IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Matthew HOFFMANN Corporal (E-4) U.S. Marine Corps, Appellant	**APPELLANT'S BRIEF** Crim. App. Dkt. No. 15-0361/MC Crim. App. No. 201400067

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

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Statement of Statutory Jurisdiction

The Navy Marine Corps Court of Criminal Appeals (hereinafter NMCCA) had jurisdiction over this matter pursuant to Article 66(b)(1), Uniform Code of Military Justice (hereinafter UCMJ). 10 U.S.C. § 866(b)(1). This Honorable Court has jurisdiction over this matter under Article 67, UCMJ. 10 U.S.C. § 867.

Statement of the Case

A general court-martial, consisting of members with enlisted representation, convicted Appellant, contrary to his pleas, of one specification each of attempted sodomy of a child, indecent liberties with a child, child enticement, and

possession of child pornography, in violation of Articles 80, 120, and 134, UCMJ. 10 U.S.C. §§ 880, 920, 934. Appellant was sentenced to confinement for seven years, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On December 11, 2014, the NMCCA affirmed the findings and sentence in this case. *United States v. Hoffmann*, 74 M.J. 542 (N-M. Ct. Crim. App. Dec. 11, 2014). Appellant filed a Petition for Review with this Court on February 9, 2015. Appellant also filed three requests to extend time to file the Supplement, which this Court granted. On April 28, 2015, this Court granted review and ordered briefing.

Statement of the Facts

In September of 2011, PM, one of the complaining witnesses, lived on board Camp Lejeune, North Carolina. (JA at 147.) While PM was playing football in his yard, a man drove by and made a "nasty gesture" while looking at PM. (JA at 147, 148.) The vehicle then drove away. (JA at 148.) PM identified the vehicle as a silver sports-utility vehicle (SUV). (JA at 148) PM admitted he never saw the person's face. (JA at 152.) At a later point in time, PM was asked by investigators to come in and look at a photo lineup of the suspect. (JA at 152.) PM did

not identify Cpl Hoffmann and instead identified a different individual. (JA at 72, 73.)

On November 22, 2011, AL, another one of the complaining witnesses, was walking home from school when an adult male driving by made a gesture to him. (JA at 164.) AL assumed the gesture referenced oral sex. (JA at 164.) The driver was wearing "cammies" and was Caucasian. (JA at 166, 167.) AL only saw the vehicle for a few seconds as it passed by. (JA at 179.) AL identified the vehicle as a white SUV. (JA at 166.) In December, AL viewed a photographic line-up of suspects and identified Cpl Hoffmann with "maybe fifty percent" certainty. (JA at 72, 73.)

Approximately two to three weeks later, AL saw what he assumed to be the same vehicle again. (JA at 168.) AL contacted his mother, who picked AL up in her car. (JA at 170.) Thereafter, AL and his mother followed the vehicle. (JA at 170.) A chase ensued on base but the vehicle got away. (JA at 170, 403.)

Later that same day, Officer Brown responded to the location of AL's father, who had recognized the vehicle after leaving work and followed the vehicle until it parked. (JA at 191.) Officer Brown checked the license plate and it came back to an individual with the last name of Hoffmann. (JA at 193.) Officer Brown contacted Staff Sergeant (SSgt) Rivera of the

Command Investigative Division (CID), who responded to the location. (JA at 193.)

That same day SSgt Rivera confronted Corporal (Cpl) Hoffmann and had him sign a form for permissive authorization for search and seizure for his barracks room. (JA at 224.) Midway through the search, Cpl Hoffmann withdrew his consent. (JA at 42.) Notwithstanding, SSgt Rivera seized a laptop, media equipment, and various electronic storage drives. (JA at 227.) The day following the search and seizure, Cpl Hoffmann gave SSgt Rivera a written revocation of his permission granting SSgt Rivera permission to search and/or seize his property. (JA at 45.) At that point SSgt Rivera turned the investigation over to the Naval Criminal Investigative Service (NCIS). (JA at 46.)

In April of 2011, RW, the third complaining witness, was 13 years old. (JA at 125.) On April 18, 2011, while walking home from school, an adult male drove by and looked at RW. (JA at 127.) The male passed RW a second and third time. (JA at 127, 128.) On the third pass, the male asked RW if he wanted a "quickie." (JA at 128.) RW did not know the definition of a "quickie" but thought it was something "nasty." (JA at 135.) After RW said "no", the man drove off again. (JA at 128.) RW reported this incident to law enforcement and eventually came to the conclusion that the vehicle was a silver SUV. (JA at 129.) Seven months after this incident, in December of 2011, RW viewed

a photographic lineup of potential suspects and identified Cpl Hoffmann. (JA at 131.)

After the three photographic line-ups, NCIS did not attempt to get authorization to search Cpl Hoffmann's seized items but rather continued to investigate Cpl Hoffmann. NCIS canvassed Cpl Hoffmann's friends and acquaintances, which revealed no negative information. (JA at 78.) NCIS put a GPS tracker on Cpl Hoffmann's car from November 2011 to January 2012, which revealed no negative information. (JA 64, 256.) Most importantly, NCIS checked with the Internet Crimes against Children (ICAC) taskforce to see if Cpl Hoffmann was associated with any child pornography activity online, which also revealed no negative information. (JA 74, 75.)

On March 9, 2012, over four months after the initial seizure, NCIS finally sought a Command Authorization for Search and Seizure (CASS) for Cpl Hoffmann's laptop. (JA at 264-74.) Cpl Hoffmann's commanding officer relied on an affidavit from Special Agent Shutt to support the CASS. (JA at 266-74.)

The supporting affidavit began by stating SA Shutt's experience and training in the field of child exploitation. (JA at 266.) The affidavit then stated SA Shutt knows, based on her training and experience, there is "an intuitive relationship" between molestation and child pornography -- individuals interested in sexual gratification may use it as a "precursor to

physical interaction" or use it to "reduce the inhibitions of [] children." (JA at 267-68.) She did not cite any studies or quantitative evidence to support this proposition. Under the section "FACTS AND CIRCUMSTANCES GIVING RISE TO PROBABLE CAUSE," SA Shutt outlined the facts of the three alleged solicitations of AL, PM, and RW. (JA at 272-73.) Importantly, she stated AL identified Cpl Hoffmann, but did not note the identification was only with fifty percent certainty. (JA at 272.) Also, she stated PM was "unable to identify" Cpl Hoffmann, but did not include the fact PM identified another individual. (JA at 272.)

Pursuant to the CASS, the Government performed a forensic search of Appellant's laptop and the search revealed child pornography. Subsequently, Cpl Hoffmann was charged with multiple offenses under Articles 80, 120 and 134. Cpl Hoffmann was acquitted on all charges involving AL and PM. (JA at 257.) The members found Cpl Hoffmann guilty of the charges involving RW and also child pornography. (JA at 257.)

I.

THE SEARCH AND SEIZURE OF THE PERSONAL ITEMS OF AN INDIVIDUAL WHERE THE SEARCH WAS INITIALLY GRANTED BY CONSENT, BUT LATER REVOKED BEFORE THE SEIZURE OF ITEMS, VIOLATED THE FOURTH AMENDMENT OF THE CONSTITUTION.

Standard of Review

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007); *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or he misapplied the law. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

Argument

The most fundamental law regarding search and seizure is governed by the Fourth Amendment of the Constitution, which states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

> supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST, IV Amend.

The case at bar violates the precepts of this historic provision. Cpl Hoffman had a reasonable expectation of privacy in his barracks room. He also enjoyed a reasonable expectation of privacy relating to the contents of his computer and electronic equipment housed in his room. Notwithstanding, initially, Cpl Hoffmann gave permission to SSgt Rivera to search his room in the barracks. Before the search was completed and before any electronic equipment had been removed from the premises, Appellant revoked his consent. Despite this revocation, SSgt Rivera still secured and seized the electronic equipment of Appellant. Thus, the seizure was warrantless and without consent.

But the lower Court concluded the evidence from the seized electronic equipment was admissible because it would have been inevitably discovered. The lower court cited *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012), to state the inevitable discovery exception only applies "[w]hen the routine procedures of a law enforcement agency would inevitably find the same evidence." In this case there is absolutely no rationale that supports the doctrine of inevitable discovery.

Therefore, the key question for this court to consider is whether, absent a warrant, the inevitable discovery doctrine applies in this case.

In *Dease*, the Court opined that for the inevitable discovery exception to apply the Government had to demonstrate by a preponderance of the evidence that, "when the illegality occurred, the government agents possessed, or were actively pursuing evidence or leads that would have inevitably led to the discovery of the evidence" in a lawful manner. *Dease*, 71 M.J. 116, 112 (C.A.A.F. 2012) (quoting *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982). The Court in *United States v. Wicks*, 73 M.J. 93 (2014) (citing *United States v. Wallace*, 66 M.J. 5, 11 (C.A.A.F. 2008)) found that the inevitable discovery doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant." That is precisely the issue in the instant case. SSgt Rivera as a Government actor did not meet the burden to demonstrate that absent a warrant the evidence at issue would have been inevitably discovered through independent means. An explanation after the fact is insufficient to justify the taint of illegally seized property.

While SSgt Rivera testified he would have secured the scene and tried to obtain a search authorization or warrant, there is

no evidence he would have done so and there is no certainty an authorization would have issued. Like the *Wicks* case, there is no evidence in the case at bar that Rivera made any effort to secure a warrant or considered the ramifications of extracting information from property illegally seized. SSgt Rivera's explanation is merely hindsight and completely speculative.

SSgt Rivera could have easily secured or "frozen" the scene to seek a warrant, but he did not. There is no indication that a delay to secure a warrant would have resulted in the destruction of evidence. The only element necessary to secure a warrant was time. Instead of taking the time to seek an authorization for a warrant and despite the undisputed revocation of consent by Appellant, SSgt Rivera gathered up the electronic equipment and removed it from the scene, in violation of the Fourth Amendment. However, the NMCCA opined SSgt Rivera would have provided available information to the Commander with a request for authorization to seize and search Appellant's electronic items. Facts cannot be substituted after the event to justify the illegal actions that were taken.

Additionally, the NMCCA exhibited a leap in logic in determining the information available to the agents would have been sufficient to justify a warrant. There was no connection between the incidents being investigated and electronic equipment so as to justify an authorization for search of the

electronic equipment. None of the alleged enticement incidents being investigated involved the use of electronic equipment. There was no justification for a warrant even if one had been sought. If SSgt Rivera was so experienced and educated in the elements of investigation, it only begs the question whether he should have also been experienced in practice and procedure, which he failed to adhere to? Had SSgt Rivera sought authorization for a warrant he would have had to specify the items he was searching for and what he intended to seize. He would have also been required to establish a nexus between the incidents being investigated and the items sought and/or seized. This would have been impossible given that none of the crimes for which the Appellant was being investigated centered on or even referenced electronic equipment or digital media.

The Court further opined that it is "common sense" that those who seek to engage in sexual activity with children frequently engage in some form of computer based research. While this may be a concern, there is absolutely no evidence to suggest that in this case the Appellant was engaged in computer based crimes involving child pornography. Absent evidence, the government cannot possibly meet its burden which is a preponderance of evidence. As this Court stated in *Wallace*:

> It bears repeating: in order for the evidence to have been admissible, under the inevitable discovery doctrine, the government would have to have shown that

> investigators 'possessed' or were actively pursuing, evidence or leads' that independently would have led to the discovery of the evidence.

66 M.J. at 11, (citing *Kozak*, 12 M.J. at 394). Here, there was no evidence the Government was actively pursuing evidence of leads that would have independently led to the discovery of child pornography in the possession of the Appellant.

To justify his actions, SSgt Rivera had to justify a nexus between the items he sought to find and the incidents being investigated. This is true whether the search was warrantless or with a warrant. There had to be some evidence of a connection between the crimes being investigated and the search of the Appellant's room and property for a warrant to issue. As there was no evidence, the Government cannot possibly demonstrate that a connection between the crimes being investigated and child pornography would have been inevitably discovered.

Conclusion

The revocation in this case occurred before any items had been seized from the Appellant's room. The NMCCA opinion setting forth that the items seized and the contents thereon would have been inevitably discovered is without merit. There was no independent evidence to suggest that a search of electronic equipment belonging to the Appellant had anything to do with the crimes being investigated. As a warrant was never

issued and none of the crimes for which the Appellant was being investigated related to, involved or even referenced electronic or digital media, the doctrine of inevitable discovery is not applicable. The computer seized and the content thereon must be excluded as evidence pursuant to the exclusionary rule and the protection of the Appellant's Fourth Amendment rights.

II.

THE APPELLANT WAS CHARGED WITH CRIMES INVOLVING CHILD ENTICEMENT. THE NMCCA FOUND A SEARCH FOR A SEPARATE CRIME, CHILD PORNOGRAPHY, WAS SUPPORTED BY PROBABLE CAUSE BASED SOLELY ON THE CHILD ENTICEMENT ALLEGATIONS. IN DOING SO, THE NMCCA RELIED ON A MINORITY OPINION IN FEDERAL CASE LAW AND APPLIED IT INCORRECTLY. THIS COURT SHOULD REVERSE.

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Argument

Even making the illogical assumption that the property in this case would have been inevitably discovered, the authorization to search the laptop for child pornography was flawed.

A search of specific property seized must also be justified by a legal warrant or authorization based upon probable cause. U.S. CONST, IV AMEND Furthermore, there must be some link, nexus or connection between the crime being investigated and the search for which authorization is sought. See *U.S. v. Wicks*, 73 M.J. 93 (2014).

Despite the lack of any evidence connecting the crimes being investigated and any digital media, the lower court found the affidavit of Special Agent Shutt to be sufficient for justification of the command authorization to search Appellant's computer. *Hoffmann*, 74 M.J at 551-52. This was based on the special agent's experience in the investigation of sexual crimes involving children. However, there was no link or nexus in this case between the allegations of child enticement regarding AL, PM, or RW and the request to search Cpl Hoffmann's computer for child pornography. None of the evidence involved in the investigation of the alleged crimes of enticement established a connection or nexus with electronic equipment. The alleged enticements were not facilitated by phone, text, email or any

other electronic means, nor did the interactions reference any digital media. Established law requires a court to look to the totality of the circumstances. Even considering the totality of the circumstances test set forth in *Illinois v. Gates*, 462 U.S. 213 (U.S. 1982), there was insufficient probable cause for the authorization to search.

In seeking to justify the unlawful search, the NMCCA incorrectly followed the interpretation of the Eighth Circuit in *United States v. Colbert*, 605 F. 3d 573 (8th Cir. 2010). In *Colbert*, the Eighth Circuit held there is an intuitive connection between the crime of child molestation or enticement and the crime of child pornography. *Id.* at 578. The Court chose this interpretation despite knowing *Colbert* is an outlier compared to the overwhelming majority of federal case law.[1] Six other circuits who have examined the issue reject this approach. These Circuits hold evidence of child molestation or enticement alone, without other connecting information in the affidavit, cannot establish probable cause to search for child pornography.[2]

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[1] The NMCCA itself noted the split in case law between the circuits. In fact, the Court performed an analysis of the controlling cases from the Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits.

[2] *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2011) (allegations of sex crimes against minors are "not sufficient to establish--or even to hint at--probable cause as to the wholly separate crime of possessing child pornography"); *United States v. Doyle*, 650 F.3d 460, 472 (4th Cir. 2011) ("[E]vidence of

Besides just being the minority opinion, the facts of *Colbert* are clearly distinguishable from the instant case. In *Colbert*, the accused interacted with a five-year old girl in a park for forty minutes in an effort to entice her to come to his apartment. *Id.* at 575. The court found the fact the accused attempted to entice a child was one factor in determining probable cause to search for child pornography, because of the "intuitive relationship" between the two crimes. *Id.* at 578. During the interaction, however, the accused also told the child he had movies she would like to watch in his apartment. *Id.* at 575.

The court found this information "established a direct link to Colbert's apartment and raised a fair question as to the nature of the materials to which he had referred." *Id.* at 578.

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child molestation alone does not support probable cause to search for child pornography."); *Dougherty v. City of Covina*, 654 F.3d 892, 899 (9th Cir. 2011) (bare inference that those who molest children likely to possess child pornography insufficient for probable cause); *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) ("Although offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, [a] correlation . . . ."); *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) ("[I]t was unreasonable for the officer executing the warrant in this case to believe that probable cause existed to search Hodson's computers for child pornography based solely on a suspicion . . . that Hodson had engaged in child molestation."); *cf. United States v. Clark*, 668 F.3d 934, 939 (7th Cir. 2012) (requiring evidence of sexual interest in children along with use of computer to connect accused to "collector profile" needed for probable cause).

The court said it would "strain credulity" under the circumstances to believe the movies were innocent, so this supported a fair probability there was child pornography at the apartment. *Id.* at 578-79. Thus, the court's finding of probable cause was also predicated on the accused mentioning media in relation to the attempted enticement, a fact absent in Cpl Hoffmann's case. In the investigation for enticement of PM, AL and RW there is absolutely no reference to movies or any other electronic manifestation of a crime.

There was absolutely no reason to believe Cpl Hoffmann had any media related to the crimes for which he was being investigated. In this case there was no nexus between the allegations of child enticement and the possession of child pornography.

Further, Special Agent Shutt's affidavit also does not support probable cause for a search of child pornography. The affidavit consisted of three primary sections: Special Agent Shutt's training and experience, her opinions based upon her training and experience, and the factual allegations of child enticement against Cpl Hoffmann.

Within the second section, SA Shutt stated there is an intuitive relationship between child molestation acts and

possession of child pornography.[3] The pertinent case law examines whether, in the absence of any connection to online child pornography, acts of child molestation alone are sufficient to support probable cause. In these cases, the supporting affidavits generally lacked a specific correlation between the two offenses, which is present here.[4] It is important to note, however, some of this case law states an expert's opinion linking the two crimes *may* establish probable cause, but does not specify how.

In the few cases where federal courts have upheld evidence of child abuse as sufficient to establish probable cause to search for child pornography, the holdings were predicated on

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[3] SA Shutt also spent several paragraphs discussing the habits of child pornography collectors in order to justify why all of the seized electronic media should be searched. Cpl Hoffmann is not challenging the particularity of the affidavit, rather just whether there was probable cause to initially identify him as a possessor of child pornography.

[4] *See John*, 654 F.3d at 420 ("We acknowledge the possibility that studies might show that a correlation exists between one crime and the other, or perhaps extensive investigator experience might reveal a pattern substantial enough to support a reasonable belief on the part of a police detective. But Joseph's affidavit did not allege the existence of the connection in question, let alone any evidentiary reason to believe in it."); *Falso*, 544 F.3d at 122 ("Perhaps it is true that all or most people who are attracted to minors collect child pornography. But that assertion is nowhere stated or supported in the affidavit."); *Hodson*, 543 F.3d at 289 ("Moreover, Detective Pickrell offered no assertion – in either the affidavit or any other evidence (e.g. expert testimony) then before the magistrate judge – of any relational nexus between child molestation and child pornography".).

one additional factor: a nexus to some form of digital media relating to the abuse. In the instant case there is no nexus.

In *United States v. Clark*, there was a nexus that is not present here. There, the supporting affidavit alleged the accused molested three children. 668 F.3d at 936. In that affidavit a detective, based on his training and experience, described the typical characteristics of a child pornography collector. *Id.* at 938. The Seventh Circuit considered the fact the accused "employed a computer in at least one of his inappropriate advances" as "sufficiently particularized facts" to characterize him as someone who collects child pornography. *Id.* at 941. Thus the court's probable cause finding was based upon the use of a computer during the actual assault. *Id.* at 941. That is a distinguishing fact from the facts of this case.

The holding in *Colbert*, discussed above, also relied on a reference to media during the attempted assault as an integral factor in the probable cause determination. 605 F.3d at 578; *see also United States v. Kapordelis*, 569 F.3d 1291, 1311 (11th Cir. 2009) (finding evidence Defendant traveled to Russia where he molested several boys, *created images of boys while in Russia*, and had an interest in young boys predating his travel was sufficient to support probable cause to search for child pornography and sexual tourism) (emphasis added).

Lastly, in *United States v. Doyle*, the accused allegedly sexually assaulted children in his home and the Government sought to search his computer for the separate crime of child pornography. 650 F.3d at 464. The affidavit alleged "[o]ne victims [sic] disclosed to an [u]ncle that Doyle had shown the victim pictures of nude children," so child pornography was specifically linked to one of the acts of assault. *Id.* The Fourth Circuit found there was "remarkably scant evidence . . . to support a belief that Doyle in fact possessed child pornography" for three reasons. *Id.* at 472. One, evidence of child molestation alone did not support probable cause to search for child pornography.[5] *Id.* Two, while pictures of "nude children" allegedly existed, the police took no efforts to determine whether those photos were actually child pornography, considering not all pictures of naked children are illegal. *Id.* at 473. Lastly, assuming the photos were child pornography, the information was stale because there was no indication of when the accused may have possessed the photos. *Id.* at 474. Thus, probable cause for child pornography was lacking even when a victim was shown "pictures of nude children" during an assault.

[5] The opinion is silent on the issue of whether the affidavit included an expert link between the two crimes, but based upon the outcome, it appears this link was missing.

The affidavit here, however, alleged no nexus whatsoever to digital media in relation to the alleged enticements. SA Shutt conceded there was a complete absence of any electronic component to the crime during her testimony. *Colbert* and *Clark* are distinguishable from the present case because there was no evidence Cpl Hoffmann employed or offered any type of media during the alleged enticements. This is an imperative difference. The holding in *Doyle*--"naked photos of children" used during an alleged sexual assault were not sufficient for probable cause--is even more pertinent.

Here, the witnesses did not allege Cpl Hoffmann used or referenced any digital media or electronic devices in the three alleged enticements. NCIS even specifically searched for a connection between Cpl Hoffmann and online child pornography, so as to justify their actions. This was to no avail.[6] The only other evidence submitted in the affidavit was Cpl Hoffmann owned two computers and several media storage devices--the previously seized items. Because most individuals in the country own a computer or a media device, this ownership is insufficient to justify a search.

[6] SA Shutt did not include this fact in the affidavit and it is unclear from the record whether she discussed this issue with the commanding officer.

Even actual evidence of child enticement was weak--in fact the members acquitted Cpl Hoffmann of all allegations involving AL and PM. It appears NCIS knew its case was weak and did not believe there was sufficient evidence to support probable cause to search at the time of the seizure—otherwise it begs the question, why let evidence sit for an extended time? NCIS did not seek an immediate CASS after seizing the property, but rather waited four months to take further investigative steps. But the continued investigation further weakened the Government's case. Only one alleged victim positively identified Cpl Hoffmann. Another identified a different person and the last could only identify him with "maybe fifty percent" certainty. The supporting affidavit did not include the identification concerns, and the commanding officer testified that he was not aware of them. In sum, NCIS had limited evidence relating to child enticement and no evidence of possession of child pornography or any connection thereto. Under the totality of the circumstances, the weak evidence of enticement and the lack of a digital nexus to child pornography did not equate to probable cause.

Here, the reliance by the NMCCA on the opinion of the Eighth Circuit was in error. In attempting to carve out an exception to justify probable cause for a search, the NMCCA

attempted and failed to distinguish cases with substantially similar factual scenarios.

Conclusion

Cpl Hoffmann was harmed twice by over-zealous Government agents. First, he revoked his consent to a search and yet items were seized after his revocation. The lower court then erroneously found that inevitable discovery applied to this issue despite the Government's lack of leads or evidence that would have independently led to the child pornography.

Second, the NMCCA relied on a case that is an outlier in federal precedent to uphold a search that lacked probable cause. Other than a generalized statement outlining a purported connection between people who entice children and child pornography, there was no specific connection between the two crimes in this case. There was absolutely no digital nexus between the acts of child enticement and child pornography as present in the federal case law, and thus there was insufficient probable cause.

Wherefore, the Appellant prays that this Honorable Court Order any and all items seized during the warrantless search to be suppressed pursuant to the exclusionary rule; for an order specifying that the items seized are inadmissible under the

doctrine of inevitable discovery; and for an Order remanding the case herein for a new trial consistent with the rulings herein.

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Certificate of Filing and Service

I certify on May 28, 2015, the foregoing was electronically filed with the Court, and copies were electronically delivered to the Appellate Government Division and Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity.

Certificate of Compliance

This supplement complies with the page limitations of Rule 24(c) because it contains less than 14,000 words. Using Microsoft Word 2010 with 12-point Courier New font, this supplement contains 5,759 words, exclusive of appendices and tables of contents and authorities.

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