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IN THE  
SUPREME COURT OF THE UNITED STATES

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ROBERT C. HUNTZINGER, SPECIALIST,  
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

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**On Petition for a Writ of Certiorari  
To the United States Court of Appeals for the  
Armed Forces**

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**PETITION FOR WRIT OF CERTIORARI**

The petitioner, Robert C. Huntzinger, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Armed Forces is reported at 69 M.J. 1 (2010) (Appendix A). The opinion of the United States Army Court of Criminal Appeals is unpublished (Appendix B). The denial by the Army Court of the

petitioner's request for reconsideration of its opinion was also unpublished. (Appendix C).

### **JURISDICTION**

The judgment of the Court of Appeals for the Armed Forces was entered on April 30, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 867(a)(3).

### **CONSTITUTIONAL PROVISION INVOLVED**

This case implicates the Fourth Amendment to the United States Constitution in asking whether a military officer can both authorize and personally conduct a search:

Fourth Amendment:

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.

### STATUTE INVOLVED

This case involves Articles 92 and 134, UCMJ; 10 U.S.C. §§ 892 and 934. These sections are provided below:

#### 10 U.S.C. § 892 (2005)

Any person subject to this chapter who –

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order;
- (3) is derelict in the performance of his duties, shall be punished as a court-martial may direct.

#### 10 U.S.C. § 934 (2005)

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty,

shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

### **MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315, Probable cause searches, provides in relevant part:

(b)(1) Authorization to search. An “authorization to search” is an express permission, written or oral, issued by a competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of

command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of the war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(f)(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of

probable cause under this rule shall be based upon any of the following:

(A) Written statement communicated to the authorizing officer;

(B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

## STATEMENT OF THE CASE

### *Procedural History*

Contrary to his pleas, petitioner was convicted by a military judge<sup>1</sup> sitting as a general court-martial of violating a lawful general order by possessing sexually explicit materials on a laptop as well as on an external hard drive, and by possessing child pornography on the external hard drive while deployed to Iraq in violation of Articles 92 and 134, UCMJ; 10 U.S.C. §§ 892 and 934, respectively.

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<sup>1</sup> The military term for the trial judge, *see* 10 U.S.C. § 826 (2005).

Petitioner was also found not guilty of possessing child pornography at Fort Campbell, Kentucky.

The military judge sentenced petitioner to ten months confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

The Army Court of Criminal Appeals (Army Court) affirmed the conviction in an unpublished opinion (Appendix B) and denied the petitioner's request for reconsideration in an unpublished *per curiam* opinion (Appendix C).

The Court of Appeals for the Armed Forces (CAAF) granted review of petitioner's case on the following issues:

WHETHER THE MILITARY JUDGE  
ERRED IN CONCLUDING THAT NO  
SOLDIER AT FORWARD OPERATING  
BASE (FOB) LOYALTY HAD A  
REASONABLE EXPECTATION OF  
PRIVACY IN ANY REGARD.

WHETHER THE MILITARY JUDGE  
ERRED IN DENYING A MOTION TO  
SUPPRESS PETITIONER'S  
EXTERNAL HARD DRIVE AND  
PASSWORD PROTECTED LAPTOP  
WHEN THE COMMANDER WHO  
ORDERED THE SEIZURE OF THE

EQUIPMENT IMMEDIATELY SEARCHED THE EQUIPMENT UPON SEIZURE, DEMONSTRATING THAT HE WAS PERFORMING LAW ENFORCEMENT FUNCTIONS AND WAS NOT NEUTRAL AND DETACHED WHEN SEIZING THE ITEMS.

WHETHER THE DOCTRINE OF INEVITABLE DISCOVERY IS APPLICABLE WHEN THERE ARE NO INDEPENDENT POLICE ACTIVITIES, OR TESTIMONY OR EVIDENCE OF ROUTINE POLICE PRACTICES, THAT WOULD HAVE INEVITABLY RESULTED IN DISCOVERY, AND NO OTHER EXCEPTION TO THE FOURTH AMENDMENT APPLIES.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN CONCLUDING THAT PROBABLE CAUSE EXISTED TO SUPPORT THE SEARCH AUTHORIZATION OF PETITIONER'S LAPTOP COMPUTER AND DETACHABLE HARD DRIVE.

On April 30, 2010, CAAF affirmed the Army Court's decision in an opinion available at 69 M.J. 1 (2010) (Appendix A).

### ***Statement of Facts***

On January 19, 2006, while deployed to Iraq, Captain (CPT) Miller, petitioner's company commander, received a report from Sergeant First Class (SFC) Powell that SFC Powell had discovered what appeared to be child pornography in a group of computer files that SFC Powell claimed came from another soldier, Private (PV2) Parr. The video involved two naked young girls standing in a field. CPT Miller, who was leaving Forward Operating Base (FOB) Loyalty for a mission, directed his subordinates to conduct a preliminary investigation and report back to CPT Miller when he returned.

After initially denying knowledge, PV2 Parr eventually admitted that he had deleted the video, but insisted that he did not know where the video came from; he also denied knowledge of a second video that was hidden on his computer. Private Parr stated that he had shared files with three friends (in addition to SFC Powell) of which petitioner was one.

When CPT Miller returned, he reviewed PV2 Parr's statement, watched the two videos and then ordered First Sergeant (1SG) Goodwater to "seize the laptops and any external memory devices of Huntzinger [petitioner], Teran and Boudreaux." Captain Miller did not seek legal advice before ordering the seizure. He testified, "[I]t appeared that I had a contraband issue in the battery . . . so in keeping with maintaining good order and discipline in my unit I ordered this property seized."

At CPT Miller's direction, 1SG Goodwater went into petitioner's barracks room, seized petitioner's laptop computer and external hard drive, and brought them down to his own office where CPT Miller was waiting. First Sergeant Goodwater and SFC Powell also tried to seize Teran's and Boudreaux's computers, but their rooms were locked.

At the motions hearing as well as on the merits, CPT Miller testified that as soon as petitioner's computer equipment was brought to him he proceeded to plug the external hard drive into 1SG Goodwater's computer and search petitioner's external hard drive. At the motions hearing, CPT Miller testified, "I looked at the external hard drive--" and, "We plugged in his external hard drive into First Sergeant Goodwater's computer and viewed the contents and then he [petitioner] came down." Additionally, when asked by the trial counsel, ". . . correct me if I'm wrong but when the evidence was in the First Sergeant's office you looked at the external hard drives [sic]. . .," to which CPT Miller answered, "Yes." Finally, when asked by the Defense Counsel, "Once [petitioner's] laptop was brought to your office you said you viewed some of the files on the external hard drive?" Captain Miller again answered, "Yes." Captain Miller also tried to search petitioner's laptop but was unable to do so at the time because it was password protected.

CPT Miller was equally clear that he had searched petitioner's external hard drive while

testifying on the merits. He testified, “I took the hard drive and plugged it in to First Sergeant Goodwater’s laptop which was in his office, obviously, and I—and opened it.” He then described what he saw as he searched the hard drive, “I opened that file up and saw some still images and some movies that appeared to show child pornography.” Captain Miller specifically denied that either SFC Powell or 1SG Goodwater searched petitioner’s hard drive. He stated, “It was me,” when asked, “One of the three of you opened files on that external hard drive. Is that correct?”

In his factual findings denying the defense motion to suppress, the military judge stated, “First Sergeant Goodwater took the [petitioner’s] computer and hard drive back to his office where he plugged the [petitioner’s] external hard drive into his own computer and began to look through the files there.” When he issued his decision from the bench, the military judge stated, “The First Sergeant executed that search and found the evidence that the defense is complaining of.”

Consistent with CPT Miller’s testimony, 1SG Goodwater testified entirely contrary to the military judge’s findings of fact: “Captain Miller, he plugged in the external hard drive and we saw some files.”; “Captain Miller plugged in the external hard drive in my computer. He saw a series of files. I don’t know what he saw . . .”; “I didn’t see who was [sic] actually hooked it up. Probably it was the commander but I didn’t.”

The Army Court stated in its memorandum opinion, “We find nothing clearly erroneous in [the judge’s] findings of fact and adopt them.” The Army Court then determined that CPT Miller had probable cause to issue a search authorization. The Army Court entirely ignored the search conducted by CPT Miller. In response to petitioner’s request for reconsideration, which again pointed out that the military judge’s ruling was based upon a clearly erroneous fact (that 1SG Goodwater rather than CPT Miller had searched the computer equipment), the Army Court stated, “Our legal analysis relied only on the military judge’s first seven findings of fact . . . .” The military judge’s eighth finding of fact is the one stating that 1SG Goodwater, and not CPT Miller, conducted the search of petitioner’s computer equipment. The Army Court did concede that CPT Miller had plugged the external hard drive into a computer but refused to consider whether the commander’s actions constituted an illegal search or implicated the legality of the commander’s order to seize the computer equipment in the first place.

After CPT Miller searched petitioner’s external hard drive, the petitioner was brought into 1SG Goodwater’s office and read his Article 31(b), UCMJ, rights. Captain Miller was seated behind the First Sergeant’s desk, with the First Sergeant standing behind CPT Miller, and the company executive officer standing behind the petitioner. Petitioner’s laptop was on the desk in plain view of the

petitioner, as was his external hard drive which was still connected to the desktop computer in that office.

The testimony demonstrated, and the military judge found as fact, that the accused requested legal counsel. Petitioner was then immediately questioned by CPT Miller, who asked petitioner for his password. Petitioner responded by asking if he could type in his password himself, but CPT Miller responded, “[N]o. Write it down.” Petitioner complied. Captain Miller, in the presence of the petitioner, used the password and proceeded to view a document already opened and visible on the laptop screen.

Petitioner was ultimately charged and convicted based on the evidence contained in the laptop computer and external hard drive that CPT Miller ordered seized, brought to him, and which was then searched by him.

### **REASONS FOR GRANTING THE WRIT**

The investigative tactics employed in this case are exemplary of the abuses of military authority possible under the current state of Fourth Amendment jurisprudence as applied within the armed forces. It is a case in which the initial error of an improper search was exacerbated when the officer who authorized the search then conducted the search, and the military courts used strained reasoning to uphold it. The legal issues presented within this writ address these systemic concerns.

CAAF held, contrary to *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), that a military commander could conduct law enforcement functions and simultaneously authorize a probable cause search or seizure. In short, CAAF held in this case that a military commander could serve as both law enforcement officer and magistrate in the same case at the same time - so long as there was no evidence of “bias.”

Additionally, CAAF held that a military commander could search for evidence without any lawful authorization from any other authority, on the grounds that doing so constitutes the “reasonable actions of a commander charged with maintaining good order and discipline in his unit.”

The Soldiers of a free country, sworn to defend the Constitution of the United States with their lives if necessary, deserve to have their own Fourth Amendment rights honored and respected, and for such reason this Honorable Court should grant petitioner’s writ.

### **SUMMARY OF ARGUMENT**

Several decades ago, the military’s highest court struggled mightily to reconcile the dual functions of a military commander. On the one hand, military commanders routinely perform law enforcement duties as they are responsible for maintaining good

order and discipline in their units. Yet, on the other hand, military commanders have been authorized by rule to order probable cause searches and seizures. In a series of seminal cases several decades ago, the military's highest court, the Court of Military Appeals, held that the Constitution would not permit a military commander to perform both functions (law enforcement officer and magistrate) in the same case at the same time. *See, e.g., U.S. v. Ezell*, 6 M.J. 307 (CMA 1979). That Court even went so far as to state that the mere presence of the commander at the scene of the search or seizure would call into question the legality of the commander's authorization. *Id.* A commander who was personally involved in law enforcement duties was required to seek the approval, based upon probable cause, of either a higher level commander or a military magistrate in order to conduct a search or seizure.

In the present case, CAAF departed entirely from this precedent, and did so without even pausing to mention the Constitution of the United States. The facts here are plain and are not in dispute. The military commander ordered the petitioner's computer equipment brought to him, and when his subordinates complied the commander immediately proceeded to search petitioner's external hard drive. He also sought to search petitioner's laptop computer but found that it was password protected. After ordering petitioner to give him the password (even though petitioner had just formally requested legal counsel), the military commander used the password to search the laptop too.

It is impossible to reconcile the military commander's search in this case with the Fourth Amendment. Unfortunately, CAAF did not try to do so, but instead found that a commander acting as a "law enforcement official" with a "police attitude" is disqualified from authorizing a search only when "the evidence demonstrates that the commander exhibited bias or appeared to be predisposed to one outcome or another." 69 M.J. at 6.

The needs of the military do not necessitate an exception to Fourth Amendment requirements. Any military commander who wants to join the fray and investigate a matter can always do so; if that commander wants to conduct a search, all that commander has to do is request authorization from a neutral and detached official, whether that be the next higher commander, any other commanding officer in the chain of command, or a military magistrate or military judge. What has never been permitted prior to this case is for a military officer to simultaneously conduct law enforcement functions and also authorize probable cause searches or seizures; or, looked at differently, to authorize him or herself to conduct a probable cause search.

## ARGUMENT

Military Rule of Evidence 315(d) (M.R.E.) permits impartial commanders to issue search authorizations. As the military's highest court stated in *U.S. v. Staff Sergeant Freeman*, "[T]he

requirement of impartiality . . . was intended to incorporate the neutral-and-detached standard of *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979).”<sup>2</sup>

A commander who executes a search or otherwise engages in law enforcement activities in a particular case, “. . . thereby loses the objectivity and impartiality constitutionally required of an official who authorizes a search based on probable cause.”<sup>3</sup> In the seminal case of *U.S. v. Ezell*, the Court of Military Appeals stated, “[A] commander is not neutral and detached if he becomes ‘personally involved as an active participant in gathering evidence against accused.’”<sup>4</sup> In regards to the mere presence of the authorizing commander at the scene of the search, the Court in *Ezell* stated, “Presence would indicate to us that the commander has been engaged in law-enforcement activities *throughout his participation in the entire authorization process*,

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<sup>2</sup> 42 M.J. 239, 242 (1995).

<sup>3</sup> *U.S. v. Rivera*, 10 M.J. 55, 61 (C.M.A. 1980) (citing *U.S. v. Ezell*, 6 M.J. 307 (C.M.A. 1979)). The Court in *Rivera* also cites Supreme Court precedence, *Johnson v. U.S.*, 333 U.S. 1014 (1948). Many other military cases discuss the requirement for the commander to be neutral and detached in a quasi-judicial role and not executing law enforcement functions. *See, e.g.*, *U.S. v. Lopez*, 35 M.J. 35 (C.M.A. 1992); *U.S. v. Freeman*, 42 M.J. 239 (C.A.A.F. 1995); *U.S. v. Murray*, 12 M.J. 139 (C.M.A. 1981); *U.S. v. Cordero*, 11 M.J. 210 (C.M.A. 1981).

<sup>4</sup> *Ezell*, 6 M.J. 307, 315 (1979) (citing *U.S. v. Guerette*, 49 C.M.R. 530, 532 (C.M.A.)).

except in very extraordinary situations, which we will deal with on a case-by-case basis.”<sup>5</sup>

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<sup>5</sup> *Ezell* at 319 (emphasis added). Interestingly, while the Drafters’ Analysis to M.R.E. 315 in the 2005 edition and the current 2008 edition of the Manual cites the Supreme Court case of *Lo-Ji Sales v. N.Y.* for the proposition that “mere presence of an authorizing official at a search does not deprive the individual of an otherwise neutral character,” the *Lo-Ji* case actually involves the suppression of evidence in part due to the presence of the magistrate at the search and his contemporaneous participation in overseeing the search. See, *Lo-Ji Sales*, 442 U.S. 319 (1979). In this case, CPT Miller was not only present at the search, he was the one who actually conducted the search of petitioner’s computer equipment for evidence. As a matter of statutory construction, it should also be noted that this “mere presence” language in M.R.E. 315 is embedded within the section concerning military judges and magistrates, separate and distinct from the section governing authorizations by a commander. There is a very good policy reason to distinguish between a magistrate or judge, who are inherently judicial officials, and a commander, who routinely executes law enforcement functions as well as other duties.

Several military cases since *Ezell* have found exceptions to the “mere presence” rule but all of these cases start from the premise that presence is legally problematic. See, e.g., *U.S. v. Law*, 17 M.J. 229 (C.M.A. 1984) (holding that the commander’s presence during the search was due to his interest in protecting the Soldier’s personal effects); *U.S. v. Powell*, 8 M.J. 260 (C.M.A. 1980) (interpreting *Ezell*’s “mere presence” rule as not constituting a *per se* disqualification); accord *U.S. v. Hall*, 50 M.J. 247 (C.A.A.F. 1999) (stating in dicta that the acting company commander’s actions in “double-checking” on probable cause did not necessarily taint the subsequent search authorization by the actual commander). Again, in this case, CPT Miller was not only present, he actually conducted the search.

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion,<sup>6</sup> but an abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or the military judge's decision is influenced by a clearly erroneous view of the law.<sup>7</sup> Both are present here.

Simply put, there is no evidence in the record to support the military judge's finding that 1SG Goodwater "plugged the [petitioner's] external hard drive into his own computer and began to look through the files there."<sup>8</sup> Instead, all of the evidence in this case shows that CPT Miller was the one who searched petitioner's external hard drive as well as petitioner's laptop computer.<sup>9</sup>

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<sup>6</sup> *U.S. v. Khamsook*, 57 M.J. 282, 286 (C.A.A.F. 2002) (citing *U.S. v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)).

<sup>7</sup> *U.S. v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) (citing *U.S. v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)).

<sup>8</sup> Appellate Exhibit X, paragraph 8.

<sup>9</sup> The military judge did include a finding that following 1SG Goodwater's search, "CPT Miller also viewed the files on the accused's external hard drive and opened a few of the files to view their contents." (Appellate Exhibit X, para. 8.) This finding alone mandates the legal analysis required by *U.S. v. Ezell* and its progeny concerning CPT Miller's lack of neutrality and detachment, as discussed, *infra*. Regardless, there is an important qualitative difference between the First Sergeant conducting a search which was assisted by CPT Miller and the clear facts on this case, which is that CPT Miller is the one who conducted the search of petitioner's computer equipment on his own.

Factually, there should be no dispute that CPT Miller searched the petitioner's external hard drive, as he admitted as much and 1SG Goodwater confirmed that testimony.<sup>10</sup> Additionally, his manipulation of the petitioner's password-protected laptop and subsequent entry of that password into the laptop and viewing of the displayed information constituted a search of that computer as well. That such actions constitute a "search" for purposes of the Fourth Amendment is well-settled law under not only *Arizona v. Hicks*, 480 U.S. 321 (1987), but also under military-specific case law. In *U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006), CAAF held that files on a computer should be treated as contents of a non-transparent container. Nothing on petitioner's laptop was in "plain view" until CPT Miller entered the petitioner's password.

Since CPT Miller had no authority to conduct any search of petitioner's computer equipment, the conclusion must be that his actions constitute an illegal search.

This is important because CPT Miller's illegal search necessitates a legal analysis that has not yet occurred in this case, not at the trial level, not by the Army Court, and not even by CAAF. The illegal search of petitioner's computer equipment, part of which search occurred in the petitioner's very presence, necessitates an analysis evaluating

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<sup>10</sup> See R. at 115-116, 118, 123, 276-277, and 282 (testimony of CPT Miller); R. at 87-88, 270 (testimony of 1SG Goodwater).

whether CPT Miller was ever neutral and detached and calls into question even the initial seizure of petitioner's computer equipment.

Whether looked at through the prism of case law or purely as a factual matter, the totality of CPT Miller's actions demonstrate that he never acted in the required quasi-judicial, neutral and detached manner. Instead, he acted like a law enforcement officer ferreting out evidence.

Most importantly, nowhere in the record does CPT Miller ever indicate that he even intended to authorize a probable cause search, much less that he understood any of the legal requirements for authorizing a probable cause search. In fact, CPT Miller expressly testified, "I can't give a legal definition of child pornography or pornography in general but I can tell you what-" only to be interrupted by the Trial Counsel, who stated, "There's [sic] Supreme Court justices that can [chuckling]." Again, it is black letter law that not only must an authorizing official be neutral and detached, the official must also be capable of determining the existence of probable cause.<sup>11</sup>

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<sup>11</sup> Even the military courts recognize this point of law. *See, U.S. v. Lopez*, 35 M.J. 35, 40 (C.M.A. 1992) (requiring "that the issuing official must be neutral and detached and must be capable of determining whether probable cause exists"); *See also, Ezell* at 312; *Rivera* at 40; *Khamsouk*, 57 M.J. 282. The inability of the authorizing official here to enunciate any pertinent legal standard is yet another basis undermining the military court's conclusion upholding the search and seizure in

Captain Miller could hardly be acting in a quasi-judicial manner when he was unable to provide any legal definition for not only child pornography but also “pornography in general.” This is yet more evidence that CPT Miller was acting as a law enforcement officer and was not neutral and detached because any reasonable person acting in a quasi-judicial manner and intending to authorize a probable cause search would seek out some guidance prior to acting on a threshold issue on which they were ignorant. His decision to immediately request petitioner’s password upon invocation of counsel also undermines any argument that CPT Miller was acting in the required quasi-judicial manner. In short, while the seizure of an item may be distinct from the search of that same item, in this case the search by CPT Miller demonstrates that the initial seizure was not authorized by a neutral and detached official upon probable cause. At a minimum, however, the illegal search mandates an entirely different legal analysis than accomplished by the trial judge, the Army Court, or the Court of Appeals for the Armed Forces.

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this case. While the official may not have to be “experienced in the intricacies of determining probable cause,” as CAAF put it in *Freeman*, 42 M.J. at 243, the official has to have some legal standard upon which to find probable cause. *See generally Shadwick v. Tampa*, 407 U.S. 345 (1972) (holding that non-lawyer clerks possessed the requisite capacity to issue arrest warrants only for ordinary municipal ordinances).

**CONCLUSION**

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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