No. 10-158

In the Supreme Court of the United States

ROBERT C. HUNTZINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the commander's authorization of the search and seizure of petitioner's computer and hard drive violated Military Rule of Evidence 315(d) and the Fourth Amendment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 10a-24a) is reported at 69 M.J. 1. The opinion of the Army Court of Criminal Appeals (Pet. App. 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2010. The petition for a writ of certiorari was filed on July 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a specialist in the United States Army, was convicted by a general court-martial of two specifications of violating a lawful general order and one specification of possession of child pornography, in violation

of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 934. The convening authority approved petitioner's adjudged sentence of a bad-conduct discharge, ten months of confinement, forfeiture of all pay and allowances, and reduction of grade to Private E1. The Army Court of Criminal Appeals (ACCA) affirmed. Pet. App. 1a-9a. The Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 10a-24a.

1. Military Rule of Evidence (M.R.E. or Rule) 315(a) provides for the admission of evidence obtained as a result of an authorized search based on probable cause. Rule 315(b)(1) defines an "authorization to search" as an "express permission, written or oral, issued by competent military authority to search a person or an area" for specified evidence. Rule 315(d) provides that an authorization to search may be granted by an "impartial individual," including "[a] commander * * * who has control over the place where the property or person to be searched is situated or found." M.R.E. 315(d)(1). The Rule states that "[a]n otherwise impartial authorizing official does not lose that 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." M.R.E. 315(d). "[N]or 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." *Ibid.* Under the Rules, "[p]robable 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." M.R.E. 315(f)(2).

2. a. Petitioner was deployed to Forward Operating Base Loyalty, Baghdad, Iraq. Petitioner's commander was Captain (CPT) Aaron J. Miller. On January 19, 2006, Sergeant First Class (SFC) Richard Powell was reviewing computer music files that he had received the night before from Private First Class (PFC) Dennis Parr when he observed a video file containing nude minor females. SFC Powell reported his discovery to CPT Miller, who ordered First Sergeant (1SG) Joseph Goodwater to speak to PFC Parr. Pet. App. 13a-14a; Gov't CAAF Br. 3-4.

1SG Goodwater interviewed and obtained a written statement from PFC Parr, who agreed to a search of his computer. 1SG Goodwater found the same video on PFC Parr's computer. PFC Parr said that the video was not his and explained that he had exchanged files with three soldiers, including petitioner. In response to the question of who might have "downloaded pornography to your computer or hard drive," PFC Parr responded: "Maybe [petitioner]." Pet. App. 14a; see Gov't CAAF Br. 5 ("When asked 'who do you most likely think you got the file from,' [PFC] Parr said, 'Specialist Huntzinger.'") (citing CAAF J.A. 64).

That evening, 1SG Goodwater reported his findings to CPT Miller, who read PFC Parr's statement and viewed two videos that had been discovered on PFC Parr's computer. Pet. App. 14a. CPT Miller determined that one of the videos was the same one viewed by SFC Powell and that the other one, entitled "13-year-old Russian girl," was "pornography." *Id.* at 15a. Suspecting at that point that there was a "contraband issue in the battery and that these other three individuals may have the same material on their computers and external memory devices," CPT Miller directed 1SG Goodwater to search

the barracks rooms of the three soldiers identified by PFC Parr and to seize their computer equipment. *Ibid.*

1SG Goodwater entered petitioner's barracks room (the door to which was unlocked) and seized petitioner's laptop computer and external hard drive. Pet. App 15a. After 1SG Goodwater brought those items back to his office, CPT Miller viewed the files on the hard drive, including one entitled "nasty" and several files that he believed were child pornography. *Ibid.*; Gov't CAAF Br. 5. CPT Miller could not view the files on the laptop because it was password-protected. Pet. App. 15a.

Later that evening, CPT Miller advised petitioner of his right against self-incrimination under UCMJ Article 31, 10 U.S.C. 831, and petitioner requested an attorney. Pet. App. 15a-16a. CPT Miller asked petitioner for the laptop password, which petitioner provided. *Id.* at 16a. CPT Miller searched the files on petitioner's laptop, leading to the discovery of additional pornographic material. The next day, two agents of the United States Army Criminal Investigation Command (CID) interviewed petitioner, who consented to a search of his computer, hard drive, and memory card. The agents discovered additional evidence that was used against petitioner at trial. *Ibid.*

b. Petitioner filed a pretrial motion under M.R.E. 315 and the Fourth Amendment to suppress the evidence derived from the search and seizure of his computer and hard drive. The military judge denied the motion, holding that CPT Miller had probable cause to search and seize the computer and hard drive based on the discovery of child pornography on other soldiers' computers and information identifying petitioner as one of three possible sources (and the most likely one). Pet. App. 16a. The military judge also provided four addi-

tional grounds for denying the motion even if probable cause were lacking: (1) the searches were conducted in good faith; (2) the evidence would have been inevitably discovered; (3) petitioner had no expectation of privacy in living quarters in a combat zone; and (4) petitioner voluntarily consented to the search by the CID agents. *Id.* at 17a.

The ACCA affirmed. Pet. App. 1a-6a. It held that probable cause existed to search and seize petitioner's computer and hard drive, and that, alternatively, petitioner's files would have been inevitably seized and inspected. *Id.* at 3a-5a. In a footnote, the ACCA rejected petitioner's claim that CPT Miller was not neutral and detached when he authorized the search of petitioner's computer files. *Id.* at 4a n.3. In denying petitioner's motion for reconsideration, the ACCA clarified that it "agree[d] Captain Miller plugged [petitioner's] hard drive into 1SG Goodwater's computer," but stated that its "analysis of the legality of the seizure of [petitioner's] computer and hard drive did not rely on who plugged in the computer." *Id.* at 8a.

c. The CAAF granted review and affirmed. Pet. App. 10a-24a. The CAAF rejected petitioner's argument that CPT Miller was disqualified from authorizing the searches based on his involvement in the investigation. *Id.* at 19a-22a. The CAAF explained that a commander issuing a search authorization must be impartial under M.R.E. 315(d), but that disqualification occurs only when "the evidence demonstrates that the commander exhibited bias or appeared to be predisposed to one outcome or another." Pet. App. 19a. The CAAF further explained that a commander's participation in investigative activities in furtherance of command responsibilities does not *per se* establish such bias. *Id.* at 19a-20a.

Thus, the court reasoned, a commander is not disqualified merely because he directs reasonable investigative steps to determine the facts before making a probable cause determination. *Id.* at 20a.[1]

Applying those principles, the CAAF determined that CPT Miller did not prejudge any issues or the outcome of the probable cause decision before examining the evidence. Pet. App. 20a-21a. It explained that CPT Miller did not authorize the search until 1SG Goodwater had narrowed the list of suspects to three soldiers, including petitioner. *Id.* at 21a. The court noted that although CPT Miller retained a degree of control over the investigation by ordering 1SG Goodwater to speak to PFC Parr, those actions—far from showing bias—were consistent with CPT Miller's command responsibilities to obtain the necessary facts before determining whether a search should be authorized. *Ibid.*

The CAAF further stated that CPT Miller's subsequent conduct of requesting petitioner's password, reviewing the files on the computer, and evaluating the evidence reflected a commander's reasonable concern with maintaining good order and discipline in his unit and did not show that CPT Miller was biased at the time he had authorized the initial search and seizure of petitioner's computer equipment. Pet. App. 21a-22a. The CAAF held that CPT Miller's post-authorization actions did not retroactively invalidate his proper pre-authorization actions. *Id.* at 22a.

The CAAF also concluded that probable cause supported the authorization to search in this case. Pet. App. 22a-24a. The CAAF did not rely on the military

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[1] The CAAF noted that the constitutionality of M.R.E. 315(d)(1) was not at issue in the appeal before it. Pet. App. 19a n.2.

judge's ruling that petitioner lacked an expectation of privacy in his quarters, *id.* at 18a, nor did it address the alternative grounds of good faith, inevitable discovery, or consent, *id.* at 24a.

ARGUMENT

Petitioner contends (Pet. 13-22) that the search and seizure of his laptop computer and external hard drive violated M.R.E. 315(d) and the Fourth Amendment, because the commander was not "impartial" or "neutral and detached" when he authorized the search and seizure. The CAAF's factbound decision upholding the validity of the search and seizure is correct, and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The Fourth Amendment's Warrant Clause requires that a search warrant based on probable cause be made by a neutral and detached magistrate instead of by the police who are engaged in investigating crime. See *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). The military has incorporated that principle in M.R.E. 315(d) by limiting the power to authorize searches based on probable cause to an "impartial" individual. Rule 315(d)(1)'s grant of authority to commanders to authorize a search is part of a long military tradition in which commanding officers have played a significant role in administering military justice. See *Weiss* v. *United States*, 510 U.S. 163, 174-175 (1994). Because commanders have a duty to maintain order and discipline, which includes investigation of criminal activities, the CAAF has held that a commander's participation in an investigation pursuant to command responsibilities does not automatically disqualify the commander from authoriz-

ing a search under Rule 315(d). Rather, it is "only when the commander participates as a law enforcement official or is personally and actively involved in the process of gathering evidence that he loses his right to authorize searches which can produce admissible court-martial evidence." *United States* v. *Freeman*, 42 M.J. 239, 243 (C.A.A.F.), cert. denied, 516 U.S. 1011 (1995); see Pet. App. 19a-20a; *United States* v. *Lopez*, 35 M.J. 35, 41-42 (C.M.A. 1992), cert. denied, 513 U.S. 1153 (1995); *United States* v. *Ezell*, 6 M.J. 307, 318-322 (C.M.A. 1979).

Petitioner relies on a statement by the Court of Military Appeals (precursor to the CAAF) in *Ezell* that the presence of the commander at the scene of the search or seizure would call into question the legality of the commander's authorization. Pet. 15, 17-18 (citing *Ezell*, 6 M.J. at 319). But Rule 315(d) expressly provides that "[a]n otherwise impartial authorizing official does not lose that 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." M.R.E. 315(d)(2). Indeed, the Analysis of the Military Rules of Evidence explains that this part of Rule 315(d) "clarifies the decision * * * in [*Ezell*] by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character." *Manual for Courts-Martial, United States* A22-28 (2008 ed.). In any event, to the extent any tension exists between the decision below and prior decisions of the CAAF or the Court of Military Appeals, it would be the CAAF's responsibility, not this Court's, to harmonize those decisions. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Turning to the facts of this case, the CAAF correctly held that CPT Miller acted impartially when he autho-

rized the searches in this case. As the CAAF explained (Pet. App. 21a-22a), when CPT Miller learned that soldiers in his unit in a combat zone in Iraq likely possessed child pornography on their computers, he reasonably directed his First Sergeant to look into the issue and to report back to him as part of his responsibility to maintain order and discipline in the unit and to obtain the necessary facts before authorizing a search. Far from taking an active role in the investigation or prejudging the case, CPT Miller waited until his First Sergeant had narrowed the suspects to three soldiers before authorizing the search and seizure. Further, CPT Miller's post-authorization actions of advising petitioner of his rights and of examining the files on his computer did not establish any pre-decisional bias on his part. As the CAAF held (*id.* at 22a), those actions were consistent with CPT Miller's responsibilities of maintaining order in his command; they did not show that his earlier acts were based on bias and predispostion.

In any event, whether an individual was biased or impartial is a question of fact, see *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995) (juror impartiality), and this Court ordinarily does not review factual disputes resolved by the factfinder and affirmed by two appellate courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Moreover, such findings of military courts, made in the context of a search in a military setting, warrant "great deference." *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976).

2. Contrary to petitioner's suggestion (Pet. 14, 18), the decision below does not conflict with this Court's decision in *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). In that case, the Court held that a magistrate was not neutral and detached for Fourth Amendment

purposes where, after issuing a search warrant for two obscene films and other undesignated items (to be named later) at an adult bookstore, he accompanied law enforcement agents to the store; conducted a "generalized search under authority of an invalid warrant" for additional obscene materials; ordered the seizure of additional materials; and directed the law enforcement agents to seize all "similar" items—improperly leaving that determination to the agents' discretion. *Id.* at 321-328.

Lo-Ji Sales is distinguishable from this case in at least two important ways. First, *Lo-Ji Sales* involved a civilian magistrate, not a military commander with multiple responsibilities (including the maintenance of good order and discipline in the field). Second, unlike the magistrate in *Lo-Ji Sales*, CPT Miller did not conduct an extensive, open-ended search under a patently invalid warrant, nor did he delegate to law enforcement or others the authority to determine what materials were contraband. Rather, CPT Miller ordered the seizure of petitioner's computer equipment after further investigation by his subordinates revealed petitioner's likely possession of contraband, and, once the computer was seized, he reasonably examined it for the presence of child pornography as part of his legitimate command responsibilities. Indeed, as the Analysis of the Military Rules of Evidence points out, Rule 315(d), which was written in conformance with *Lo-Ji Sales*, borrowed that decision's language. *Manual for Courts-Martial, United States* A22-28; see *Lo-Ji Sales*, 442 U.S. at 328 n.6 ("We do not suggest, of course, that a 'neutral and detached magistrate' loses his character as such merely because he leaves his regular office in order to make himself readily available to law enforcement officers who

may wish to seek the issuance of warrants by him.") (internal citation omitted).

The lack of a conflict with *Lo-Ji Sales* or any other decision of this Court, and the fact that petitioner does not allege a conflict with any decision of a federal court of appeals, reinforce the conclusion that this case does not warrant further review.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2010

[2] Petitioner does not challenge the lower courts' determination that probable cause existed for the search at issue. Nor does petitioner address the alternative arguments accepted by the military judge or the ACCA—such as inevitable discovery and good faith, or the lack of an expectation of privacy in combat-zone living quarters (Pet. App. 5a, 17a)—that would compel the same result even if the commander's search authorization were deemed invalid.