IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim.App. Dkt. No. 201400067
v.	)	
	)	USCA Dkt. No. 15-0361/MC
Matthew HOFFMANN, Corporal (E-4) U.S. Marine Corps Appellant	)	

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

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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 LATER 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 Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of attempted sodomy of a child, one

specification of indecent liberties with a child, one specification of possession of child pornography, and one specification of child enticement, in violation of Articles 80, 120, and 134, UCMJ, 10 U.S.C. §§ 880, 920, 934 (2008). The Members also convicted Appellant of attempted abusive sexual contact with a child, but the Military Judge dismissed the specification as an unreasonable multiplication of charges.

The Members sentenced Appellant to seven years' confinement, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

The Record of Trial was docketed with the lower court on February 12, 2014. On appeal, Appellant alleged, in part, that the Military Judge abused his discretion in finding that the affidavit for search and seizure lacked probable cause. The lower court specified an additional issue——whether the Military Judge abused his discretion in finding that the seizure, based on Appellant's consent, was proper.

On December 11, 2014, in a published opinion, the lower court affirmed the findings and sentence. *United States v. Hoffmann*, 74 M.J. 542 (N-M. Ct. Crim. App. 2014).

On April 28, 2015, this Court granted Appellant's petition and ordered briefings.

Statement of Facts

A. Appellant made lewd statements and gestures to minor children.

On April 18, 2011, Appellant drove his vehicle through residential neighborhoods off-base, attempting to engage in sodomy with children. (J.A. 20-22, 127-30.) RW, a thirteen-year-old boy, was walking down the street to his grandmother's home. (J.A. 125-27.) As he was walking, Appellant who was driving a light-colored Sports Utility Vehicle approached RW on four separate occasions. (J.A. 127-30.)

The first time Appellant slowed his vehicle, looked at RW, smiled, and drove off. (J.A. 127.) Appellant drove by a second time. (J.A. 127-28.) The third time Appellant slowed and asked RW "if [RW] wanted a quickie." (J.A. 128.) RW stated, "no." (J.A. 128.) Appellant then asked RW, "do you know what that is[?]" (J.A. 128.) RW responded "no". (J.A. 128.)

Circling back, Appellant approached RW for the fourth time and asked, "are you sure[?]" (J.A. 129.) RW told Appellant that he was sure. (J.A. 129.) Appellant then stated, "you'll like it." (J.A. 129.) Again, RW refused and Appellant drove away for the last time. (J.A. 129.)

Two additional children reported to investigators that Appellant approached them in his vehicle, on Marine Corps Base Camp Lejeune, while they were walking alone, and made "blow job"

gestures with his hand and mouth. (J.A. 147-48, 161, 163-64.) The children provided a description of the assailant that matched Appellant. (J.A. 129, 148, 161, 163-64, 196.) One of the children photographed Appellant's vehicle. (J.A. 38.) On November 1, 2011, that child's father found the vehicle on-base and notified the Provost Marshal's Office, which in turn notified the Criminal Investigation Division. (J.A. 38.)

B. Appellant provided consent to Agent Rivera to seize his laptop and other media devices, Agent Rivera seized the laptop, and then Appellant withdrew his "authorization to search."

1. Appellant provided written consent to search his barracks room.

On November 1, 2011, after identifying Appellant as the owner of the vehicle, Agent Rivera of the Criminal Investigation Division contacted Appellant and took him to the Provost Marshal's Office for questioning. (J.A. 38.) Agent Rivera informed Appellant of the accusations against him——"indecent liberty"——and his Article 31(b) rights. (J.A. 39.)

Appellant declined to provide a statement, but he consented to a search of his vehicle and barracks room. (J.A. 39, 261-62.) Appellant initialed and signed a permissive authorization for search and seizure, stating that he understood and freely granted "permission to remove and retain any property or papers found during the search which are desired for investigative purposes." (J.A. 39-40, 261-62.)

2. Agent Rivera searched Appellant's barracks room, discovered a laptop and other media devices that he seized by physically relocating the items.

Agent Rivera escorted Appellant to his barracks room to conduct the permissive search and seizure. (J.A. 40-41.) Agent Rivera began the search by physically collecting "the DVDs, the thumb drive, the DV[D-]R, the gigabit [sic] little SD cards" from inside Appellant's dresser, and "placing them on [Appellant's] desk" in a pile to take with him as part of the seizure. (J.A. 42, 47, 50-51.)

Agent Rivera then "grabbed the laptop and started to mess with the hard drive . . . and place[d] [those] on top of the desk as well" in the same pile as the other media devices previously seized. (J.A. 51, 60.) Agent Rivera testified he believed, but was not certain, that the laptop was inside the secretary before he seized it and placed it in the pile with the other media devices. (J.A. 51, 59-60.) He then placed the external hard drive in the same pile on top of the desk. (J.A. 51.)

3. After Agent Rivera relocated Appellant's laptop to the pile, and while Agent Rivera was looking for plugs and final items to seize, Appellant stated that he wanted to withdraw the "authorization to search."

After Agent Rivera had placed the laptop and the other media devices in a pile on the desk, he placed his hand on the computer tower and began "to mess" with it by turning it off and

unplugging it. (J.A. 49, 52-53.) As Agent Rivera was looking behind the desk to unplug the computer tower and monitor, Appellant "withdrew his permission——the authorization to search," stating, "What are you doing? I told you could inspect it." (J.A. 42, 52-53, 381.) Appellant wanted Agent Rivera to "stop searching." (J.A. 53.) In response, Agent Rivera stopped searching. (J.A. 42, 53-54.)

4. Agent Rivera took the already seized laptop and other media devices.

After Appellant "withdrew his permission," Agent Rivera told Appellant that he was taking the media devices that he had already piled on the desk, including the laptop, because he had "maintained some type of control over it" prior to the revocation. (J.A. 42, 54.)

The seized media devices——the laptop, CDs, thumb drives, DVRs, SD cards, external hard drive, and the computer tower—— were placed in the Provost Marshal's Evidence depository for safekeeping. (J.A. 42.) The next day, Appellant provided written revocation of his previous permissive authorization for search and seizure. (J.A. 45.)

C. If Appellant had not consented to the search and seizure, Agent Rivera would have sought a command authorization for the search and seizure of Appellant's media devices.

Based on Agent Rivera's ten years of training with the Criminal Investigation Division and Naval Criminal Investigative

Service (NCIS) in the area of "family and sexual violence," he testified that he "always go[es] for the permissive authorization first" and "[i]f that becomes unsuccessful [he] secure[s] the scene and obtain[s] a command authorization from the command." (J.A. 55-56, 59.) He testified that if Appellant had not given his consent to search and seize, Agent Rivera would have sought a command authorization for search and seizure. (J.A. 56-57.)

At the time of the seizure, Agent Rivera believed that the media devices contained evidence related to Appellant's misconduct. (J.A. 55.) He stated: "You don't' go . . . straight to soliciting children . . . without doing some type of researching or inquiring about it with media equipment." (J.A. 55.) Agent Rivera's "past training and experience reporting different types of sex crimes within CID and NCIS" also taught him "that the person that has done some sort of sexual act has either looked it up on a computer or they usually maintain something within media equipment, have videos or things [of] that sort." (J.A. 54-55.)

D. The Military Judge found Agent Rivera's action in moving the media devices into a pile was a meaningful interference with Appellant's possessory rights that took place prior to his revocation of consent.

Prior to trial, Appellant moved to suppress evidence derived from the seized media devices. (J.A. 314.)

The Military Judge found that: (1) Appellant provided consent to search his barracks room and to seize "property found during the search which are desired for investigative purposes"; (2) after twenty-five minutes of searching, Appellant "withdrew his consent to search"; (3) after the revocation, the search ended; and, (4) investigators would have "frozen" the scene to obtain a search authorization if Appellant had not provided consent. (J.A. 381.)

Based on his findings, and relying on Mil. R. Evid. 311(e), *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008), and *United States v. Jacobsen*, 466 U.S. 109 (1984), the Military Judge concluded that the seizure took place prior to the revocation of Appellant's consent as there "had already been a meaningful interference with the accused's possessory interest in that property" and was therefore proper. (J.A. 382-84.)

Relying on Mil. R. Evid. 311(b)(2), *Nix v. Williams*, 467 U.S. 431 (1984), and *United States v. Dease*, 71 M.J. 116 (C.A.A.F. 2012), the Military Judge concluded that even if Appellant "withdrew his consent to seize the digital media . . . prior to its seizure . . . the doctrine of inevitable discovery would apply" because "[i]nvestigators would have frozen [Appellant]'s barracks room and pursued a Command Authorization for Search and Seizure based on probable cause." (J.A. 384.)

E. After seizing Appellant's laptop and other media devices, the investigation continued into the child enticement.

After depositing Appellant's media devices into an evidence depository, Agent Rivera turned the case over to NCIS. (J.A. 64.) NCIS Special Agent Shutt contacted local law enforcement and discovered that RW, the thirteen-year-old boy, had also reported a similar case to the Jacksonville Police Department. (J.A. 64.) As a result, Special Agent Shutt requested and received Appellant's Common Access Card to put together a photographic line-up to use both on base and to send to Jacksonville Police Department for its use. (J.A. 64-65.)

All three children participated in a photographic lineup of Appellant. (J.A. 42, 65, 80.) RW positively identified Appellant with ninety-five percent certainty as the person who asked him for a quickie. (J.A. 65, 134, 209, 277.) Another child identified Appellant with fifty percent certainty, and the other failed to identify Appellant. (J.A. 65.)

In addition to the photographic lineups, NCIS placed a GPS tracker on Appellant's vehicle from November 2011 to January 2012. (J.A. 64, 256.) Special Agent Shutt also checked with the Internet Crimes Against Children (ICAC) task force regarding Appellant's computer screen name, performed a criminal background check on Appellant, and canvassed people who knew Appellant to see if any of those leads provided additional

information, but none of it provided anything of evidentiary value. (J.A. 74-75, 78.)

F. Special Agent Shutt sought and received a search authorization to search Appellant's already seized media devices, including his laptop, for child pornography.

1. The agent and Appellant's Commander met for one to two hours to discuss the evidence against Appellant.

On March 9, 2012, Special Agent Shutt met with Appellant's Commander to request a search authorization, and provided the Commander a signed Affidavit for Search Authorization (the "Affidavit"). (J.A. 67, 83, 265-74.) Special Agent Shutt requested to search for "[e]vidence of the sexual exploitation of children by means of the receipt and possession of child pornography." (J.A. 264-65.)

Over the course of one to two hours, Special Agent Shutt briefed the Commander about the Affidavit and the investigation, including Appellant's attempted child exploitation of three children. (J.A. 67, 83, 88.)

Special Agent Shutt briefed the Commander on the specifics of the photographic lineups, including: that one child identified Appellant with ninety-five percent certainty; that another child identified him with fifty percent certainty; and that the other child identified another person. (J.A. 67, 80-81, 91-92.)

While testifying telephonically at the Article 39a hearing on the motion, the Commander began using his notes to refresh his recollection of the facts and circumstances surrounding his granting authorization to search. (J.A. 84.) The Military Judge told him not to use his notes and to testify based on his memory. (J.A. 84.) But the Commander could not remember being briefed on the specifics of the identification. (J.A. 67, 80-81, 91-92.) He stated:

> I would estimate or guess that [Special Agent 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.

(J.A. 92.)

Special Agent Shutt further briefed the Commander on the "intuitive relationship between enticement, child molestation, and the possession of child pornography" and how child pornography is "[u]sually a precursor to any hands-on offenses with children." (J.A. 66-67, 89-90, 265-74.)

2. Special Agent Shutt is an expert in the area of child enticement. She briefed the Commander on this expertise, including her education, training, and experience, and that she had handled hundreds of cases involving child exploitation.

The Commander was briefed on the agent's expertise, including that she: (1) is a forensic psychologist with a "Master of Arts degree in Forensic Psychology"; (2) is a member

of the North Carolina Internet Crimes Against Children (ICAC) task force, "a national program dedicated to investigations of child exploitation via the internet"; (3) has attended multiple child exploitation trainings and conferences; (4) has received several certificates in the area of computer forensics; (5) has worked for NCIS for seven years; and, (6) has worked on "[h]undreds" of cases involving child exploitation. (J.A. 66, 266.)

In the agent's extensive training and experience with "hundreds" of cases involving exploitation or enticement of children, those cases similarly involved digital media. (J.A. 66-67.) She further told the Commander that "very often there is a reconnaissance of the victim or the target that is performed prior to actually soliciting the target." (J.A. 89-90.)

3. The agent provided the Commander with an Affidavit that further outlined: (1) the evidence against Appellant; (2) the agent's education and experience; and (3) the intuitive relationship between child enticement and child pornography.

The Affidavit included "Attachment A", outlining the basis for the probable cause: the property described in the Affidavit contains "[e]vidence of the sexual exploitation of children by means of the receipt and possession of child pornography." (J.A. 264-65.) The Affidavit provided details of Appellant's attempted child exploitation of three male children, ages ten,

thirteen, and fourteen. (J.A. 272-73.) It stated that two of the three victims positively identified Appellant, but the third "was unable to identify the individual who solicited him." (J.A. 272-73.)

In addition to describing the evidence, the Affidavit also outlined Special Agent Shutt's extensive education, training and experience in the area of child exploitation. *See supra* at 11-12; (J.A. 266.) Based on her education, training and experience, the Affidavit stated: "that there is an intuitive relationship between acts such as enticement or child molestation and the possession of child pornography," and therefore there is "probable cause to believe evidence of the sexual exploitation of children by means of the receipt and possession of child pornography . . . is present within" Appellant's media devices that had previously been seized. (J.A. 267, 273.)

The Affidavit was sworn to and signed by both Special Agent Shutt and the Commander. (J.A. 265.) The Commander signed the search authorization on March 9, 2012. (J.A. 264.)

4. Appellant's laptop contained thousands of images of child pornography.

The search of Appellant's laptop resulted in evidence of "[a]pproximately a thousand" images and videos of child pornography, the majority of which were young boys, including:

> [c]hildren being raped and sodomized, children involved in sexual acts with other children, images

> and videos depicting children in sexually provocative poses wherein their genitalia was the main focus, pictures and images of children masturbating as well as masturbating others, or adults or children masturbating the children either by their hands or with vibrators.

(J.A. 240-41.) The search also showed that Appellant had used search terms such as "[w]here is sex with children legal" and "lowest age of consent." (J.A. 240.)

G. The Military Judge found that the search authorization was based on probable cause.

Prior to trial, Appellant moved to suppress evidence derived from the media devices seized in his barracks room. (J.A. 314.)

The Military Judge made written Findings of Fact and Conclusions of Law, finding that: (1) in a one-to-two hour conversation, Special Agent Shutt and Appellant's Commanding Officer discussed the specifics of Appellant's case, including the probable cause for searching the media devices; (2) the agent presented evidence to the Commanding Officer that one of the child witnesses failed to identify Appellant; (3) the agent had "extensive experience and training in the field of child exploitation"; (4) based on the agent's training, "there is 'an intuitive relationship between acts such as enticement or child molestation and the possession of child pornography'"; and, (5) the "relationship consists of some individuals using child pornography to reduce the inhibitions of potential child victims,

documenting abuse through the production of child pornography, and that possessing and viewing child pornography are a logical precursor to physical interaction with a child." (J.A. 381-82.)

Based on his findings, and relying on Mil. R. Evid. 315, *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009), *United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000), *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996), and *United States v. Colbert*, 605 F.3d 573 (8th Cir. 2010), the Military Judge concluded that the search authorization "was based on probable cause" because the Affidavit detailed Special Agent Shutt's "training and experience" which "provide[d] a reasonable basis for the [Commander] to believe in an intuitive link between the alleged child enticement and possession of child pornography." (J.A. 384.)

The Military Judge further found that the Commander "was not a 'rubber stamp' for [the] investigator." (J.A. 382.) The Military Judge gave "substantial deference to the decision of the [Commander] as an impartial magistrate" and that his decision was "supported by at least one federal case that documents the 'intuitive relationship between acts such as child molestation or enticement and possession of child pornography,'" specifically *United States v. Colbert*, 605 F.3d 573 (8th Cir. 2010). (J.A. 384.)

H. The lower court did not resolve whether the seizure occurred prior to the revocation of consent because it found that the evidence would have inevitably been discovered.

In its published opinion, the lower court here stated that it "need not address [whether consent was revoked prior to seizure] because, assuming arguendo a Fourth Amendment violation occurred, [it] conclude[s] that 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." *Hoffmann*, 74 M.J. at 546.

Summary of Argument

I.

The Military Judge did not abuse his discretion in finding that the original seizure of Appellant's laptop and other media devices was proper because Agent Rivera meaningfully interfered with Appellant's possessory interest in the items, and thereby properly seized them, prior to Appellant revoking his consent. Regardless, the evidence would have been inevitably discovered.

II.

The subsequent search of Appellant's seized media devices was reasonable under the Fourth Amendment because it was approved by a neutral and detached Commander pursuant to a valid command authorization supported by probable cause. Probable

cause existed based on: the evidence provided by the children, including their statements, photographic lineups, descriptions of Appellant, and descriptions and photograph of Appellant's vehicle; and the expertise of Special Agent Shutt as a forensic psychologist, her training, and her extensive experience that allowed her to draw an inferential connection between child enticement and child pornography that the Commander used as a factor in finding probable cause.

Argument

I.

THE MILITARY JUDGE CORRECTLY FOUND THE SEIZURE OF APPELLANT'S LAPTOP AND OTHER MEDIA DEVICES OCCURRED PRIOR TO APPELLANT'S REVOCATION BECAUSE THERE WAS A MEANINGFUL INTERFERENCE WITH APPELLANT'S POSSESSORY INTEREST. THE MILITARY JUDGE ALSO PROPERLY FOUND THAT, EVEN IF THE SEIZURE WAS IMPROPER, THE LAPTOP AND OTHER MEDIA DEVICES WOULD HAVE BEEN INEVITABLY DISCOVERED.

Although fully briefed by both parties, the lower court here did not decide whether Appellant's revocation of his consent occurred prior to the seizure. This Court, however, should address whether there was a "meaningful interference" prior to Appellant's revocation because (1) the Military Judge concluded that the seizure took place prior to the revocation and (2) the granted issue is so broad that it clearly incorporates this issue.

A. The standard of review is abuse of discretion.

This Court reviews a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010). 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).

B. The Military Judge did not abuse his discretion because the seizure was pursuant to Appellant's written consent.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). A search or seizure conducted pursuant to valid consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

To determine the scope of the consent, "the standard is 'that of 'objective' reasonableness——what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Wallace*, 66 M.J. at 7. (quoting *Florida v. Jimeno*, 500 U.S. 248 (1991)).

Appellant here provided valid consent for Agent Rivera to search and seize his media devices by signing a permissive authorization for search and seizure. (J.A. 40, 261-62.) His

consent came after being advised of his rights and the purpose of the search. (J.A. 39-40, 261-62.) Appellant provided "permission to *remove and retain any property* or papers found during the search which are desired for investigative purposes," which reasonably included his laptop and other media devices. (J.A. 261-62) (emphasis added). *See Wallace*, 66 M.J. at 8 ("a reasonable person could conclude that an authorization permitting the search and seizure of 'my computer' would permit [the] investigators not only to search, but also to remove the computer from the premises").

C. No abuse of discretion occurred. When Appellant revoked his consent, Special Agent Rivera already had seized the laptop and other media devices. The agent's act of relocating the devices from multiple locations and merging them into a single pile of "seized" devices was "a meaningful interference."

Consent to seize items may be "withdrawn at any time" by the person granting the permission. Mil. R. Evid. 314(e)(3). But the revocation must precede the seizure. *United States v. Dease*, 71 M.J. 116, 120 (C.A.A.F. 2012).

A seizure of property occurs when there is any meaningful interference with an individual's possessory interest in the property. *United States v. Jacobsen*, 466 U.S. 109 (1984); *Wallace*, 66 M.J. at 8. The Supreme Court recognized that the definition of seizure of property follows from the definition of "the 'seizure' of a person within the meaning of the Fourth

Amendment——meaningful interference, *however brief*, with an individual's freedom of movement." *Id.* 466 U.S. at 114 n.5 (emphasis added).

A seizure of property also occurs when an officer exercises "dominion and control" over the property. *Id.* at 120. *See, e.g., State v. Cotten*, 879 P.2d 971, 978-79 (Wash. Ct. App. 1994) (FBI exercised dominion and control over and therefore seized appellant's shotgun when they picked it up, unloaded it, and removed it from the bedroom); *United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973) (law enforcement officer seized rifles by removing them from a closet and separately seized them by writing down their serial numbers). Therefore, it is not necessary for the items to be removed from an accused's residence to be "seized." *See Cotten*, 879 P.2d at 978-79.

The *Wallace* court recognized that an appellant can revoke consent to seize. 66 M.J. at 8. The appellant there consented to a search and seizure, but as law enforcement began to remove his computer, he specifically revoked his consent to seize it, stating: "You can't take it." *Id.* at 5, 6. The officers told the appellant that "they had to take it." *Id.* at 7. The appellant then acquiesced to the officer's taking of the computer. *Id.* The *Wallace* court found the seizure was not based on valid consent, "but rather mere acquiescence to the color of authority." *Id.* at 10. The court noted the limitation

of a revocation of consent by recognizing that the appellant's revocation, "clearly embraced the seizure of the computer, and nothing more." *Id.* at 10.

Unlike *Wallace*, Agent Rivera already meaningfully interfered with Appellant's laptop and other media devices prior to Appellant's revocation of consent: (1) he collected the laptop from inside the secretary and the other media devices from their original locations; (2) he maintained control over them by moving them; and, (3) he piled them in one location to take with him after the search of the barracks room was complete. (J.A. 42, 47, 50-51, 54, 60.) With these three steps, Agent Rivera meaningfully took possessory interest from Appellant and exercised "dominion and control" over the property.

Moreover, after Appellant's revocation, Agent Rivera immediately terminated his search. And because he already meaningfully interfered with Appellant's possessory interests in the laptop and other media devices, Agent Rivera told Appellant that he was taking them.[1] (J.A. 42, 54.) Unlike *Wallace*, he

[1] Agent Rivera's misuse of the word "seize" is irrelevant to the legal analysis and conclusion. Whether he used the word "seize" in lieu of "took," or some other appropriate synonym, has no bearing on whether seizure occurred prior to the revocation. In fact, Agent Rivera indicated three contradictory times he "seized" the media devices: (1) prior to revocation; (2) when he took the media devices from the room and placed them in his vehicle; and (3) when he placed the media devices into the Provost Marshal's Evidence depository. (J.A. 42, 54.)

sought no additional consent from Appellant, as none was necessary.

The exact location of Agent Rivera's pile——a desk, the floor, or outside Appellant's room——is of no moment. Rather, key to the analysis is that at no time during or after the seizure did Appellant regain control over the items. As the Military Judge properly found, Agent Rivera had already seized Appellant's digital media because there "had already been a meaningful interference with [Appellant]'s possessory interest in that property." (J.A. 384.)

Accordingly, while removing items from Appellant's residence here would also have created a possessory interference, the Military Judge did not abuse his discretion in finding that law enforcement meaningfully interfered with Appellant's possessory interest in the laptop and other seized media devices by sequestering them in a single pile of "seized" items. Appellant fails to point to a single case where courts have declined to find seizure despite law enforcement asserting control over the property inside an appellant's residence.

D. Even assuming Appellant revoked his consent prior to the seizure, he revoked only his consent to search, not seize, and provided a limitation only to the seizure of his computer tower by stating, "I told you could inspect it."

Consent to search and seize "may be limited in any way by the person granting consent." Mil. R. Evid. 314(e)(3). To

determine the scope of the consent, "the standard is 'that of 'objective' reasonableness——what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Wallace*, 66 M.J. at 7 (quoting *Jimeno*, 500 U.S. at 248).

A search and a seizure "necessitate separate analyses under the Fourth Amendment." *Wallace*, 66 M.J. at 8. "As searches and seizures are separate concepts, consent to one is not, without more, consent to the other; similarly, revoking consent to one does not itself revoke consent to the other." *Id*.

In *Wallace*, this Court found that the appellant's statement, "[y]ou can't take [the computer]" properly revoked his consent to seize that particular computer, "and nothing more." *Id*.

Similarly here, after Agent Rivera placed Appellant's media devices in a pile, and as Agent Rivera was removing the cables for the computer tower and monitor, Appellant "withdrew his permission——the authorization to search" stating: "What are you doing? I told you could inspect it," referring only to the computer tower. (J.A. 49, 52-53.) Appellant told Agent Rivera to "stop searching." (J.A. 53.) And the search stopped. (J.A. 42, 53-54. At best, the Record supports only Appellant's revocation of consent to search, and similar to *Wallace*, objectively placed only a limitation on Agent Rivera as to the computer tower and any subsequent search and nothing more.

Appellant's subjective beliefs——or post-hoc desires——matter not when it comes to revocation of consent to seize. *See Wallace*, 66 M.J. at 7-8 (standard is objective reasonableness——what would typical reasonable person understand).

Even assuming the revocation came prior to the seizure, as Appellant only revoked his consent to search and placed a limitation on the computer tower, Agent Rivera was free to seize Appellant's laptop and the other media devices.

E. Even assuming Appellant revoked his consent to seize Appellant's media devices prior to the seizure, the evidence on Appellant's laptop would have inevitably been discovered.

The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Leon*, 468 U.S. 897, 906 (1984). As such, "[t]he doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means." *Wallace*, 66 M.J. at 10. Mil. R. Evid. 311(b)(2) states:

> Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

In order to establish this exception at trial, the Government must, by a preponderance of the evidence, establish

to the satisfaction of the military judge 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 and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *Dease*, 71 M.J. at 122 (quoting *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982)); *see Nix*, 467 U.S. at 444. On appeal, the burden shifts to Appellant based on the Military Judge's ruling, which is reviewed for an abuse of discretion. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999).

Moreover, even if no parallel investigation exists at the time, the exception applies "[w]hen the routine procedures of a law enforcement agency would inevitably find the same evidence." *Owens*, 51 M.J. at 210.

In *Owens*, this Court found that even where a police officer conducted a search after the appellant revoked consent, there was no reasonable probability that the officer would abandon his efforts to search because there was probable cause to continue investigating. 51 M.J. at 210. In finding the inevitable discovery exception applied, the *Owens* court emphasized (1) that two police departments had "open investigations" into the misconduct, and (2) the evidence at the time pointed to the appellant as the assailant. *Id*. at 210-11.

Like *Owens*, there was no reasonable likelihood that Agent Rivera here would have abandoned his efforts to seize and search Appellant's media devices. First, because the evidence pointed to Appellant as the assailant, if he had not provided consent, the "routine procedures" would inevitably have found the same evidence because Agent Rivera testified that he would have sought a command authorization to search Appellant's barracks room and vehicle based on his experience and the known evidence at the time. (J.A. 56.) Agent 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.

(J.A. 56.) He further testified that he believed that the media devices contained some type of evidentiary value based on his training because "[y]ou don't go directly straight to soliciting children . . . without doing some type of researching or inquiring about it with media equipment." (J.A. 55.)

No evidence exists to support Appellant's position that the investigation would have somehow ceased into the media devices if there was no consent to search and seize them. To the contrary, in addition to what Agent Rivera would have done, *supra*, and like *Owens*, two police departments had open investigations into Appellant's criminal conduct——the

Jacksonville Police Department and Criminal Investigation Division.

Second, at the point when Appellant revoked his consent to search the remainder of his barracks room, Agent Rivera had probable cause to obtain a command authorization to search and seize based on: (1) two of the children's description and identification of Appellant's vehicle, including the photograph of the vehicle; (2) the confirmation that the vehicle belonged to Appellant; and (3) two of the children's description of the assailant that matched Appellant. The Command Authorization would have allowed for a search of evidence related to both child enticement[3] as well as child pornography.[4]

Based on the uncontroverted findings of fact, and relying on Mil. R. Evid. 311(e), *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008), and *United States v. Jacobsen*, 466 U.S. 109 (1984), the Military Judge properly concluded that the evidence would have been inevitably discovered because "[i]nvestigators would have frozen [Appellant]'s barracks room and pursued a Command Authorization for Search and Seizure based on probable cause." (J.A. 382-84.) Therefore, he did not abuse his discretion.

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[3] Agent Rivera testified that he would have sought the Command Authorization to search the media devices for "research[] or inquiri[es] about [soliciting children]." (J.A. 55.)

[4] The second assigned error, *infra*, provides a complete probable cause analysis regarding child pornography.

II.

THE COMMANDER'S DETERMINATION OF PROBABLE CAUSE IS GIVEN SUBSTANTIAL DEFERENCE. THE MILITARY JUDGE DID NOT ERR IN VALIDATING THE SEARCH AUTHORIZATION AS IT WAS BASED ON PROBABLE CAUSE AND REASONABLE. THE MILITARY JUDGE'S FINDINGS ARE SUPPORTED BY THE RECORD, INCLUDING THE EXTENSIVE DISCUSSIONS BETWEEN THE COMMANDER AND SPECIAL AGENT SHUTT REGARDING PROBABLE CAUSE, AND HIS CONCLUSIONS OF LAW ARE CORRECT AND SUPPORTED BY CASE LAW.

A. This Court must review the probable cause determination within two layers of deference: (1) the Military Judge receives deference in his ruling, reviewed for an abuse of discretion, and (2) the neutral and detached magistrate receives substantial deference in the initial determination.

This Court reviews a military judge's ruling on a motion to suppress for abuse of discretion. *Clayton*, 68 M.J. at 423. 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).

"The task of the reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Macomber*, 67 M.J. at 214 (internal quotations and citations omitted). Reviewing courts look to whether the commander had a "substantial basis" for concluding that probable cause existed

based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Owens*, 51 M.J. at 211.

The Court of Appeals for the Armed Forces summarized the framework for reviewing probable cause determinations, focusing on four key principles: (1) determinations of probable cause made by a neutral and detached magistrate are entitled to substantial deference; (2) resolution of doubtful or marginal cases should be largely determined by the preference for warrants; (3) close calls will be resolved in favor of sustaining the magistrate's decision; and (4) the evidence must be considered in the light most favorable to the prevailing party below. *Clayton*, 68 M.J. at 423-24 (citations and quotations omitted); *Gates*, 462 U.S. at 236 ("after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review") (internal citation and quotation omitted).

B. The Military Judge properly found the search reasonable because it was supported by probable cause and pursuant to a command authorization from a neutral and detached Magistrate.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City*, 547 U.S. at 403. To be reasonable, there must be probable cause,

based on the totality of the circumstances, that (1) "the person, property, or evidence sought is located in the place or on the person to be searched," and (2) the evidence in question is evidence of a crime. *Gates*, 462 U.S. at 238; Mil. R. Evid. 315(f)(2).

"Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). "Thus, the evidence . . . need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false." *Id.* (citing *United States v. Burrell*, 963 F.2d 976, 986 (7th Cir. 1992)).

Probable cause is based on both written and oral statements communicated to and information known by the authorizing officer and is determined from the totality of the circumstances. *Id.*; Mil. R. Evid. 315(f)(2).

1. Probable cause exists here based on the evidence of child enticement, and Special Agent Shutt, as an expert in the field of child exploitation, articulating the intuitive relationship that exists between child enticement and child pornography.

In *United States v. Gallo*, 55 M.J. 418, 419-20 (C.A.A.F. 2001), the appellant used his Government computer to view images of child pornography. In support of a request for a warrant to search the appellant's residence and personal computer, the

affiant provided details of his extensive experience in the area of child enticement and child pornography. *Id*. at 420.

On appeal, the appellant argued that there was no nexus between child pornography on his government computer and his personal computer at his residence. *Id*. The *Gallo* court held that the nexus, or "gap," was filled by the affiant's extensive experience in law enforcement which made the appropriate connection. *Id*. at 422.

In *Colbert*, upon which the Military Judge relied, the appellant interacted with a five-year-old girl at a park and attempted to get her to follow him to his apartment to watch a movie. 605 F.3d at 575. In finding that there was probable cause to search for child pornography, the court stated that "[t]here is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography." *Id*. at 578; *see also United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994) ("[C]ommon sense would indicate that a person who is sexually interested in children is likely to also be inclined, *i.e.*, predisposed, to order and receive child pornography").

Although the appellant referenced watching a movie, there was no evidence, either explicit or implicit, that the movie contained child pornography. *Id*. The *Colbert* court, however, made the assumption that the appellant had movies containing

child pornography at his apartment based solely on the evidence of child enticement and the intuitive relationship between child enticement and child pornography. *Id*.

To explain its reasoning behind relying on the intuitive relationship, the *Colbert* court stated that "[c]hild pornography is in many cases simply an electronic record of child molestation" and the court characterized computers and internet connections as "tools of the trade for those who sexually prey on children." *Id*.

Although the investigator failed to include his expert opinion as to the nexus in the affidavit, the court held that the appellant's attempted enticement of a child is *a factor* to consider in determining the likelihood of the appellant possessing child pornography. *Id*.

Like *Colbert*, the Military Judge here found that the Commander had a substantial basis for finding probable cause, relying on *Colbert*'s nexus between child molestation or enticement and child pornography as a factor to consider. (J.A. 384.)

Beyond *Colbert*, Special Agent Shutt here detailed her extensive expertise——education, training, and experience——in the area of child enticement and child pornography. (J.A. 66, 266.) The Affidavit detailed her expertise as an educated and trained forensic psychologist, her "training and experience" with

"hundreds" of similar cases, and her belief that child pornography would be in Appellant's already-seized media devices, all of which "provide[d] a reasonable basis for the [Commander] to believe in an intuitive link between the alleged child enticement and possession of child pornography." (J.A. 66-67, 266-67, 273, 384.) Like *Gallo*, Special Agent Shutt's extensive education, training, and experience with hundreds of similar cases involving exploitation or enticement of children, all of which included digital media, properly filled any nexus gap. *See Gallo*, 55 M.J. at 422 (allowing gap in nexus to be filled based on affiant's experience).

The detailed Affidavit further provided the Commander with evidence of Appellant's attempt to entice three children—— approaching all three children while driving his vehicle, making gestures indicating a desire for a "blow job," asking them to "go for a ride," and asking one of the children if he wanted "a quickie." (J.A. 272-73.) All the statements accurately reflected the evidence the investigators had at that time and were corroborated by the children's description of Appellant's vehicle and further corroborated when two of the three children positively identified Appellant in a photographic lineup.[5] (J.A. 80, 91.)

[5] Appellant's subsequent acquittal of two of the three specifications of child enticement is irrelevant to the probable

Both the agent and the Commander discussed these facts during an extensive one-to-two hour meeting prior to the Commander authorizing the search. (J.A. 67, 80, 89, 91.) The agent briefed the Commander that one child had identified Appellant with ninety-five percent certainty, the second with fifty percent, and the other identified another person. (*Id*.)

The Military Judge, in line with *Colbert*, properly concluded that the Commander had a substantial basis for finding probable cause, relying on the appropriate nexus between child molestation or enticement and child pornography as one factor. (J.A. 384.) The Military Judge concluded that based on the agent's "training and experience" and her belief that child pornography would be in Appellant's already seized media devices, there was "a reasonable basis for the [Commander] to believe in an intuitive link between the alleged child enticement and possession of child pornography." (J.A. 66-67, 384.)

2. Reliance on the logical nexus between child molestation and child pornography is not a minority view.[6]

Contrary to Appellant's assertions, acknowledging the logical nexus between child molestation and child pornography is not a minority view. The Eighth Circuit, as stated *supra*,

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cause analysis because (1) the standard is higher to prove guilt——beyond a reasonable doubt, and (2) this Court should look at what the Commander knew when he authorized the search.

[6] Several federal circuits have not addressed this issue.

specifically held that the nexus is a factor to consider. *See Colbert*, 605 F.3d at 578 ("[t]here is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."). Both the Third and Seventh Circuits, in dicta, stated that the nexus is a factor for a magistrate to consider. *See United States v. Clark*, 668 F.3d 934, 940 (7th Cir. 2012) (finding probable cause where appellant's sexual offenses on multiple children connected him to "collector" profile, making it "likely" that he "collected and/or viewed images on the computer"); *Virgin Islands v. John*, 654 F.3d 412, 413 (3d Cir. 2011) (finding it reasonable to assume connection between sexually assaulting a child and child pornography).

In *Virgin Islands*, the Third Circuit found no probable cause to search the appellant's home for child pornography because in her affidavit, the affiant "did not aver the existence of any connection between" child molestation and child pornography. 654 F.3d at 413. The court stated that the affiant should have put the nexus argument in the affidavit if she wanted to rely on it as the basis for the probable cause determination, suggesting that the nexus can be used as a factor in determining probable cause as long as it is averred. *Id*. at 420.

Similarly, the Sixth Circuit, in dicta, suggested that the nexus may be a factor to consider if an expert outlines the logical connection for the magistrate. *See United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008) (in finding no probable cause, court emphasized lack of expert testimony in affidavit about nexus between molestation and child pornography).

Only the Ninth Circuit has rejected the nexus argument. *See Dougherty v. City of Covina*, 654 F.3d 892 (9th Cir. 2011) (conclusory statements of nexus between molestation and child pornography not sufficient to establish probable cause). In *United States v. Needham*, 718 F.3d 1190 (9th Cir. 2013), based on evidence of child molestation, the affiant obtained a search warrant to search the appellant's home for child pornography. *Id*. at 1193. Other than asserting that in her experience a nexus exists between molestation and child pornography, the affiant did not provide any additional information or elaborate on how she learned the characteristics of sexual predators, meaning she did not provide any expertise to support her position. *Id*. at 1192. The Ninth Circuit found that evidence of child molestation, alone, does not create probable cause for a search warrant for child pornography. *Id*. at 1195.

Unlike *Needham*, and similar to *Colbert* and *Clark*, and in line with the court's advice in *Virgin Islands*, the agent here

averred the existence of the nexus between child molestation and child pornography based on her expertise as a forensic psychologist and her extensive training and experience. The nexus, together with the corroborated and reliable evidence of Appellant's sexual desire and intent to commit sexual acts with children, established probable cause.

After reviewing the evidence, the Military Judge properly gave "substantial deference to the decision of the [magistrate] as an impartial magistrate." (J.A. 384.); *see Illinois v. Gates*, 462 U.S. 213, 238 (1983) and *Owens*, 51 M.J. at 211. Moreover, the Military Judge found that the magistrate was not a "rubber stamp" for the investigators. (J.A. 382.)

When viewed in the proper context, through the lens in which the evidence was presented, the Commander properly found probable cause that child pornography would be found on Appellant's already-seized media devices. And the Military Judge correctly found that the magistrate had a "substantial basis" to issue the search authorization to search Appellant's laptop and other media devices.

C. Even assuming there was not sufficient evidence to support probable cause, the good faith exception to the exclusionary rule applies as the Commander was neutral and detached, Special Agent Shutt was not dishonest or reckless, and she harbored an objectively reasonable belief in the existence of probable cause.

The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Leon*, 468 U.S. at 906. As such, in the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. *Id*. at 926.

Appellant here does not allege that the Commander abandoned his detached and neutral role. In fact, the Military Judge properly found that the Commander was not a "rubber stamp" for investigators based on the one-to-two hour intensive meeting the Commander had with the agent regarding probable cause to search Appellant's laptop and other media devices. (J.A. 67, 83, 88, 382.) Therefore, the good faith exception applies because the agent was not dishonest or reckless in preparing the Affidavit and had an objectively reasonable belief in the existence of probable cause. *See Leon*, 468 U.S. at 926.

1. In seeking a search authorization, the agent was neither dishonest nor reckless in the Affidavit or in the discussion with the Commander.

In *Gallo,* the Court of Appeals for the Armed Forces stated that "[e]ven if probable cause was lacking because of the failure to establish a nexus with appellant's house, the good faith exception . . . would apply" because (1) the warrant "was not issued based on bare bones statements," (2) the officer "set forth and detailed his experience and why he believed child pornography would be at appellant's house," and (3) there was no "intentional misstatement." *Gallo*, 55 M.J. at 422.

Like *Gallo*, the search authorization here was not based on "bare bones" statements because the agent provided detailed and corroborated evidence to the Commander of Appellant's misconduct. Further, as in *Gallo*, Special Agent Shutt provided specific details of her extensive experience and training in the area of child molestation, enticement, and child pornography. (J.A. 66-67, 266.)

Although Appellant fails to address the good faith exception, he alludes to it by mistakenly asserting that the agent failed to inform the Commander of the facts of the identification. (Appellant's Br. at 22.) But the Record does not support his position. Special Agent Shutt specifically testified that she *did* inform the Commander that one of the children identified Appellant with fifty percent certainty and

another identified another person. (J.A. 67, 80-81, 91-92.) Appellant relies solely on the telephonic testimony from the Commander who had been inappropriately using his notes during his testimony to refresh his recollection of the facts and circumstances surrounding his granting authorization to search. (J.A. 84.) But at the motions hearing, the Commander guessed, and specifically stated that he was guessing when he testified about what he knew about the identification at the time he granted the search authorization. (J.A. 92.) He stated:

> I would estimate or guess that [Special Agent 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.

(J.A. 92.) The Commander was wrong in both percentages——the identification of the first child was higher and the second child was lower. (J.A. 65, 80-81, 134.) In contrast to the Commander's memory lapses, the agent was very aware and recalled what she told the Commander. (J.A. 67, 80-81.)

Regardless of the Commander's inaccurate guess, the Affidavit establishes that the Commander knew, at the time of granting the search authorization, that two of the children identified Appellant, but the third did not, both of which are factual statements. (J.A. 272-73.)

2. Special Agent Shutt had an objectively reasonable belief in the existence of probable cause based on her extensive training and experience.

In *Needham*, although the Ninth Circuit rejected the nexus argument, it found that the investigators acted in good faith because at the time of the search, the Ninth Circuit had not yet rejected the nexus argument and therefore the investigators had an objectively reasonable belief in the intuitive relationship. *Needham*, 718 F.3d at 1196. As such, the exclusionary rule did not apply. *Id*.

Like *Needham*, based on her expertise, Special Agent Shutt honestly believed in an intuitive relationship between child enticement and child pornography. Objectively, as most federal circuits have expressed *supra*, it is reasonable to link child enticement and child pornography. Because this Court had not addressed this issue at the time of seeking the Command Authorization, the agent had an objectively reasonable belief in the existence of probable cause based on the evidence available to her at the time, her expertise, and the nexus. Therefore, even assuming no probable cause, the good faith exception to the exclusionary rule applies because she reasonably relied on the search authorization that a neutral and detached magistrate authorized.

Conclusion

Wherefore, the United States respectfully requests that this honorable Court affirm the findings adjudged and approved below.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on June 29, 2015.

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