JPED) examination. The primary purpose of the JPED reasonably fits within the Rule 313(b) rationales of "security, military fitness, or good order and discipline." The scope of the inspection was reasonable and the personnel involved in the inspection remained within the scope of the inspection. As such this court can affirm on a theory of inspection under Mil. R. Evid. 313(b).

Law

Military law recognizes a type of examination called an "inspection," which is "an intrusion for the purpose of allowing a commander to examine all places within his or her command, including areas where individual service members have a reasonable expectation of privacy."¹ Courts "long have recognized that unit inspections are necessary and legitimate exercises of command responsibility."²

The President promulgated Military Rule of Evidence 313(b), which governs inspections in the armed forces. An inspection is "an examination of the whole or part of a unit including an examination conducted at entrance and exit points, conducted as an incident to command the primary purpose of which is to determine and ensure the security, military fitness or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle."³ Inspections must be conducted in

¹ Military Criminal Law Evidence, Chapter 22-8(a)(2), *Administrative Intrusions* (1987); *United States v. Ellis*, 24 M.J. 370, 372 (C.M.A. 1987) ("We have long held that military inspections ordered for the purpose of ensuring sanitation and cleanliness, security, military fitness, or good order and discipline do not violate any reasonable expectation of privacy which a servicemember might otherwise have in the area to be inspected.").

² *United States v. Thatcher*, 28 M.J. 20, 22 (C.M.A. 1987) (citing *United States v. Gebhart*, 10 U.S.M.C.A. 606, 610 n. 2, 28 C.M.R. 172, 176 n. 2 (1959), *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981)).

³ Mil. R. Evid. 313(b).

a reasonable manner.⁴ "What is reasonable depends upon the circumstances of the intrusion."⁵

"[I]f an intrusion on privacy is really an 'inspection' and complies with Mil. R. Evid. 313, no reasonable expectation of privacy has been violated; but if the purported inspection is only a subterfuge for a search or is not properly conducted, then a violation has occurred."⁶ Courts have insisted that persons conducting military "inspections must be ever faithful to the bounds of a given inspection, in terms both of area and purpose."⁷

"The authority to order an inspection under Mil. R. Evid. 313 is directly tied to a commander's inherent authority; it is the connection with command authority, and the commander's responsibility to ensure fitness of a unit, that keeps a valid inspection scheme within constitutional parameters."⁸ "This tie, or connection, between the inspection and command authority is important in justifying the reasonableness of what is otherwise a warrantless search."⁹

Argument

⁴ *Id.*

⁵ *Thatcher*, 28 M.J. at 24 fn.3.

⁶ *Id.* at 24.

⁷ *Id.* at 22, quoting *United States v. Brown*, 12 M.J. 420, 423 (C.M.A. 1982).

⁸ *United States v. Miller*, 66 M.J. 306, 308 (C.A.A.F. 2008).

⁹ *United States v. Miller*, 66 M.J. 306, 308 (C.A.A.F. 2008).

a. The JPED and Command Authority

All processing of appellant's personal effects (PE) - including the JPED's examination of appellant's digital media - was grounded upon a "legitimate exercise of command authority."¹⁰ The all army activities message (ALARACT) expressly notes that "PE collection, inventory, safeguarding, and disposition is a *command responsibility*."¹¹ The ALARACT directs commanders to appoint a summary court martial officer (SCMO) immediately upon the hospitalization of an individual.¹² That command-appointed SCMO must ensure that the PE for medically evacuated individuals is packaged, sealed, properly labeled and sent to the nearest mortuary affairs control point.¹³ From there, the PE is shipped to the JPED for further processing.¹⁴

Additionally, the regulations in the Joint Appendix similarly connect PE processing with command authority. Dept' Army Reg. 638-2, Care and Disposition of Remains and Disposition of Personal Effects (22 December 2000), para. 20-1 states:

The Army is responsible for the care and disposition of PE under it's [sic] control or jurisdiction. The prompt delivery or shipment of the deceased or missing person's PE is an important command function. Delays in collecting, delivering, or shipping the PE increase the probability the PE will be damaged, lost, or

¹⁰ See *Miller*, 68 M.J. at 308.

¹¹ JA 161 (ALLCAPs removed) (emphasis added).

¹² JA 162.

¹³ JA 163.

¹⁴ See JA 163.

stolen while in the Army's care. As PE may have both monetary value and sentimental value, it is important commanders quickly appoint SCMOs and provide them sufficient resources and time to discharge their duties.¹⁵

Joint Publication 4-06, Mortuary Affairs in Joint Operations, also links PE processing with command authority. "Disposition of PE includes the collection, receipt, recording, accountability, storage, and disposal of the PE of US military personnel The handling of PE begins at the time of initial collection by representatives of the Armed Forces of the United States and extends to the time of receipt by the [person eligible to receive effects] ("PERE")...or until other disposition is made in accordance with applicable regulations."¹⁶ "The unit is responsible for gathering, inventorying, and evacuating the PE to the depot."¹⁷

This case does not involve a command on "auto-pilot" - not providing any input into processing appellant's PE.¹⁸

Appellant's command took an active role in processing appellant's PE. Appellant's command appointed CPT Hull as the SCMO.¹⁹ CPT Hull, with assistance from members of appellant's unit, processed and inventoried appellant's personal effects.²⁰ CPT Hull then delivered appellant's PE to mortuary affairs.²¹

¹⁵ JA 182.

¹⁶ JA 229.

¹⁷ JA 230.

¹⁸ *Miller*, 66 M.J. at 308.

¹⁹ JA 42 (military judge's findings); JA 53 (CPT Hull's sworn statement); JA 16 (appellant's motion to suppress proffering that CPT Hull was appointed as appellant' SCMO); JA 45 (appellant's later stipulation that his commander appointed CPT Hull to inventory appellant's PE).

²⁰ JA 53.

²¹ JA 53.

The JPED then followed its standard procedure in processing appellant's PE. Timely processing of PE is a command responsibility for all levels of command.²² The ALARACT established a procedure where commanders would send the PE of medically evacuated personnel to the JPED. The JPED would then process that PE in accordance with that same ALARACT. This ALARACT was issued on behalf of the Department of the Army, Washington, D.C.²³

Ultimately, numerous commands have the responsibility to process appellant's PE. The SCMO is a function of the company and battalion level commands. The Department of the Army directed commanders to send PE to the JPED - and for the JPED to process that PE, which includes a duty to clean, sort and distribute that PE.²⁴ These actions are not the actions of commands on "auto-pilot."²⁵ These actions are inextricably tied to command responsibility and authority. Thus, the JPED's process is "an incidence of command" in accordance with Rule 313(b).

b. The JPED's Primary Purpose Ensures Security, Military Fitness, and Good Order and Discipline

²² See JA 161 ("Commanders at all levels are reminded of the importance of accountability and timely movement of PE for all...medically evacuated personnel") (ALLCAPs removed).

²³ JA 161.

²⁴ JA 163

²⁵ *Miller*, 66 M.J. at 308

The primary purpose of the JPED reasonably fits within the Rule 313(b) rationales of "security, military fitness, or good order and discipline." The JPED's examination for classified material and digital media depicting the battle space is an inspection conducted for security purposes.²⁶

The JPED's purpose of alleviating further sorrow and preventing embarrassment is a subset of military fitness and good order and discipline.²⁷ As a matter of military fitness, Soldiers need not be distracted or worried that their family members will receive embarrassing PE if that Soldier is medically evacuated or killed. This worry might distract Soldiers from their mission in theater and any subsequent recovery once medically evacuated. In other words, this worry and distraction negatively affects military fitness.

Additionally, the Army has taken possession of PE and is reasonably likely to distribute that PE to grieving family

²⁶ See *United States v. Alleyne*, 13 M.J. 331, 335 (C.M.A. 1982) ("Additionally, our overseas forces constitute our first line of defense in the event of an armed conflict. There exists a special need to insure combat readiness. Because of the proximity of potentially hostile forces, there also exists the danger that military equipment or classified information may either intentionally or inadvertently fall into the hands of our potential enemies. Preventing the flow of information or military hardware from the installation is as vital a consideration as preventing contraband from entering.").

²⁷ In this case, any distinction between military fitness and good order and discipline is academic. A unit's military fitness directly correlates to that unit's good order and discipline, and vice-versa.

members. In that context, the Army's policy of sanitizing that PE for items that could cause further sorrow and embarrassment is a reasonable exercise of military fitness. The wounded Soldier's PE is secure. The family members who are reasonably likely to take possession of that PE are spared further sorrow or possible embarrassment. And the Army can avoid allegations that it unnecessarily inflamed the sorrow of grieving families. These governmental interests are subsets of military fitness.

c. The Reasonableness of the Inspection

The JPED's entire process - including its examination of digital media - is constitutionally reasonable under an inspection analysis. While some facts are different commonly accepted military inspections such as unit urinalysis and "health-and-welfare" inspections, the same constitutional principles apply. As stated above, the processing of PE - including the JPED's process - flows from command authority. The JPED's stated purpose has a direct nexus to military fitness and good order and discipline.

In an analogous case, *United States v. Rendon*, the Fourth Circuit affirmed a district court's denial of a motion to suppress where drill sergeants inspected for pornography on cell phones, iPods, and other digital media belonging to recruits.²⁸

²⁸ *United States v. Rendon*, 607 F.3d. 982, 986 (4th Cir. 2010).

The drill instructors did not suspect Rendon of misconduct.²⁹ The examination of his personal property was conducted pursuant to a regularly scheduled intake protocol for new members of the unit, and the examination stayed within the parameters authorized by the commander in a written standard operating procedure.³⁰

The JPED's process is just as reasonable as the drill instructor's examination of Rendon's MP3 player. Both involve examinations of digital media. Appellant was neither singled out nor suspected of misconduct. The command at multiple levels followed a standardized process. That process is a means to achieve an end directly tied to military fitness.

d. This Court Can Affirm on an Inspection Theory

The Supreme Court has noted, "[i]n 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."³¹ Similarly the 4th Circuit held in *Rendon*, "There is no doubt that the search conducted in the present case, in scope and in purpose, was a valid military inspection, conducted in compliance with Military Rule of Evidence 13, regardless of whether it was labeled as an

²⁹ *Id.* at 992.

³⁰ *Id.*

³¹ *Brown v. Allen*, 344 U.S. 443, 459 (1953); see also *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)).

"inventory" or an "inspection" by individual officers."³²

Accordingly, this Court can safely conclude that the JPED's process was a reasonable inspection under Rule 313(b), even though the military judge relied upon an inventory theory under Rule 313(c).

³² *Rendon*, 607 F.3d. at 991

Conclusion

As the examination of appellant's computer was a lawful inspection, the Government requests that this Honorable Court should affirm the Army Court's decision.



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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on February 14, 2013.

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