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 REPLY 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:

Respectfully submitted,

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ISSUES PRESENTED

I.

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

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. SHOULD THIS COURT REVERSE?

Statement of the Facts

On April 18, 2011, while RW was walking home from school, an adult male drove by and looked at RW. (JA at 127, R. at 354.) 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.) Seven months later, RW viewed a photographic lineup of 6 potential suspects and identified the Appellant in the lineup. (JA at 131 -134.) The identity was with 95% certainty by RW. (JA at 72.)

In September of 2011, a man drove by and made a "nasty gesture" while looking at PM. (JA at 147, 148.) PM admitted he

never saw the person’s face. (JA at 152.) Like RW, PM was shown a photographic lineup. (JA at 152.) PM did not identify Appellant and instead identified a different individual. (JA at 73.)

In November of 2011, a male drove by AL and made a gesture. (JA at 164.) AL assumed the gesture referenced oral sex. (JA at 164.) AL’s father observed a vehicle described to him by AL and Al’s mother and Officer Brown checked the license plate provided by AL’s father, which came back to an individual with the last name of Hoffmann. (JA at 192, 193.) At a photo lineup AL identified the Appellant with “maybe fifty percent” certainty. (JA at 72.)

Officer Brown contacted Staff Sergeant (SSgt) Rivera of the Command Investigative Division (CID), who responded to the location of the vehicle referenced above. (JA at 193.) SSgt Rivera confronted Appellant and had him sign a form for permissive authorization for search and seizure of his barracks room. (JA at 224.) After the search was initiated but before it was completed and before any items were seized, Appellant withdrew his consent. (JA at 42.) Following the withdrawal of consent, SSgt Rivera seized a laptop, media equipment, and various electronic storage devices. (JA at 227.) The investigation was turned over to the Naval Criminal Investigative Service (NCIS). (JA at 46.) The investigation

was assumed by Special Agent (SA) Dana Shutt of NCIS, who continued investigating Appellant. (JA at 46.) NCIS canvassed Appellant's friends and acquaintances, which revealed no negative information. (JA at 78.) An investigation with the Internet Crimes against Children (ICAC) taskforce to see if Appellant was associated with any child pornography activity online yielded no negative information. (JA at 74, 75.)

On March 9, 2012, NCIS sought a Command Authorization for the search and seizure of information on Appellant's laptop. (JA 314-324; Appellate Ex. VIII, Encl 1.) The Command Authorization was based upon an affidavit of SA Shutt. (JA at 314-324; Appellate Ex. VIII, Encl 2.)

The affidavit did not disclose that AL's identification of Appellant in the photo lineup was only with fifty percent certainty. (JA at 272, 273.) Furthermore, the affidavit did not reflect that PM selected another individual out of the photo lineup. (JA at 272, 273.) Based upon the incomplete affidavit of SA Shutt, the Government performed a forensic search of Appellant's laptop revealing child pornography. (JA at 240, 241.)

Prior to trial, Appellant moved to suppress evidence derived from the media devices seized from his barracks room. (JA at 314.) The MJ ruled that the search authorization was based upon probable cause due to the intuitive link between

alleged child enticement and possession of child pornography. (JA at 384.)

The lower court opined that it "need not address whether consent was revoked prior to seizure because, assuming arguendo a Fourth Amendment violation occurred, the evidence of child pornography was admissible since the appellant's laptop would have inevitably been seized and the subsequent search for child pornography was supported by probable cause." (United States v. Hoffmann, 74 M.J. 542 (N-M. Ct. Crim. App. Dec. 11, 2014.)

Argument

I.

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

A Military Judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). In this instant case the Military Judge erred by admitting the improperly seized evidence.

There is no dispute that Appellant initially consented to the initial search. (JA at 40, 261-262.) As the Government stated in their brief, "[c]onsent to seize items may be

'withdrawn at any time' by the person granting the permission." Mil. R. Evid. 314(e)(3). Pursuant to *United States v. Dease*, 71 M.J. 116, 120 (C.A.A.F. 2012), the revocation must precede the seizure. In the instant case there is no doubt that the revocation preceded the seizure.

The Government relies on *United States v. Jacobsen*, 466, U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), in defining seizure as any meaningful interference with an individual's possessory interest in the property. But in this case, SSgt Rivera simply collected some items together that he intended to seize. He had not searched the items but only identified some items he wanted to subsequently seize. As he was continuing to gather and assess the equipment, Appellant revoked his consent.

The Government defends SSgt Rivera's actions by arguing that he exercised dominion and control over the property which included a laptop. This is simply false. The item had not been removed from the barracks room and had not been powered up. These facts distinguish this case from *State v. Cotten*, 879 P.2d 971, 978-979 (Wash. Ct. App. 1994), where a firearm was picked up and removed from the bedroom. The instant facts also are distinguishable from *United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973), where items were seized by writing down serial numbers. That did not happen in this case. Instead, SSgt Rivera simply placed a few items together inside the barracks

room. He did not remove them nor did he record serial numbers. His intent was obviously to remove the items, but before he did so the consent was revoked. See *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008).

While SSgt Rivera could have attempted to secure the scene and obtain a warrant, he did not. Instead he seized the laptop and other media devices. (JA at 42, 54.) The Government argues that SSgt Rivera was permitted to seize the items because he had exerted dominion and control over said items. This is simply inaccurate. SSgt Rivera had done nothing more than identify items he sought to seize, but he had not yet seized those items. Until SSgt Rivera began to pull power cables associated with the equipment, Appellant did not know SSgt Rivera intended to remove the items. He then stated, "What are you doing? I told you could inspect it." (JA 49, 52-53.) At that juncture, Appellant revoked his consent. (JA at 53.) To assume that the revocation only pertained to the computer tower is absurd.

Finally, the Government relies on the doctrine of inevitable discovery. The Government relies on *United States v. Dease*, 71 M.J. 116 (C.A.A.F. 2012), in arguing that the investigation of Appellant would have inevitably led to the discovery of the evidence in a lawful manner. This is a misstatement. First, there was insufficient probable cause to obtain a warrant. But for the initial consent given by

Appellant, there would have been no search. Once the consent to search and seizure was revoked by Appellant, SSgt Rivera could have secured the scene and attempted to obtain a warrant to lawfully seize the computer and other electronic equipment. If SSgt Rivera did not follow routine procedure of securing a warrant once the consent had been revoked, how can it then be assumed that following the routine procedures of law enforcement would inevitably find the same evidence as argued by the Government? See *United States v. Owens,* 51 M.J. 204, 209 (C.A.A.F. 1999).

The Government even concedes the argument that SSgt Rivera could have secured the scene and sought a command authorization. SSgt Rivera testified, “Prior training has always taught us that you always go for the permissive authorization first if that becomes unsuccessful secure the scene and obtain a command authorization from the command”. (JA at 56.) The dilemma for SSgt Rivera in this case is that there was insufficient probable cause for the search.

In this case, SSgt Rivera failed to follow his own training. Once Appellant revoked his consent, SSgt Rivera failed to take any other action. The Government goes on to argue that after Appellant revoked his consent, SSgt Rivera had probable cause to obtain an authorization based on the facts in the instant case. That is merely speculation. Appellant had not

been positively identified. He had simply been determined to be the owner of a certain vehicle. Owning a vehicle does not establish probable cause but merely assumes that he who owns the vehicle was the driver at the time of the incidents resulting in criminal allegations. To allow the evidence seized to be admissible in light of SSgt Rivera's failure to even seek a warrant is clearly error. The actions of SSgt Rivera should not be overlooked and dismissed as harmless error but should be enforced via suppression of evidence illegally obtained.

Argument

II.

THE APPELLANT WAS CHARGED WITH CRIMES INVOLVING CHILD ENTICEMENT. THE NMCCA FOUND A SEARCH FOR A SEPARATE CRIME, CHILD PORNOGRAPHY, WAS SUPPPORTED 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.

Citing *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009), the Government argues that there was substantial evidence in the record supporting the decision to issue a command authorization for a search. The search was based upon a conversation between NCIS special agent (SA) Dana Shutt and the commanding officer, as well as an affidavit of SA Shutt detailing an intuitive relationship between child enticement and child pornography.

While the nature of the conversation is not fully known, the affidavit was deceptively accurate. It did not detail that one of the victims had only identified Appellant with a fifty percent certainty and yet another had selected a different perpetrator.

Furthermore, there must be a nexus between the alleged child enticement and child pornography. In *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2001), the Third Circuit opined, "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". In *United States v. Doyle*, 650 F.3d 460, 472 (4th Cir. 2011), the Court stated, "[e]vidence of child molestation alone does not support probable cause to search for child pornography." In *Dougherty v. City of Covina*, 654 F.3d 892, 899 (9th Cir. 2011) the court found that bare inferences between those who molest children and those who may possess child pornography are insufficient for probable cause. Also, in *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008), the Court determined it "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."

In the instant case there was NO correlation or nexus between the alleged victimization of RW, PM, and AL and child pornography other than the misleading affidavit of SA Shutt and the "intuitive connection" alleged by SA Shutt. The Government relies on *United States v. Gallo*, 55 M.J. 418, 419-420 (C.A.A.F. 2001). In *Gallo*, the court held that the nexus, or "gap," was filled in by the affiant's extensive experience in law enforcement which made the appropriate connection." (*Id.* at 422.) Experience, standing alone, with no "nexus" between the crimes of child molestation and child pornography is not enough. Even in *Colbert*, relied upon by the Government, the Court opined that the appellant's enticement of a child is a factor to consider in determining the likelihood of the appellant possessing child pornography. One factor alone is not conclusory. In this case, there were no connections between the allegations of child molestation and child pornography.

Finally, the Government argues that even assuming there was insufficient evidence to support probable cause, the good faith exception to the exclusionary rule applies. This is a false assumption. "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the

Fourth Amendment." See *United States v. Peltier*, 422 U.S., at 539, 95 S.Ct. at 2330.

SA Shutt had personal knowledge that Appellant had not been positively identified. In fact, one of the alleged victims selected another individual out of a photo lineup. Another victim could only identify Appellant with fifty percent certainty. A third victim still was not a hundred percent sure his perpetrator was Appellant.

The Government indicated that SA Shutt was not dishonest or reckless. Appellant disagrees. In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Court opined, "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." The omissions of SA Shutt created an illusion that the accused had been positively identified as the perpetrator involving three incidents of child enticement. Had the commander had knowledge of the important details concerning the photo lineups, it is unlikely that a command authorization would have been issued. The Government avers that the Commanding Officer did know of the identification problems based on the testimony of SA Shutt. However, when questioned, the Commander stated:

> I would estimate or guess [SA Shutt] told me that [the first child] was about 90 percent sure. The second child was reasonably sure. And I know it was – I'm going to guess—just guess—because I don't have my notes it's 70 percent or higher sure that it was the accused.

(JA at 92.)

Without an accurate affidavit, there is no way to determine what the commander actually understood. The fact that the statements in the affidavit may have been factual does not mean they were complete. (JA at 272-273).

When a warrant or command authorization is obtained via false pretenses or the presentation of misleading information, the only remedy is suppression of the unlawfully obtained evidence. In the case herein, the good faith exception cannot apply.

Conclusion

The case herein has two major flaws. First, the Court clearly erred by allowing the seizure of the computer equipment belonging to Appellant. There was no warrant. There was no probable cause to obtain a warrant. Appellant initially gave consent to a search and then revoked it before any items had been inspected or seized. There was not meaningful interference with the possession of Appellant's items until they were seized after the consent had been revoked. SSgt Rivera did not exercise dominion and control over the property. He was simply

searching for electronic items and had not inspected the items or viewed the content contained on said items. Once the consent was revoked, the search terminated. At that time no property had been seized.

Second, the command authorization to search the illegally seized computer is fatally flawed. The Courts are split on the "intuitive relationship between child enticement and child pornography". Notwithstanding, there has to be some nexus between the offense of child enticement and child pornography. In this case there is no nexus. Appellant was identified as the owner of a vehicle that was utilized by someone who had attempted to entice children to commit criminal acts. He was not positively identified by any of the alleged victims with certainty. That important fact was neglected or omitted in the affidavit submitted in support of SA Shutt's request for command authorization to search the computer. Wherefore, the good faith exception to the exclusionary rule does not apply and the information found on the computer must be suppressed.

For all of the reasons set forth herein, Appellant moves this Honorable Court to reverse his conviction and to suppress the admission of the illegally seized equipment and the evidence discovered pursuant to the command authorization.

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Certificate of Filing and Service

I certify on 15 July 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 document 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 document contains 3,419 words, exclusive of appendices and tables of contents and authorities.

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