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PROBABLE CAUSE IN CHILD PORNOGRPAHY CASES: DOES IT MEAN THE SAME THING?

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It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence.[1]

I. Introduction

In today's ever-increasing complex and technological world, the dissemination and possession of child pornography[2] has never been more

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[1] Boyd v. United States, 116 U.S. 616, 630 (1886) (discussing the purpose of the Fourth Amendment).

[2] For the purposes of this article, the term "child pornography" is used as defined in 18 U.S.C. § 2256 (2006). Some say that child pornography is mislabeled because it is the permanent depiction of sexual abuse of children. *See* YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW 11 (2008) (citing Vernon Jones & Elizabeth Skogrand, *Visible Evidence—Forgotten Children*, SAVE THE CHILDREN EUROPE (Oct. 2006),

widespread.[3] It has never been easier to acquire large collections of vile, illegal depictions of children being abused in the worst ways imaginable.[4] As a result, the number of prosecutions involving child pornography has been steadily rising over the past two decades.[5] This trend has not been unique to the civilian sector, as the military has seen a similar increase.[6]

Some have used the horrendous nature of child pornography to argue that the courts have created a lesser probable cause standard in child pornography cases simply because of the despicable nature of the crime.[7] This argument is largely recycled rhetoric from the days when drug searches were shaping Fourth Amendment jurisprudence,[8] but, at least in

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available at http://www.europarl.europa.eu/hearings/20070417/libe/save_the_children_1_en.pdf (last visited Feb. 21, 2012) ("The term 'child pornography' . . . undermines the seriousness of the abuse. It also tends to oversimplify what is a very complex social problem, and . . . the term 'child abuse images' . . . better reflects the nature of the offense."). However, not all depictions meeting the definition as defined in 18 U.S.C. § 2256 are the result of children being sexually abused. KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 110–11 (5th ed. 2010), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf.

[3] LANNING, *supra* note 2, at 81.

[4] *Id.* at 79–80 (classifying pre–internet boom collectors as better educated, wealthier, and older as opposed to today where any individual can quickly obtain a large collection via the internet); Robert Booth, *EU Fights Huge Increase in Web Child Abuse*, THE GUARDIAN (Mar. 4, 2009), http://www.guardian.co.uk/society/ 2009/mar/04/child–sex–abuse–websites–increase (citing a fourfold increase in Europe of child abuse websites between 2004 and 2007). *See generally Child Pornography: Model Legislation and Global Review*, INT'L CENTRE FOR MISSING & EXPLOITED CHILDREN (5th ed. 2008), *available at* http://www.icmec.org/en_X1/English__5th_Edition_.pdf (finding only 29 of 187 Interpol member countries have enacted legislation sufficient to combat child pornography).

[5] AKDENIZ, *supra* note 2, at 130–39 (discussing the rapidly rising federal prosecution rate for child pornography offenses from 1995 to 2006; in 1995 five offenders were convicted as compared to 1251 in 2006).

[6] In Fiscal Year (FY) 2001, the Army charged twenty-one soldiers with possession of child pornography. From FY 2008 until FY 2010, the Army averaged sixty-four child pornography cases per year. E–mail from Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court, Army Court Criminal Appeals (Nov. 17, 2010) (on file with author).

[7] United States v. Coreas, 419 F.3d 151 (2d Cir. 2005) ("Child pornography is so repulsive a crime that those entrusted to root it out may, in their zeal, be tempted to bend or even break the rules. If they do so, however, they endanger the freedom of all of us.") (upholding warrant only because of *stare decisis*).

[8] JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 97 (2001) ("In fact, it is widely understood by attorneys and legal commentators that there is a 'drugs exception' to the Bill of Rights."); *see also* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889

the case of *United States v. Clayton*,[9] it has some validity.

The Court of Appeals for the Armed Forces (CAAF) has dealt with two cases over the past two years involving the sufficiency of evidence presented to obtain authorization to search for and seize evidence of child pornography. First, in *United States v. Macomber*, the court found that the magistrate properly issued a search authorization[10] when Airman First Class Macomber paid to access a child pornography website and then fourteen months later ordered two child pornography videos from undercover agents.[11] In the second case of interest, *United States v. Clayton*, the CAAF ruled that there was probable cause to seize and search media when Lieutenant Colonel Clayton was found to be a member of an internet discussion group which may have distributed child pornography via an e-mail digest.[12] Judge Ryan, who authored dissenting opinions in both cases, argued in *Clayton* that "[t]he Court today appears to champion the idea that there is something *de minimis* about the Fourth Amendment's requirements when the thing sought by a search authorization or warrant is child pornography."[13] Other judges throughout the federal circuits have expressed similar concerns.[14]

This article specifically argues that the CAAF got it right in *Macomber* by properly applying traditional Fourth Amendment principles to current technology. While there may be new variables that the founders of our country did not envision, the courts are applying the same historical legal analysis. However, the CAAF took a step too far when they saved the nearly "bare bones" affidavit prepared by the investigator in *Clayton* by declaring that sufficient evidence was presented to establish probable cause. Had the agent spent some more time investigating the case to obtain specific information about Clayton and his interaction with the discussion group, the CAAF would likely have been on solid ground in affirming the search based on probable cause. However, the agent's failure to address nexus to the place searched and to provide a complete description of the website that

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(1987).

[9] 68 M.J. 419 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 595 (2010).

[10] The competent military authority issues a "search authorization" as opposed to a "search warrant," which is issued by civilian authorities. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(b)(1)–(2) (2008) [hereinafter MCM].

[11] United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009).

[12] 68 M.J. 419 (C.A.A.F. 2010).

[13] *Id.* at 428 (Ryan, J., dissenting).

[14] *See* cases cited *supra* note 7 and *infra* note 327.

Clayton joined, along with the inability to classify Clayton as a child pornography collector in order to rely on profile information, left the magistrate with little more than a suspicion that Clayton possessed child pornography in his quarters. Thus, if the CAAF was determined to sustain the search, the court should have relied on the deference given to magistrates and the warrant process to declare the evidence admissible, or even the good faith reliance of the investigator on the warrant, rather than affirming insufficient evidence as an adequate basis for probable cause.

This article compares *Macomber* and *Clayton* to prior military and federal circuit courts jurisprudence and concludes with an appendix incorporating the lessons learned in determining the existence of probable cause in child pornography cases. Part II examines the origins of the Fourth Amendment, current case law regarding the standards for obtaining a search authorization, Military Rule of Evidence (MRE) 315's[15] application to those standards, and how the standard of appellate review affects case outcomes. Part III examines the factors that the CAAF found significant in determining that probable cause existed in *United States v. Macomber* and *United States v. Clayton*. Lastly, Part IV analyzes the totality of the circumstances test as it relates to child pornography and other crimes by comparing *Macomber* and *Clayton* to federal circuit cases. The article will discuss how the totality of the circumstances test is applied and how the following areas meet that test: staleness of the evidence; establishment of a nexus to the place searched, including ownership of a computer and access to the internet; the use of profile information; subscription to websites containing illegal images; and sufficiency of the affidavit in describing the child pornography on which the affidavit is based and the items to be seized. Considering all of these factors, this article concludes that the CAAF's decision in *Macomber* was consistent with the Fourth Amendment and similar cases in the federal circuit. However, in *Clayton*, the CAAF ignored precedent and Fourth Amendment principles when the court encroached on the right to personal security and liberty in finding probable cause to save the deficient search authorization.

[15] MCM, *supra* note 10, MIL. R. EVID. 315.

II. Search and Seizure

To understand the totality of the circumstances test and its current application, one must review the origins and history of search and seizure law.

A. Fourth Amendment

The Fourth Amendment simply states,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[16]

1. History and Meaning

When analyzing a Fourth Amendment issue, the Supreme Court requires courts to look to the original intent of the Framers of the Bill of Rights.[17] Strange as it may seem, the Senate did not debate the Fourth Amendment until three years after it was ratified.[18] Thus, it is somewhat difficult to discern exactly what the founders of our country intended when the Fourth Amendment was proposed. While there is debate among constitutional scholars as to the exact original intent of the amendment,[19] what is clear is that the founders abhorred the "colonial epidemic of general searches" that were used by the British prior to America's

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[16] U.S. CONST. amend. IV.

[17] "In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed." Florida v. White, 526 U.S. 559, 563 (1999).

[18] THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 20 (2009).

[19] BRUCE A. NEWMAN, AGAINST THAT "POWERFUL ENGINE OF DESPOTISM," at xiv–xvii (2007) (describing the following three views: (1) the Fourth Amendment only requires that searches be reasonable, (2) the Fourth Amendment requires a warrant for the search to be deemed reasonable, and (3) the Fourth Amendment requires warrants for searches on private property and only reasonableness to search public areas).

independence.[20] John Adams demonstrated the importance of the issue when he stated that the British use of general warrants and refusal to follow colonial legislation banning general warrants was "the spark in which originated the American Revolution."[21]

Prior to 1791, there was a movement in England to prohibit these general warrants, also called writs of assistance.[22] As far back as 1604, Sir Edward Coke stated that "[t]he house of every one is to him as his castle and fortress" when arguing against arbitrary entry of the home by the government.[23] Where the common law had advanced over the century prior to 1776 to require specific warrants, the colonialist's homes were routinely searched by power of general warrants issuing blanket authority to search without the presentation of evidence or individualized suspicion.[24] These issues were hotly debated in the years prior to independence, to include James Otis Jr.'s famous argument in the 1761 Boston Writs Case decrying the issuance of general warrants while acknowledging the legitimacy of properly issued specific warrants.[25]

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[20] LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 154 (2001) (citing WILLIAM CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING (1990) (Ph.D. Dissertation at Claremont Graduate School)).

[21] 1 CHARLES FRANCIS ADAMS & JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR 59 (1856); *see also* NELSON BERNARD LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937).

[22] Boyd v. United States, 116 U.S. 616, 625–31 (1886) (discussing the inevitable affect of general warrants on the founders and quoting in length Lord Camden's opinion in *Entick v. Carrington and Three Other King's Messengers*, 19 Howell's State Trials 1029 (1765)).

[23] Semayne's Case, 77 Eng. Rep. 194 (1604).

[24] PHILLIP HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 21–23 (2005).

[25] *Id.* at 23–30. John Adams quoted Mr. Otis as saying

> I will admit, that writs of one kind, may be legal, that is *special writs, directed to special officers*, and to search *certain* houses &c, especially set for in the write, may be granted by the Court of the Exchequer at home, *upon oath made* before the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed* in THOSE VERY PLACES HE DESIRES TO SEARCH.

Id. at 26 (emphasis and capital letters in original). Mr. Otis went on to use the terms "probable suspicion" and "probable grounds" when describing the information to be presented under oath to a magistrate. *Id.* (emphasis removed). The Massachusetts legislature passed a bill which supported Mr. Otis's view of specific warrants in 1762, but the bill was vetoed by the British governor. *Id.* at 30–31.

While the impetus of the Fourth Amendment was to forbid the use of general warrants, the Fourth Amendment makes clear that the Framers went further than just prohibiting general warrants.[26] While certainly not prohibiting all searches and seizures,[27] the Fourth Amendment also prohibits "unreasonable searches and seizures," and when warrants are issued, they must be based on probable cause.[28] The key point in forcing the government to obtain a warrant is to prevent an arbitrary decision of the government as to what constitutes probable cause resulting in an unreasonable invasion of an individual's privacy interest. The exact meaning of what constitutes probable cause drives much of the subsequent case law.

2. Case Law Development Pre-1983

In early American history, the federal government played a limited role in criminal law resulting in few early cases to develop the breadth of search and seizure law.[29] It was not until 1886 that the Supreme Court gave substance to the Fourth Amendment as it applied to civilian criminal law,[30] and it was not until 1914 when the Court forcefully applied the principles of the Fourth Amendment in *United States v. Weeks*.[31] In *Weeks*, the Court established the sanctity of the home by holding the federal government cannot forcefully enter, search, and seize private property unless a constitutionally proper warrant is obtained.[32] A

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[26] MCINNIS, *supra* note 18, at 20.
[27] *Id.* at 97.
[28] The First Congress, which adopted the Bill of Rights, passed legislation allowing the suspicionless and warrantless boarding of vessels to examine the ship's manifest. United States v. Villamonte-Marquez, 462 U.S. 579, 592 (1983) (citing the drafter's interpretation of the Fourth Amendment in upholding the warrantless, yet reasonable, boarding of a vessel by customs agents).
[29] LASSON, *supra* note 21, at 106.
[30] Colonel Fredric I. Lederer & Lieutenant Colonel Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 144 MIL. L. REV. 110, 117–18 (1994) (citing Boyd v. United States, 116 U.S. 616 (1886) (holding compulsory production of books and papers for use against the owner violated the Fourth and Fifth Amendments)).
[31] 232 U.S. 383 (1914). In 1961, the Court applied Fourth Amendment protections and the exclusionary rule to state governments through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). The Fourteenth Amendment was ratified in 1868. The Due Process Clause states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.
[32] *Weeks*, 232 U.S. at 393 ("The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution

search without a warrant was deemed per se unreasonable.[33] For the first time, the Court instituted the exclusionary rule by reversing the conviction of the accused and returning the unlawfully seized goods to the accused.[34] The Court specifically stated that the amendment was not directed at individual action, but that of the federal government.[35]

The scope of the Fourth Amendment continued to grow when the Court established that the Fourth Amendment applies to people, not to places.[36] Thus, the home is not the exclusive place in which a person has sanctuary.[37] If a person has a reasonable expectation of privacy in a place,[38] "he is entitled to be free from unreasonable government intrusion"[39] and law enforcement must seek a warrant from an

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. . . .").

[33] *Id.*; *see also* Johnson v. United States, 333 U.S. 10, 14–15 (1948) (holding that, barring "exceptional circumstances," a warrantless search is unlawful no matter how much evidence is present for a probable cause determination).

[34] Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("[Exclusion] was a matter of judicial implication."); *Weeks*, 232 U.S. at 398–99. The exclusionary rule is not an individual right, is not constitutionally mandated, and is only applied if exclusion can deter police misconduct in the future. Herring v. United States, 555 U.S. 135, 140 (2009). Prior to *Weeks*, unlawfully obtained evidence was admissible at trial against the defendant, but the defendant had a civil cause of action against the officer in tort. NEWMAN, *supra* note 19, at 13.

[35] *Weeks*, 232 U.S. at 398. The Fourth Amendment does not apply unless there is a governmental invasion of privacy. *See* Rakas v. Illinois, 439 U.S. 128, 140–49 (1978) (discussing the basis of possessing a "legitimate expectation of privacy" in the place searched).

[36] Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (citations omitted)).

[37] *Katz*, 389 U.S. at 359 (finding a reasonable expectation of privacy in communications); *see also* United States v. Huntzinger, 69 M.J. 1 (C.A.A.F. 2010) (finding a reasonable expectation of privacy in a deployed environment). *But see* Texas v. Brown, 460 U.S. 730 (1983) (finding no expectation of privacy to the visible interior of an automobile); California v. Greenwood, 486 U.S. 35 (1988) (finding no expectation of privacy in sealed trash bags left for collection at curbside); United States v. Michael, 66 M.J. 78 (C.A.A.F. 2008) (finding no expectation of privacy in a laptop computer left in restroom).

[38] *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("There is a twofold requirement, first that a person have exhibited an actual subjective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

[39] Terry v. Ohio, 392 U.S. 1, 9 (1968). The Court added, "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

independent magistrate before invading that area of privacy.[40] The independence of the magistrate is key, as law enforcement officers "may lack sufficient objectivity" to weigh the evidence properly in determining if there is probable cause to search a particular place.[41]

In *United States v. Carroll*, the Court only required a warrant to be obtained when "reasonably practicable."[42] The Court allowed a warrantless seizure when the officer had probable cause to believe that an item was contraband.[43] This initiated nearly a century of wordsmithing to determine what exactly constitutes probable cause. The Court's acknowledgment that probable cause is "incapable of precise definition or quantification into percentages"[44] created various definitions and argument in the law. Shortly after the *Carroll* decision, the Court said that probable cause is "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."[45] This appears to be a fairly high standard, but looks can prove to be deceiving. The Court had earlier said in *United States v. Locke* that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."[46] While stating what probable cause is not, the *Locke* definition is still unclear because it fails to state what amounts to probable cause. The Court clarified in *Brinegar v. United States* that the

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[40] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) ("Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement.").

[41] Steagald v. United States, 451 U.S. 204, 212 (1981); *see also* Johnson v. United States, 333 U.S. 10, 13–14 (1948) ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is . . . [i]ts protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

[42] 267 U.S. 132, 155–56 (1925) (holding that the warrantless search of a vehicle for illegal liquor was lawful when the officer had "reasonable or probable cause" that contraband was present).

[43] *Id.* The Fourth Amendment denounces only unreasonable searches and seizures. *Id.* at 147.

[44] Maryland v. Pringle, 540 U.S. 366, 371 (2003).

[45] Dumbra v. United States, 268 U.S. 435, 441 (1925) (quoting Stacey v. Emery, 97 U.S. 642, 645 (1891)).

[46] 11 U.S. 339, 348 (1813), *quoted in* Brinegar v. United States, 338 U.S. 160, 175 (1949) *and* United States v. Ventresca, 380 U.S. 102, 107 (1965).

facts known to the officer must be more than "bare suspicion."[47] When the cautious investigator has "reasonably trustworthy information" to believe that a crime is being or has been committed, he has sufficient information with which to establish probable cause to seek a warrant.[48]

The requirement for only "reasonably trustworthy information" appeared to be well established until *Aguilar v. Texas*[49] and *Spinelli v. United States*[50] were decided in the 1960s. The Court established a two-prong test to determine the sufficiency of probable cause to issue a warrant. First, the affidavit seeking a search warrant must set forth the "'underlying circumstances' necessary to enable the magistrate independently to judge of the validity of the informant's" information.[51] Second, the affiant must "attempt to support their claim that their informant [i]s 'credible' or his information 'reliable.'"[52] The resulting *Aguilar-Spinelli* test created a more doctrinally rigid definition of probable cause[53] while the Court continued to use some of the same terms that had become the foundation of Fourth Amendment jurisprudence.[54] But the *Aguilar-Spinelli* test had a short lifespan.

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[47] 338 U.S. 160, 175 (1949); *see also* Nathanson v. United States, 290 U.S. 41 (1933) (holding that officer's suspicion without any supporting facts was insufficient for magistrate to find probable cause).
[48] *Brinegar*, 338 U.S. at 175–76 (citing *Carroll*, 267 U.S. at 162).
[49] 378 U.S. 108 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983).
[50] 393 U.S. 410 (1969), *abrogated by Gates*, 462 U.S. 213.
[51] *Spinelli*, 393 U.S. at 413.
[52] *Id.* The test was controversial. Justice Black said that *Aguilar*

> went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial. . . . But not content with this, the Court today expands *Aguilar* to almost unbelievable proportions. Of course, it would strengthen the probable–cause presentation if eyewitnesses could testify that they saw the defendant commit the crime. . . . Nothing in our Constitution, however, requires that the facts be established with that degree of certainty and with such elaborate specificity before a policeman can be authorized by a disinterested magistrate to conduct a carefully limited search.

Id. at 429 (Black, J., dissenting).
[53] *Gates*, 462 U.S. at 230 n.5, 235 n.9.
[54] The court stated that "the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit." *Spinelli*, 393 U.S. at 415 (majority opinion) (citing United States v. Ventresca, 380 U.S. 102, 108 (1965)). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id.* at 419 (citing Beck v. Ohio, 379 U.S. 89, 96 (1964)).

3. Illinois v. Gates and Beyond

In *Illinois v. Gates*, the Supreme Court returned to the "nontechnical" analysis of "probabilities" established in *Brinegar*.[55] The Court retreated from their prior decisions in *Aguilar* and *Spinelli* which established that "veracity" and "basis of knowledge" were critical prongs of probable cause.[56] The Court found that the *Aguilar-Spinelli* test was being interpreted as a "rigid, technical methodology" which had been incorrectly instituted into Fourth Amendment jurisprudence.[57] Instead, the Court ruled that probable cause must be analyzed by looking at the traditional "totality of the circumstances."[58]

Citing past precedent, the Court re-established the meaning of probable cause[59] by stating that "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[60] The Court elaborated,

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.[61]

The Court returned to a "circumstances which warrant suspicion"

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[55] 462 U.S. 213 (1983) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
[56] *Id.* at 271.
[57] *Id.* at 232 n.6.
[58] *Id.* at 238 (citing United States v. Ventresca, 380 U.S. 102 (1965)); Jones v. United States, 362 U.S. 257 (1960); Brinegar v. United States, 338 U.S. 160 (1949)).
[59] *Id.* at 232 ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").
[60] *Id.* at 231 (quoting *Brinegar*, 338 U.S. at 175). The Court stated that a "prima facie" showing of criminal activity is not the standard. *Id.* at 235 (quoting United States v. Spinelli, 393 U.S. 410, 419 (1969)).
[61] *Id.* at 231–32 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

standard established in *Locke*.[62] The Court further defined the term by stating that the probable cause standard is not "proof beyond a reasonable doubt or by a preponderance of the evidence, [which is] useful in formal trials, [but has] no place in the magistrate's decision."[63]

In re-establishing the standard, the Court acknowledged that innocent citizens would sometimes be subjected to search and seizure while being ultimately vindicated, but "to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands."[64] Thus, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[65] This probable cause standard has also been termed "substantial basis"[66] and "reasonable belief."[67]

Over the past thirty years, the Court has continued to apply the *Illinois v. Gates* analysis.[68] The Court has not created a more stringent requirement than the "totality of the circumstances" test.[69] Further refinement of the term dictated that probable cause to search does not require evidence sufficient to arrest a person,[70] and "does not demand any showing that such a belief be correct or more likely true than false,"[71] nor does it have to be more than a "fifty-percent" probability.[72]

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[62] *Id.* at 235 (quoting Locke v. United States, 7 Cranch 339, 348 (1813)).
[63] *Id.* at 235.
[64] *Id.* at 245 n.13.
[65] *Id.* at 238.
[66] The magistrate must have had a "substantial basis" for concluding that there was probable cause to conduct the search. *Id.* at 238–39; *see Investigations and Police Practices*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 3, 26 n.68 (2010) (listing cases from the circuit courts discussing "substantial basis").
[67] United States v. Taketa, 923 F.2d 665, 674 (9th Cir. 1991) ("[T]he correct inquiry is whether there was reasonable cause to believe that evidence of . . . misconduct was located on the property that was searched.").
[68] As of 2009, the Court cited to *Gates* to reaffirm the "'fair probability'" standard of probable cause. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (citing *Gates*, 462 U.S. at 238).
[69] United States v. Banks, 540 U.S. 31, 41 (2003) (rejecting a lower court's attempt at overlaying a "categorical scheme" to the reasonableness approach of a totality of the circumstances review).
[70] Zurcher v. Stanford Daily, 436 U.S. 547, 558–59 (1978).
[71] Texas v. Brown, 460 U.S. 730, 742 (1983).
[72] United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999).

B. Military Rule of Evidence 315

Historically, the Fourth Amendment was not applied to members of the military.[73] It was not until the 1920s that policies and decisions were emplaced applying Fourth Amendment principles to the military, and search and seizure was not part of the Manual for Courts-Martial until 1949.[74] While the Fourth Amendment has never been strictly applied to the military by the Supreme Court,[75] military courts have applied it continuously since 1959.[76] The Court of Military Appeals (CMA)[77] specifically applied the Fourth Amendment to military members when the court said that "the protections of the Fourth Amendment and, indeed, the entire Bill of Rights, are applicable to the men and women serving in the military services of the United States unless expressly or by necessary implication they are made inapplicable."[78] However, special considerations are still accorded the military. Demonstrating such considerations, a commander has broad latitude to carry out inspections[79] and the CMA has found that the commander's power to search and seize are separate from the Warrant Clause and predicated on reasonableness.[80]

Today, the Fourth Amendment principles and limitations have been laid out in MRE 311–317. Probable cause 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."[81] Evidence obtained from "searches requiring probable cause" is admissible at trial,[82] and

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[73] Lederer & Borch, *supra* note 30, at 117–18.
[74] United States v. Stuckey, 10 M.J. 347, 352–60 (C.M.A. 1981) (discussing the history of search and seizure in the military from the 1920s until the 1969 version of the *Manual for Courts-Martial*).
[75] Lederer & Borch, *supra* note 30, at 110. Because of the Military Rule of Evidence's adoption of Fourth Amendment principles, it is unlikely the Supreme Court would make such a ruling when the Court can rule on the independent grounds of the Military Rule of Evidence (MRE) instead. *Id.* at 121.
[76] United States v. Brown, 28 C.M.R. 48 (C.M.A. 1959) (holding that a commander must have probable cause to authorize a search); *see also* United States v. Long, 64 M.J. 57 (C.A.A.F. 2006) ("The Fourth Amendment of the Constitution protects individuals, including servicemembers, against unreasonable searches and seizures." (citing United States v. Daniels, 60 M.J. 69, 70 (C.A.A.F. 2004))).
[77] The CMA is the previous name of the Court of Appeals for the Armed Forces.
[78] United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979) (citing United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960)).
[79] MCM, *supra* note 10, MIL. R. EVID. 413.
[80] United States v. Stuckey, 10 M.J. 347, 361–62 (C.M.A. 1981).
[81] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2) (emphasis added).
[82] *Id.* MIL. R. EVID. 315(a).

unlawfully seized evidence is inadmissible.[83] Military Rule of Evidence 315 specifically lays out the standards for conducting probable cause searches.[84] Since this power is separate from the Warrant Clause, the competent military authority issues a "search authorization" as opposed to a "search warrant," which is issued by civilian authorities.[85] An "impartial"[86] military commander, judge or magistrate may issue a search authorization,[87] but the authority to search is generally limited to persons subject to military law and property within military control.[88] Unlike a civilian magistrate who is limited in considering just the information located on the search affidavit request,[89] a military issuing authority can also rely on oral statements and previously obtained information when making a probable cause determination.[90] The military issuing authority may rely on hearsay when making a probable cause determination,[91] but must determine that the information provided is "believable and has a factual basis."[92]

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[83] *Id.* MIL. R. EVID. 311(a).

[84] *Id.* MIL. R. EVID. 315. In limited circumstances, the MRE allows search and seizure without a search authorization or probable cause. *Id.* MIL. R. EVID. 313 (inspections and inventories do not require a search authorization or probable cause); *id.* MIL. R. EVID. 314 (detailing searches not requiring search authorization or probable cause); *id.* MIL. R. EVID. 315(g) (exigent circumstances require probable cause but no search authorization); *id.* MIL. R. EVID. 316(d)(4)(C) (plain view does not require a search authorization).

[85] *Id.* MIL. R. EVID. 315(b)(1)–(2); *see also Stuckey*, 10 M.J. at 359–61.

[86] This term is read to mean "neutral and detached." *See* United States v. Ezell, 6 M.J. 307, 326 (C.M.A. 1979).

[87] MCM, *supra* note 10, MIL. R. EVID. 315(d). A military commander must have 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 [the] person." *Id.* MIL. R. EVID. 315(d)(1).

[88] *Id.* MIL. R. EVID. 315(c). The MRE allows search of military property, persons or property within military control, and certain nonmilitary property located within a foreign country. *Id.*

[89] "It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. 'It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention.'" Spinelli v. United States, 393 U.S. 410, 413 n.3 (1969) (quoting Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964)).

[90] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2)(B)–(C); *see also* United States v. Cunningham, 11 M.J. 242, 243 (C.M.A. 1981) (allowing the commander to use information provided to him before he made his probable cause determination); United States v. Henley, 48 M.J. 864, 870 (A.F. Ct. Crim. App. 1998) (holding that a magistrate may consider the oral opinion of an investigator or expert).

[91] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2).

[92] *Id.* MIL. R. EVID. 315(f), analysis, app. 22, at A22-29.

C. Standard of Review and Effects on Case Outcome

Once a military judge denies a defense motion to suppress evidence obtained as a result of a search authorization, the appellant faces a high hurdle at the appellate level to get that decision overturned. The courts review the military judge's ruling for an abuse of discretion.[93] While the conclusions of law are reviewed *de novo*, the findings of fact are not.[94] The findings of fact will only be overturned if "they are clearly erroneous or unsupported by the record."[95] The appellate court's review determines if "there is substantial evidence in the record supporting the magistrate's decision to issue the warrant."[96] The high bar to relief is in place because of the preference for warrants.[97] The courts seek to encourage law enforcement's use of the warrant process because "the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were [the courts] to eliminate this distinction, [the courts] would eliminate the incentive."[98]

The CAAF analyzes a magistrate's probable cause determination by focusing on four key principles.[99] First, the court gives substantial deference to decisions made by a "neutral and detached"[100] magistrate.[101]

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[93] United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999). Reviews of warrantless searches are *de novo*. United States v. Neal, 41 M.J. 855, 857 (A.F. Ct. Crim. App. 1994).
[94] *Owens*, 51 M.J. at 209.
[95] *Id.* (quoting United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996)); *see also* United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995); United States v. Allen, 53 M.J. 402, 405–06 (C.A.A.F. 2000); *cf.* Ornelas v. United States, 517 U.S. 690, 697–700 (1996) (holding no appellate deference due in warrantless search cases).
[96] United States v. Monroe, 52 M.J. 326, 331 (C.A.A.F. 1999) (quoting Massachusetts v. Upton, 466 U.S. 727, 728 (1984)).
[97] *Monroe*, 52 M.J. at 331 (citing *Upton*, 466 U.S. at 733); *see also* Illinois v. Gates, 462 U.S. 213, 236 (1983).
[98] *Ornelas*, 517 U.S. at 699.
[99] United States v. Clayton, 68 M.J. 419, 423–24 (C.A.A.F. 2010).
[100] Military Rule of Evidence 315(d) uses the term "impartial individual." MCM, *supra* note 10, MIL. R. EVID. 315(d). Military Rule of Evidence 315(d)(2) clarifies that a magistrate is not disqualified by merely being "present at the scene of a search" or by issuing a prior authorization similar to one which might be issued by a federal district judge. *Id.* MIL. R. EVID. 315(d)(2). For a discussion on commanders' disqualification to issue search authorizations, see United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) (finding disqualification when the commander has personal bias against the accused or when the commander becomes actively involved in the law enforcement or prosecutorial functions).
[101] United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996) (citing United States v. Ventresca, 380 U.S. 102, 109 (1965)) (finding the magistrate to be neutral and detached

This deference has its limitations. The authorization cannot be based on a "hunch"[102] nor be based on a "bare bones" affidavit.[103] The courts will look to ensure the magistrate did not merely ratify the officer's conclusions and act as a "rubber stamp."[104] For example, the CAAF has found sufficient a magistrate spending over an hour reviewing the affidavit and asking questions of the investigator.[105]

Second, "the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants."[106] The CAAF has stated that "close calls will be resolved in favor of sustaining the magistrate's decision."[107] Third, the court must interpret the affidavit in a commonsense manner, rather than making a "hypertechnical" review.[108] During their review, the court will consider the facts known to the magistrate at the time of the magistrate's decision and the manner in which those facts became known to the magistrate.[109] This information allows the court to "usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."[110] Lastly, because the military

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because he had no "ill motive" towards the appellant); *see also* Shadwick v. Tampa, 407 U.S. 345, 350 (1972) ("[N]eutrality and detachment . . . require[s] severance and disengagement from activities of law enforcement."); Lo-Ji Sales v. New York, 442 U.S. 319, 326–28 (1979) (holding that the issuing magistrate was not neutral and detached because of his participation in the search and seizure).

[102] *Upton*, 466 U.S. at 734.

[103] United States v. Leedy, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *Carter*, 54 M.J. at 422 (implying that a bare bones affidavit is one that fails to identify sources and fails to acknowledge conflicts and gaps in the evidence)).

[104] Nathanson v. United States, 290 U.S. 40, 44–47 (1933) (holding inadequate the affiant's conclusion that he believed evidence was in a specific location without listing supporting facts); Illinois v. Gates, 462 U.S. 213, 239, 288 (1983).

[105] *Maxwell*, 45 M.J. at 423. In *Clayton*, the military judge found that the magistrate did not act as a "rubber stamp" as he spent forty-five minutes discussing the case with the investigator and twenty minutes researching the probable cause standard. Transcript of Record of Trial at 172, 174–75, 203, United States v. Clayton, 68 M.J. 419 (C.A.A.F 2010) (Fort McPherson Jan. 9, 2007) [hereinafter *Clayton* ROT].

[106] United States v. Ventresca, 380 U.S. 102, 109 (1965), *quoted in Gates*, 462 U.S. at 237 n.10.

[107] United States v. Monroe, 52 M.J. 326, 331 (C.A.A.F. 2000) (quoting *Maxwell*, 45 M.J. at 423).

[108] *Gates*, 462 U.S. at 236 (quoting *Ventresca*, 380 U.S. at 109). This standard is consistent with the probable cause review of "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949), *quoted in Gates*, 462 U.S. at 231 *and* United States v. Leedy, 65 M.J. 208, 213 (2007).

[109] United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005); *Leedy*, 65 M.J. at 214.

[110] *Gates*, 462 U.S. at 230.

judge's decision is reviewed for an abuse of discretion, "the evidence [is considered] 'in the light most favorable to the prevailing party.'"[111] As most cases at the appellate level are submitted by convicted servicemembers, this last factor typically gives the government a huge advantage as to the standard of review.

1. The Effect of False Information Presented to the Magistrate

While this article will not go in depth on this particular topic, cases involving the sufficiency of evidence presented to a magistrate often involve the issue of the magistrate being provided false information.[112] The U.S. Supreme Court established in *Franks v. Delaware* that

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.[113]

Military Rule of Evidence 311(g)(2) incorporated the *Franks* standard.[114] The CAAF went one step further when the court held that any "misstatements or improperly obtained information" will also be

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[111] United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996), *quoted in* United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010).

[112] This article analyzes whether there was sufficient evidence to substantiate probable cause in *United States v. Clayton* after all erroneous information was severed. *See Clayton*, 68 M.J. at 425–26.

[113] 438 U.S. 154, 155–56 (1978), *quoted in Cowgill*, 68 U.S. at 391. This hearing is often called a *Franks* hearing. United States v. Williamson, 65 M.J. 706, 713 (A. Ct. Crim. App. 2007).

[114] MCM, *supra* note 10, MIL. R. EVID. 311(g)(2).

severed when conducting a review of probable cause sufficiency.[115] In addition, omissions of information that may undermine probable cause are reviewed using the same standard as established in *Franks*.[116] The understanding of this step is essential because it drives what the court considers when analyzing the affidavit and the facts known to the magistrate.[117] The exclusionary rule does not come into play unless the remaining evidence is insufficient to establish probable cause.[118]

2. When All Else Fails, the Government's Silver Bullet—Good Faith

Even when the court finds the magistrate lacked probable cause to issue the search authorization, the evidence may still be admitted against the accused. Incorporating the good faith exception outlined in *United States v. Leon*,[119] MRE 311(b)(3) allows for the admission of evidence when the investigator objectively relies in good faith on the issued search

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[115] United States v. Gallo, 55 M.J. 418, 421 (C.A.A.F. 2001) (disregarding statements of the accused); *see also Cowgill*, 68 U.S. at 391–93 (discussing the treatment of erroneous information).
[116] United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992).
[117] *See supra* text accompanying notes 108–10.
[118] *Cowgill*, 68 U.S. at 391 (citing *Franks*, 438 U.S. at 165–71).
[119] 468 U.S. 897 (1984). *Leon* lays out four limits to the good faith exception:

> [F]irst, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." . . .
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> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."
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> . . . .
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> . . . Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 914–15, 923 (internal citations omitted).

authorization.[120] This exception requires that the investigator reasonably believe the issuing authority had a substantial basis to find probable cause.[121] If so, the purpose of the exclusionary rule—to deter police misconduct—is moot, and the evidence will be admitted.[122] However, if the information presented to the magistrate is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," the good faith exception does not apply.[123] As the CAAF never reached the good faith exception in *Macomber*[124] and *Clayton*,[125] good faith will not be a focus of this article. Nevertheless, it is important for the military justice practitioner to understand that while the investigator does not get an automatic free pass once he gets the signature on the authorization, a court may find probable cause lacking and yet still admit the evidence under the good faith doctrine.

III. *Macomber* and *Clayton*—A Cause for Concern?

Macomber and *Clayton* were the first two CAAF cases to find probable cause based substantially on internet activity alone without any direct evidence of child pornography possession in the locations searched. In *Macomber*, an Immigration and Customs Enforcement (ICE) investigation found that Airman First Class Macomber paid to subscribe to a child pornography website called "LustGallery.com-A Secret Lolitas Archive."[126] Immigration and Customs Enforcement joined with Air Force investigators and a Postal Inspector to send a

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[120] MCM, *supra* note 10, MIL. R. EVID. 311(b)(3).

[121] *Id.* MIL. R. EVID. 311(b)(3)(B); United States v. Carter, 54 M.J. 414, 421–22 (C.A.A.F. 2001) (discussing the differences in meaning of the term "substantial evidence" as it applies to the probable cause determination compared to the good faith exception).

[122] Massachusetts v. Sheppard, 468 U.S. 981, 990–91 (1984) (citing Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment) ("[The] exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges.")).

[123] *Leon*, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)).

[124] *But see* United States v. Macomber, 67 M.J. 214, 223 (C.A.A.F. 2009) (Ryan, J., dissenting) (stating that she would have also suppressed the evidence under the good faith exception).

[125] 68 M.J. 419, 426 (C.A.A.F. 2010) (declining to consider the good faith exception after finding the magistrate's decision was correct). *But see id.* at 428–30 (Ryan, J., dissenting) (discussing why she would have also suppressed the evidence under the good faith exception).

[126] *Macomber*, 67 M.J. at 215 (majority opinion).

"target letter" to Macomber concerning his interest in child pornography.[127] Macomber indicated an interest in "teen sex" and "pre-teen sex" before attempting to purchase two child pornography videos to be sent to his on-base address.[128] Macomber was arrested and his on-base dormitory room searched after he attempted to pick up the videos from the base's post office.[129]

In *Clayton*, an ICE investigation found that Lieutenant Colonel Clayton joined an internet discussion group called "Preteen-Bestiality-and-Anything-Taboo."[130] Immigration and Customs Enforcement found only one picture of child pornography on the website, and discovered that Clayton requested to receive a daily e-mail digest to be sent to his e-mail account registered to his home address in Georgia.[131] The investigation found that a government computer in Kuwait accessed Clayton's Yahoo! account,[132] although it was after the website had been shut down.[133] The magistrate knew that Clayton had the ability to purchase internet access, but did not know whether Clayton had actually paid for the service or owned a personal computer.[134] The moderator of the group and the individual who posted the illicit image both confessed to possessing child pornography prior to the search of Clayton's quarters in Kuwait.[135]

As will be discussed *infra* in Part IV, the CAAF's decision in *Macomber* was consistent with similar decisions in the federal circuit courts because the affidavit demonstrated by a totality of the circumstances that there was probable cause to search the appellant's dormitory room for child pornography. However, the CAAF overextended the bounds of the totality of the circumstances test when saving the deficient affidavit in *Clayton* by finding probable cause.

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[127] *Id.* at 216.
[128] *Id.*
[129] *Id.* at 217.
[130] *Clayton*, 68 M.J. at 422.
[131] *Id.* at 426–28 (Ryan, J., dissenting).
[132] *Id.* at 422 (majority opinion).
[133] Final Brief on Behalf of Appellant at 9, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705.
[134] *Clayton*, 68 M.J. at 423.
[135] *Id.*

IV. Probable Cause Factors Common in Child Pornography Cases

A. The CAAF and Probable Cause

1. Reasonable Expectation of Privacy

In order to challenge a warrant-based search, there must be a governmental invasion of privacy[136] and the person must have had a reasonable expectation of privacy in the place searched.[137] That expectation of privacy must be both subjectively held by the person subject to the search and determined to be objectively reasonable.[138] While the military environment can change the analysis compared to civilian cases, the military courts have found a reasonable expectation of privacy in many of the same places. For example, in today's modern barracks with individually assigned rooms, a Soldier has some expectation of privacy when it comes to investigative searches.[139] This expectation has also been applied in the deployed environment to living quarters,[140] to room wall lockers issued for personal use,[141] to personal

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[136] Rakas v. Illinois, 439 U.S. 128, 140–49 (1978). The actor must be acting in an official capacity for the search to be declared a governmental intrusion, as opposed to a non-protected private search. *See* United States v. Portt, 21 M.J. 333, 334 (C.M.A. 1986) (distinguishing between a servicemember acting in their private capacity and as "an agent of the government"); United States v. Michael, 66 M.J. 78, 80 (C.A.A.F. 2008) ("For the purposes of military law, a Fourth Amendment search is 'a government intrusion into an individual's reasonable expectation of privacy.'" (quoting United States v. Daniels, 60 M.J. 69, 71 (C.A.A.F. 2004))).

[137] United States v. Maxwell, 45 M.J. 405, 417 (C.A.A.F. 1996).

[138] United States v. Conklin, 63 M.J. 333, 337 (C.A.A.F. 2006) ("[T]he test used in evaluating the question of a reasonable expectation of privacy . . . 'is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."'" (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))); *see also Maxwell*, 45 M.J. at 417 (holding that there is a reasonable expectation of privacy in a personal computer, but there is a diminished expectation of privacy when sending messages over the internet).

[139] United States v. Conklin, 63 M.J. 333 (C.A.A.F. 2006) (recognizing a limited expectation of privacy in a barracks room). *But see* United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993) ("[A] military member's reasonable expectation of privacy in the barracks is limited by the need for military discipline and readiness.") (citing United States v. Middleton, 10 M.J. 123, 128 (C.M.A. 1981)).

[140] United States v. Huntzinger, 69 M.J. 1, 9–10 (C.A.A.F. 2010) (finding that the government did not present sufficient facts to overrule the presumption that there is a reasonable expectation of privacy in living quarters, even in a combat zone); *see also* United States v. Poundstone, 46 C.M.R. 277, 279 (C.M.A. 1973) (holding that "the right to be free from unreasonable search and seizure" applies in the combat zone).

[141] United States v. Neal, 41 M.J. 855, 860–61 (A.F. Ct. Crim. App. 1994) (finding a

computers,[142] and to e-mails sent through a private server.[143] However, the courts have determined the reasonable expectation of privacy decreases in office space,[144] military property not issued for personal use,[145] government computers,[146] personal computers using file sharing programs,[147] and bank records.[148] As *Macomber's* search was in an on-base barracks room and *Clayton's* search in deployed living quarters, this article primarily focuses on cases involving a residence.

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reasonable expectation of privacy in a barracks room locker but not a locker located in the unit's common area).

[142] *Maxwell*, 45 M.J. at 418 (finding a reasonable expectation of privacy in a personal computer kept in a private home); United States v. Tanksley, 54 M.J. 169, 172 (C.A.A.F 2000), *overruled in part on other grounds by* United States v. Inong, 58 M.J. 460, 465 (C.A.A.F. 2003) (finding a limited expectation of privacy in a government-owned work computer located in a government office); *Conklin*, 63 M.J. at 337 (finding a reasonable expectation of privacy in a personal computer kept in a shared barracks room).

[143] *Compare Maxwell*, 45 M.J. at 417–19 (holding that the same expectation does not apply to forwarded e-mails and messages sent in a "chat room"), *with* United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000) (holding that a person does not have a reasonable expectation of privacy in e-mails sent through a government server when users are notified that their actions are subject to monitoring).

[144] The expectation of privacy depends on the "operational realities" of the workplace. O'Connor v. Ortega, 480 U.S. 709, 714–19 (1987). If the expectation of privacy is reasonable, a search for administrative purposes must still undergo a reasonableness analysis. *Id.* at 719–26; *see also* City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (finding an administrative search of a government pager reasonable); United States v. Muniz, 23 M.J. 201 (C.M.A. 1987) (finding no expectation of privacy in a locked government desk searched for administrative purposes).

[145] MCM, *supra* note 10, MIL. R. EVID. 314(d) (stating that government issued footlockers to store personal property is normally for personal use and thus a reasonable expectation of privacy attaches). *But see* United States v. Weshenfelder, 43 C.M.R. 256, 262 (C.M.A. 1971) (finding no expectation of privacy in a government desk).

[146] United States v. Larson, 66 M.J. 212 (C.A.A.F. 2008). *But see* United States v. Long, 64 M.J. 57 (C.A.A.F. 2006) (holding that the warning banner was insufficient to deprive the user of a reasonable expectation of privacy when the banner failed to state that the monitoring could be for law enforcement purposes and the search was at the direction of law enforcement).

[147] United States v. Stults, 575 F.3d 834 (8th Cir. 2009) (finding no reasonable expectation of privacy when appellant downloaded a file sharing program to make some computer files available to others); United States v. Borowy, 595 F.3d 1045, 1048 (9th Cir. 2010) (finding a misunderstanding of the file-sharing program does not create a reasonable expectation of privacy).

[148] United States v. Wooten, 34 M.J. 141 (C.M.A. 1992).

2. Totality of the Circumstances

The CAAF incorporated the *Illinois v. Gates* totality of the circumstances analysis when making probable cause determinations.[149] The totality of the circumstances analysis requires the magistrate to have a "substantial basis" for his determination that there was probable cause to conduct the search.[150] This analysis includes taking a "practical, common-sense" approach to determine if there is a "fair probability" that evidence of a crime is located at a particular place.[151] Like the civilian courts, the CAAF affirmed that "[p]robable cause requires more than bare suspicion,"[152] yet represents less than a fifty-percent probability[153] and less than preponderance of the evidence.[154]

As "probable cause determinations are inherently contextual," each piece of evidence is viewed in relation to the "overall effect or weight of all factors."[155] The totality of the circumstances test allows the magistrate to consider "the location to be searched; the type of crime being

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[149] United States v. Tipton, 16 M.J. 283, 285–87 (C.M.A. 1983); United States v. Lopez, 35 M.J. 35, 38 (C.M.A. 1992); United States v. Hester, 47 M.J. 461, 463 (1998).

[150] United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting Illinois v. Gates, 462 U.S. 213, 239 (1983)). The CAAF has used this "substantial basis" standard in reviewing probable cause determinations since 1966. United States v. Figueroa, 35 M.J. 54, 56 n.2 (C.M.A. 1992) (citing United States v. Penman, 36 C.M.R. 223, 229 (C.M.A. 1966)).

[151] *Bethea*, 61 M.J. at 187 (quoting *Gates*, 462 U.S. at 238), *quoted in* United States v. Allen, 53 M.J. 402, 407 (C.A.A.F. 2000); *see also* United States v. Gallo, 55 M.J. 418, 421–22 (C.A.A.F. 2001); United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007) ("[P]robable cause deals with probabilities. It is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949))).

[152] *Leedy*, 65 M.J. at 213.

[153] *Bethea*, 61 M.J. at 187 (citing Ostrander v. Madsen, No. 00-35541, 2003 U.S. App. LEXIS 1665, at *8 (9th Cir. Jan. 28, 2003) (unpublished) ("Probable cause is met by less than a fifty-percent probability . . . .")).

[154] *Id.* at 187 n.15 (citing Samos Imex Corp. v. Nextel Commc'ns, Inc., 194 F.3d 301, 303 (1st Cir. 1999) ("The phrase 'probable cause' is used, in the narrow confines of Fourth Amendment precedent, to establish a standard less demanding than 'more probable than not.'")); *see also* Texas v. Brown, 460 U.S. 730, 742 (1983) ("[Probable cause] does not demand any showing that such a belief be correct or more likely true than false."), *quoted in Bethea*, 61 M.J. at 187.

[155] *Leedy*, 65 M.J. at 213; *see also* United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) ("[The appellant's] arguments are necessarily related where the totality of the circumstances is weighed . . . . [W]e consider each argument in turn, recognizing that the question presented is not whether one fact or another provided sufficient cause, but whether the facts taken as a whole did so.").

investigated; the nature of the article or articles to be seized; how long the criminal activity has been continuing; and, the relationship, if any, of all these items to each other."[156] The nature of the test allows probable cause to be found when considering all the facts as they relate to each other even when the evidence is weak in one or more aspects.

The remainder of this article will compare and contrast the CAAF's application of this test to the federal circuit courts and searches seeking various types of evidence. As there are common components in the totality of the circumstances test, this section will discuss staleness, nexus to the place searched, the child pornographer profile, subscription to child pornography based websites, sufficiency of the description of child pornography in the affidavit, and sufficiency of particularity in the warrant.

B. Staleness

The issue of staleness is a common factor in probable cause analysis cases. For the warrant to be valid there must be a "reasonable belief that the . . . evidence sought is located in the place . . . to be searched."[157] Time is an important factor in this analysis because the likelihood that the contraband is located at the original location dissipates over time.[158] Courts require that "[t]he proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."[159] To establish this nexus, it is imperative that the affidavit establish timeliness because the courts will not presume timeliness.[160]

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[156] United States v. Henley, 48 M.J. 864, 869 (A.F. Ct. Crim. App. 1998), *aff'd*, 53 M.J. 488 (C.A.A.F. 2000).

[157] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2).

[158] United States v. Lopez, 35 M.J. 35, 38 (C.M.A. 1992).

[159] Sgro v. United States, 287 U.S. 206, 210–11 (1932) (holding that reapplication for a search warrant that had expired after ten days must satisfy a new timeliness analysis to ensure the subsequent warrant is based on adequate probable cause); *see also* United States v. Hall, 50 M.J. 247, 250 (C.A.A.F. 1999) ("Probable cause to search must be based on timely information with a nexus to the place to be searched.").

[160] United States v. Hython, 443 F.3d 480 (6th Cir. 2006) (holding that the affidavit in support of the search warrant was insufficient to establish probable cause when the affidavit failed to state when the controlled buy of drugs had occurred even though it was just one day prior to obtaining the search warrant). A military magistrate may use information outside the affidavit to establish timeliness. *See supra* note 90 and accompanying text.

However, "time alone provides no magic formula for determining the presence or absence of a sufficient basis to authorize a search."[161] For example, the difficulty of moving or consuming items greatly affects the lenience the courts will apply on the issue of timeliness.[162] In addition, the analysis of potentially stale information is nearly identical to a totality of the circumstances test.[163] The appropriate amount of time an item is likely to be located at a particular place is contingent on "(1) the nature of the article sought; (2) the location involved; (3) the type of crime; and (4) the length of time the crime has continued."[164] An investigator's experience and knowledge can greatly assist the magistrate in analyzing these four factors when determining if there is a fair probability that objects are located in a particular place when some amount of time has passed.[165]

Macomber and, to a lesser extent, *Clayton*, both had issues concerning the timing of the search as compared to the activity that led to probable cause. In *Macomber*, the evidence supporting probable cause for the search warrant was a paid membership to a child pornography website fourteen months prior to the attempted purchase of two child pornography videos via the mail in an undercover sting operation.[166] The search authorization was not conditioned on receipt of the videos, but the search was conducted after Macomber attempted to pick-up the videos from the base's Postal Service Center.[167]

In *Clayton*, just over five months after shutting down an internet discussion group that contained one child pornography image, a search authorization was issued for Clayton's quarters in Kuwait.[168] No

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[161] *Sgro*, 287 U.S. at 210.

[162] United States v. Johnson, 23 M.J. 209, 212 (C.M.A. 1987) (holding two and a half week old information sufficient under the totality of the circumstances test because a stereo expander would not be easily sold and would likely be retained by the thief); United States v. Motley, No. ACM 29210, 1993 CMR LEXIS 135, at *12–13 (A.F.C.M.R. Mar. 1, 1993) (unpublished) (holding household items are not easily moved or sold resulting in two and a half week old information not being stale).

[163] *See supra* text accompanying note 156.

[164] United States v. Agosto, 43 M.J. 745, 749 (A.F. Ct. Crim. App. 1995) (citing United States v. Lopez, 35 M.J. 35, 38–39 (C.M.A. 1992)).

[165] United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001) (relying on investigator's experience); United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007) (same).

[166] United States v. Macomber, 67 M.J. 214, 216 (C.A.A.F. 2009).

[167] *Id.* at 217.

[168] Final Brief on Behalf of Appellant at 2–3, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705.

evidence was obtained as to when Clayton became a member or last accessed the discussion group, but he had not "unsubscribed" at the time the group was shut down.[169] While Clayton raised the issue of staleness to the CAAF on appeal,[170] the court did not address it in their opinion.

The nature of the item sought for seizure is a predominant focus in the staleness analysis.[171] The next few sections will analyze how the courts generally treat physical evidence, in comparison to child pornography evidence, when using dated information to establish probable cause.

1. Controlled Substances

Even though controlled substances could be kept in a single location for years, courts generally find a short lifespan on information attempting to establish a nexus to the location of controlled substances. In particular, the CAAF has said that "[i]f the property sought is a controlled substance, apparently intended for use or distribution, then it probably would not remain in a suspect's possession over a long period of time."[172] As a result, investigators have a short window to obtain sufficient information and execute a search.

In *United States v. Land*, the CAAF found that possession of a substantial amount of hashish two to three days prior to the search was sufficient time to execute a search.[173] Information indicating possession of marijuana up to a week prior to the search has been found not to be stale.[174] However, the CAAF has held that an alleged single incident of possession and use that was four months old[175] and even one month old[176] were stale for the probable cause analysis. The federal courts of

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[169] *Clayton*, 68 M.J. at 422–23; *Clayton* ROT, *supra* note 105, at 59, 67. When the group was shut down, Clayton was presumably receiving daily digests of the website's postings to his e-mail account. *Id.*

[170] Final Brief on Behalf of Appellant at 24–25, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705.

[171] United States v. Lovell, 8 M.J. 613, 618 (A.F.C.M.R. 1979) ("[A]n additional factor [to time] which is likely to be most important is the nature of the property sought.").

[172] United States v. Johnson, 23 M.J. 209, 212 (C.A.A.F. 1987).

[173] 10 M.J. 103, 105 (C.M.A. 1980).

[174] United States v. McClelland, 49 C.M.R. 557, 566 (A.C.M.R. 1974).

[175] United States v Brown, 28 C.M.R. 48 (C.M.A. 1959); United States v. Britt, 38 C.M.R. 415 (C.M.A. 1968).

[176] United States v. Crow, 41 C.M.R. 384, 387 (C.M.A. 1970) ("Of particular importance

appeal have returned similar results.[177]

When also considering the continuing nature of the criminal activity, particularly with controlled substances, the courts extend the amount of time in their staleness analysis. A single use or possession will likely see probable cause diminish very quickly, but evidence of multiple incidents extends the time factor.[178] In *United States v. Harris*, the Supreme Court found that evidence of illegal whiskey sales two weeks prior to the search were not stale because the appellant had been selling liquor illegally to the informant for two years.[179] While the military courts have rarely addressed this issue directly,[180] in *United States v. Bauer*, the Air Force Court of Military Review embraced the concept that multiple related criminal acts dissipate staleness even when those acts occurred at a different location than the one searched.[181] In *Bauer*, the court held that evidence placing marijuana in the appellant's room two months prior to the search was not stale when the magistrate also considered that the appellant had used marijuana four times in other places two weeks prior to the search of his room.[182]

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to this case is the testimony of [the informant] . . . that he had *never observed marihuana in the bunk or locker area of the accused*." (emphasis in original)).

[177] United States v. Wagner, 989 F.2d 69 (2d Cir. 1993) (holding that a one-time sale seven weeks prior to the search was stale). *But see* United States v. Tabares, 951 F.2d 405 (1st Cir. 1991) (holding that an informant seeing cocaine in an apartment ten days prior to the search warrant was not stale); United States v. Guitterez, 203 F.3d 833 (9th Cir. 1999) (holding that a search fifteen days after a controlled buy was not stale).

[178] United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972) ("Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.").

[179] 403 U.S. 573, 579 (1971).

[180] *See* United States v. Connor, No. NMCM 88-0527, 1988 CMR LEXIS 654, at *2 (N.M.C.M.R. Sept. 12, 1988) (unpublished) (finding a search for controlled substances was not stale because of the on-going criminal activity at the residence) (citing United States v. Bruner, 657 F.2d 1278, 1298–99 (D.C. Cir. 1981) (holding that reports of drugs in a cabinet four to five months prior to the affidavit was not stale when the cabinet was located in an established residence of the appellant who had been in a "major drug conspiracy" for six years)).

[181] 49 C.M.R. 121 (A.F.C.M.R. 1973).

[182] *Id.* at 122–23.

The federal courts have considered additional factors such as multiple controlled purchases over time,[183] the size of the drug trafficking operation,[184] the ability of forensics to find trace evidence,[185] the length of the drug conspiracy,[186] the permanency of the operation,[187] and even the lengthy nature of law enforcement narcotic operations.[188]

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[183] United States v. Mathis, 357 F.3d 1200 (10th Cir. 2004) (holding that a search conducted two months after an investigation that spanned several months with multiple controlled purchases was not stale); United States v. Pruneda, 518 F.3d 597, 604 (8th Cir. 2008) (holding that a search conducted one month after an investigation that spanned several months with multiple controlled purchases was not stale).

[184] United States v. Foster, 711 F.2d 871 (9th Cir. 1983) (holding that the passing of three months did not make information stale when the appellant was alleged to head a major heroin distribution ring); United States v. Comeaux, 955 F.2d 586 (8th Cir. 1992) (holding that the passing of two months did not make information stale considering the large size of the drug conspiracy). *But see* United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) (holding that two-year-old information of a narcotics ring was stale).

[185] United States v. Beltempo, 675 F.2d 472 (2d Cir. 1982) (holding that information fifty-two days old was not stale when an expert stated that traces of heroin should still be in the carpet after an alleged spill).

[186] United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984) (holding that a search nearly two months after an informant had purchased drugs for three consecutive months was not stale because of the continuing nature of the drug trafficking); United States v. McNeese, 901 F.2d 585 (7th Cir. 1990) (holding that a seven-month-old distribution was not stale when the appellant had been distributing cocaine for over two years); United States v. Pitts, 6 F.3d 1366 (9th Cir. 1993) (holding that a search four months after distribution to an informant was not stale since the appellant was a regular supplier to the informant); United States v. Feliz, 182 F.3d 82 (1st Cir. 1999) (holding that a search three months after two controlled purchases was not stale when the appellant's drug trafficking had been on-going for twelve years); United States v. Iiland, 254 F.3d 1264 (10th Cir. 2001) (holding that three-month-old information was not stale when the drug trafficking was alleged to have been on-going over a considerable period of time). *But see* Molina *ex rel.* Molina v. Cooper, 325 F.3d 963 (7th Cir. 2003) (holding that two-year-old information concerning a suspected drug dealer was stale).

[187] United States v. Dozier, 844 F.2d 701 (9th Cir. 1988) (holding that five-and-a-half-month-old information was not stale because marijuana cultivation is a long-term crime and the appellant was unlikely to dispose of the tools of the trade); United States v. Schaefer, 87 F.3d 562 (1st Cir. 1996) (holding that two-month-old information was not stale when the appellant was allegedly cultivating marijuana in his home); United States v. Hammond, 351 F.3d 765 (6th Cir. 2003) (holding that five-month-old information was not stale because evidence of marijuana cultivation is likely to remain for an indefinite period of time). *But see* United States v. Goody, 377 F.3d 834 (8th Cir. 2004) (information regarding the manufacture of amphetamines that was sixteen months old was stale).

[188] United States v. Smith, 266 F.3d 902 (8th Cir. 2001) (holding that controlled purchases made three months prior to the search were not stale) ("In investigations of ongoing narcotic operations, 'intervals of weeks or months between the last described act and the application for a warrant [does] not necessarily make the information stale.'" (quoting United States v. Formaro, 152 F.3d 768, 771 (8th Cir. 1998))).

2. Non-Consumable Physical Objects

When the courts analyze the basis to search for non-consumable physical objects, time factors that are considered include the portability of the item, the likely location for an object of that type to be stored, and the likelihood that a suspect would maintain control of such an object. In general, the courts allow investigators more time in the probable cause analysis.[189] However, that is not always the case. In *United States v. Blake*, the search to find two twenty dollar bills used in a controlled purchase was deemed stale after a week.[190] Likewise, a pistol has been considered easily portable and concealable, which limits the amount of time that reliable information retains evidentiary value.[191]

Reliability of information about objects that are difficult to sell or move dissipates at a slower rate. In *United States v. Johnson*, a stereo expander stolen two months prior to the search was found to not be stale.[192] The court reasoned that the stereo expander was harder to transport or hide than a pistol, more likely to be retained for personal use, and less likely to be sold "than some other types of property."[193] Likewise, in *United States v. Lovell*, the court stated that a pistol and disguise used in a robbery would likely still be in the possession of a suspect when the items were not easily sellable and the suspect had no reason to believe the government had been tipped off that he possessed

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[189] United States v. Alvarez, 451 F.3d 320, 332 (5th Cir. 2006) ("[T]his court previously has identified two issues of significance: (1) Information reaching back over long periods may be used to support an affidavit 'if the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity;' and (2) where the type of evidence sought is 'the sort that can reasonably be expected to be kept for long periods of time in the place to be searched,' the court is 'more tolerant of dated allegations.'" (quoting United States v. Pena-Rodriguez, 110 F.3d 1120, 1130 (5th Cir. 1997))).

[190] 7 M.J. 914, 916 (A.C.M.R. 1979), *pet. denied*, 8 M.J. 42 (C.M.A. 1979) ("It is unreasonable to believe that the currency would still be in the appellant's possession after a week."); *see also* United States v. Lovell, 8 M.J. 613, 618 (A.F.C.M.R. 1979) (stating in dicta that stolen money is unlikely to be in a house three months after the theft).

[191] United States v. Bright, 2 M.J. 663, 665 (A.F.C.M.R. 1976) (holding that a pistol was likely moved in the two to three weeks since it had last been seen in a vehicle, thus the information was stale). *But see* United States v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007) (holding that information twelve days old was not stale when investigators were searching for ammunition and firearms); United States v. Queen, 26 M.J. 136, 139–40 (C.M.A. 1988) (holding that information relating to a pistol seen up to six weeks prior to the search was not stale); United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992) (holding that a pistol seen one week prior to the search was not stale).

[192] 23 M.J. 209, 212 (C.M.A. 1987).

[193] *Id.*

the items.[194]

When the objects are of a documentary nature, the timeliness of the search has even greater latitude. In *United States v. Andersen*, the Supreme Court found reasonable the search for real estate records produced three months prior to the search.[195] The Air Force Court of Criminal Appeals has found that three and a half months and a move to a new dormitory did not dissipate the probable cause to search for photographs.[196] The federal courts have extended these limits to five months,[197] nearly two years old,[198] and even an open "number of years."[199] The rationale for the extension of time relies on documentation likely being retained for greater periods of time prior to being discarded[200] and the continuing nature of the criminal enterprise.[201]

3. Child Pornography

When reviewing how the courts handle the staleness issue in searching for items other than child pornography, it is easier to understand why the courts extend the lifespan of probable cause when investigators are seeking child pornography. Child pornography is not consumed like a controlled substance, it does not spoil with time, nor is it easily sold. In the digital world, child pornography can be retained even

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[194] 8 M.J. 613, 618 (A.F.C.M.R. 1979) (stating in dicta that even three months' time would not have made the information stale).
[195] 427 U.S. 463, 478 n.9 (1976).
[196] United States v. Agosto, 43 M.J. 745, 749 (A.F. Ct. Crim. App. 1995).
[197] United States v. Alvarez, 451 F.3d 320, 332 (5th Cir. 2006) ("[D]ocumentary evidence can reasonably be expected to be retained after it is obtained or created."); *see also* United states v. Webb, 255 F.3d 890, 905 (D.C. Cir. 2001) (holding that information three and a half months old was not stale in the search for a drug dealer's documents regarding his supplier).
[198] United States v. Yusuf, 461 F.3d 374, 391–92 (3d Cir. 2006).
[199] United States v. Gardiner, 463 F.3d 445, 472 (6th Cir. 2006) ("[F]inancial documents, receipts, and business records of the sort sought in this investigation are generally kept for a number of years . . . .").
[200] *Yusuf*, 461 F.3d at 391–92 ("[T]he mere passage of time does not render information in an affidavit stale where . . . the items to be seized were created for the purpose of preservation, e.g., business records." (citing United States v. Williams, 124 F.3d 411, 421 (3d Cir. 1997))); *Agosto*, 43 M.J. at 749 ("[P]hotographs and telephone numbers, were not necessarily incriminating in themselves; were not consumable over time, like drugs; and were of a nature that they would be kept indefinitely.").
[201] *Yusuf*, 461 F.3d at 391–92 (searching for business records as evidence of money laundering); *Gardiner*, 463 F.3d at 472 (alleging that the appellate took bribes for contracts over several years).

if a copy is sold or given away. Child pornography "can have an infinite life span."[202] In addition, like the creation of documents, child pornography is acquired to be maintained, not quickly destroyed.[203]

Affidavits are often bolstered with evidence that child pornography collectors are more likely to hoard their collections instead of routinely disposing them. The Federal Bureau of Investigation's resident expert on child abusers, Kenneth V. Lanning, states that a preferential sex offender's collection is "a cherished possession and his life's work."[204] As a result, these collectors are highly unlikely to destroy such a collection.[205] The federal courts have almost universally accepted this premise, and routinely cite hoarding by pedophiles as a presumed fact when conducting a staleness analysis.[206]

An additional fact that makes digital child pornography unique is that deleting the files is difficult.[207] Federal courts have factored the possibility of this lingering piece of evidence into their timeliness calculus.[208] While not setting an outer limit, the Sixth Circuit recognized that the forensic examiners ability to retrieve files long after they are deleted significantly alters the probable cause analysis.[209]

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[202] United States v. Burkhart, 602 F.3d 1202, 1207 (10th Cir. 2010) (quoting United States v. Frechette, 583 F.3d 374, 378 (6th Cir. 2009)).

[203] United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008) ("Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to destroy them . . . . [P]edophiles, preferential child molesters, and child pornography collectors maintain their materials for significant periods of time." (quoting United States v. Riccardi, 405 F.3d 852, 861 (10th Cir. 2005) (citing cases from the 3rd, 8th, and 9th Circuit Courts))).

[204] LANNING, *supra* note 2, at 91–92.

[205] *Id.* at 91–92, 136. "If law enforcement has evidence an offender had a collection 5 or 10 years ago, chances are he still has the collection—only it is larger." *Id.* at 91.

[206] *Perrine*, 518 F.3d at 1206 ("'The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases.'" (quoting *Riccardi*, 405 F.3d at 861); *see also* United States v. Irving, 452 F.3d 100, 125 (2d Cir. 2006).

[207] LANNING, *supra* note 2, at 136.

[208] United States v. Allen, 625 F.3d 830, 843 (5th Cir. 2010) ("Important to the staleness issue, the magistrate was advised that computer files or remnants of such files can be recovered months or even years after they have been downloaded onto a hard drive, deleted, or viewed via the internet.") (holding eighteen month old information was not stale).

[209] United States v. Terry, 522 F.3d 645, 650 n.2 (6th Cir. 2008) (holding that a five month delay from intercepting an e-mail containing child pornography did not cause the search to be stale), *cited with approval in* United States v. Lewis, 605 F.3d 395, 402 (6th Cir. 2010) (seven months).

In addition, just like recent activity involving controlled substances can refresh probable cause, a continuing course of conduct in child pornography significantly refreshes old information.[210] While the timeliness window is not endless,[211] federal courts have found that up to a year,[212] eighteen months,[213] and even years-old[214] evidence does not cause information regarding digitally stored child pornography to become stale.

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[210] United States v. Harvey, 2 F.3d 1318, 1323 (3d Cir. 1993) (holding that mailings received thirteen months and two months prior to the search was sufficient to establish probable cause when considering the fact that pedophiles rarely discard sexually explicit material); United States v. Newsom, 402 F.3d 780, 783 (7th Cir. 2005) (holding probable cause existed for evidence of year old images when a pornographic tape had been seen shortly before the search); United States v. Lapsins, 570 F.3d 758, 767 (6th Cir. 2009) (holding that nine month old information was refreshed by the downloading of child pornography a month prior to the search).

[211] *E.g.*, United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) ("We are unwilling to assume that collectors of child pornography keep their materials indefinitely . . . ."); United States v. Doyle, 650 F.3d 460, 74-75 (4th Cir. 2011) (invalidating a search warrant where, *inter alia*, the affidavit was silent as to the age of the allegations).

[212] *Id.* (holding that ten month old information was not stale because of the long term nature of child pornography collectors (citing United States v. Dozier, 844 F.2d 701, 707 (9th Cir. 1988) (discussing long term nature of marijuana cultivation))); United States v. Paul, 551 F.3d 516, 522 (6th Cir. 2009) (holding that evidence thirteen months old was not stale when the appellant had subscribed to child pornography websites for the preceding two years); United States v. Schwinn, 376 F. App'x 974, 979 (11th Cir. 2010) (unpublished) (holding that ten month old information was not stale).

[213] United States v. Frechette, 583 F.3d 374, 378–79 (6th Cir. 2009) (holding that a sixteen month old subscription to a child pornography website was not stale information); United States v. Lemon, 590 F.3d 612, 614–15 (8th Cir. 2010) (considering the continuing nature of child pornography, search warrant based on evidence that was eighteen months old was not stale (citing United States v. Maxim, 55 F.3d 394, 397 (8th Cir. 1995) (holding three year old information for illegal firearms possession was not stale))); *cf.* United States v. Pappas, 592 F.3d 799, 803 (7th Cir. 2010) (finding with little analysis that officers had good faith belief to assume that appellant still possessed child pornography eighteen months after receipt).

[214] United States v. Irving, 452 F.3d 110, 125 (2d Cir. 2006) (holding that two year old information of child pornography on a home computer was not stale); United States v. Morales-Aldahondo, 524 F.3d 115, 119 (1st Cir. 2008) (holding that child pornography obtained three years prior to the search warrant was not stale); United States v. Burkhart, 602 F.3d 1202, 1207 (10th Cir. 2010) (holding that e-mails containing purchased child pornography sent twenty-eight months prior to the search warrant were not stale); *cf.* United States v. Prideaux-Wentz, 543 F.3d 954, 958 (7th Cir. 2008) (holding that information two to four years old was stale when the affidavit did not state when the images were uploaded onto the website, but finding officers had a good faith belief that the appellant possessed child pornography).

Accordingly, the military courts have returned similar results. Even prior to *Macomber* and *Clayton*, the CAAF acknowledged the unique characteristics of child pornography. In *United States v. Gallo*, the court summarily accepted a time lag of six months when obtaining a search authorization.[215] The CAAF has gone so far as to find probable cause when searching for child pornography five years after the appellant had last been seen with the material.[216] In a recent case by the Air Force Court of Criminal Appeals, the court held that an affidavit obtained twenty-two months after the appellant paid for a subscription to a child pornography website did not dissipate the fair probability that child pornography would be found on the appellant's computer.[217] The court quickly dismissed the staleness argument citing the affidavit's assertion that digital child pornography is maintained for an "indefinite period of time."[218]

Thus, looking at *Clayton* and *Macomber*, the time span between the website subscriptions and the search easily falls within the window of time that has been allowed by the circuit courts when dealing with both child pornography and documentary evidence. When considering that child pornography is not consumable, is easily recovered by forensic analysis if it is deleted, and is likely to be kept for a long period of time, it is apparent why in *Clayton* the CAAF did not even address the appellant's assertion that the website being shut down for just over five months caused the information to be stale in the probable cause analysis.[219] However, unlike the cases cited above,[220] the Special Agent in *Clayton* failed to list any retention evidence in her affidavit.[221] Had

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[215] 55 M.J. 418, 422 (C.A.A.F. 2001); *see also* United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007) (accepting a one month delay because of the trend that possessors of child pornography tend to hoard their collections, and, if the files were deleted, forensic tools would likely be able to recover the files).

[216] United States v. Henley, 53 M.J. 488, 491 (C.A.A.F. 2000), *cert. denied*, 532 U.S. 943 (2001) (finding that the continual use of child pornography by the appellant to sexually assault his two children in a different home five years prior was sufficient to establish probable cause).

[217] United States v. Orona, No. ACM 36968, 2009 CCA LEXIS 345, at *12–13 n.5 (A.F. Ct. Crim. App. Sept. 14, 2009) (unpublished), *review denied*, No. 10-0128/AF, 2010 CAAF LEXIS 214 (Mar. 5, 2010) (unpublished).

[218] *Id.*

[219] United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010).

[220] *See* cases cited *supra* notes 202–03, 206–18.

[221] U.S. Dep't of Army, DA Form 3744, Affidavit Supporting Request for Authorization to Search and Seize or Apprehend (20 Apr. 2006) [hereinafter *Clayton* Affidavit] (on file with author). While the agent exhibited her knowledge of these trends during the hearing for the motion to suppress, there was no evidence that this information was presented to

there been a longer delay, this failure could have been fatal in the court's analysis of whether or not the magistrate had a substantial basis to believe that evidence of child pornography was located on Clayton's computer.

The case of *Macomber* is a much closer call, but when looking at the totality of the circumstances, the search fourteen months after Macomber subscribed to a child pornography website was properly not considered stale. Recognizing the unique hoarding attribute of child pornography possessors, the affidavit established that they "almost always maintain and possess child pornography materials."[222] More importantly, Macomber showed his continued interest in child pornography and refreshed this fourteen month old information by responding to the sexual interest questionnaire and placing a subsequent order for two child pornography movies in the weeks prior to the search affidavit.[223] The court did criticize the agent for failing to state the date of the subscription.[224] However, when considering the long-term nature of child pornography and Macomber's continued attempt to acquire child pornography, the court correctly found that there was a "fair probability" that evidence of child pornography possession was still located in Macomber's dormitory.[225] The key to a sufficient affidavit is describing the hoarding trends of child pornography possessors and the ability to retrieve deleted files through forensic analysis.[226]

C. Nexus to the Place Searched

Miltary Rule of Evidence 315(f)(2) requires a "reasonable belief that the . . . evidence sought is located *in the place . . . to be searched*."[227] This requirement is often referred to as the "nexus" between the contraband and the suspected location of the contraband.[228] It has been

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the magistrate. *Clayton* ROT, *supra* note 105, at 106.

[222] United States v. Macomber, 67 M.J. 214, 217 (C.A.A.F. 2009).

[223] *Id.*

[224] *Id.* at 220.

[225] *Id.* at 220–21 (citing United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007)).

[226] *See* COMPUTER CRIME & INTELLECTUAL PROP. SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 243 (3d ed. 2009) [hereinafter CCIPS], *available at* http://www.justice.gov/criminal/cybercrime/ssmanual/ ssmanual2009.pdf (sample affidavit with proposed language for child pornography cases).

[227] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2) (emphasis added).

[228] United States v. Hall, 50 M.J. 247, 250 (C.A.A.F. 1999) ("Probable cause to search

recognized that "[i]f there is probable cause to believe that someone committed a crime, then the likelihood that that person's residence contains evidence of the crime increases."[229] However, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[230] While direct observation can establish probable cause, the courts also allow for the inference of a nexus.[231] As with the totality of the circumstances test in general, there are several factors that a magistrate may consider when making this inferential step.

> The required nexus between the items to be seized and the place to be searched rests not only on direct observation, but on the type of crime, the nature of [the] items, the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to [keep the] property.[232]

This issue of nexus is a key point of contention in both *Macomber* and *Clayton*. In *Macomber*, the appellant argued that probable cause was not established to search his dormitory room because (1) there was no evidence that he possessed a computer in his room, and (2) the child pornography found in his possession was delivered and seized at a postal center as opposed to his dormitory.[233] The affidavit stated that Macomber's dormitory address was listed on the "LustGallery.com-A Secret Lolitas Archive" website's subscriber index, the credit card that paid for the subscription, the return address on the two correspondence letters he sent to the undercover agents, and the money order included in his request to purchase the videos.[234] The affidavit also stated that child

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must be based on timely information with a nexus to the place to be searched . . . .").

[229] United States v. Jones, 994 F.2d 1051, 1055–56 (3d Cir. 1993).

[230] Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

[231] United States v. Potts, 586 F.3d 823, 831 (10th Cir. 2009) ("[D]irect evidence that contraband is in the place to be searched is not required."); *see also* United States v. Alexander, 835 F.2d 1406, 1409 (11th Cir. 1988) (inferring that tools of a robbery were located in an automobile), *noted in* United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (inferring the location of stolen items).

[232] United States v. Gann, 732 F.2d 714, 722 (9th Cir. 1984) (discussing a search for stolen property); *see also* United States v. Lopez, 35 M.J. 35, 38–39 (C.M.A. 1992) (discussing nexus factors and supporting cases).

[233] United States v. Macomber, 67 M.J. 214, 219 (C.A.A.F. 2009) (holding that the search authorization was not predicate on receipt of the contraband).

[234] *Id.* at 215–17.

pornography is "stored in a secure but accessible location within [the collectors] immediate control, such as in the privacy and security of [the collectors] own home[], most often in their personal bedrooms."[235]

The nexus to Clayton's living quarters in Kuwait was more tenuous. The Yahoo! e-mail that Clayton used to subscribe to the free internet group "Preteen-Bestiality-and-Anything-Taboo" was linked to his home address in Georgia.[236] Clayton requested receipt of a daily e-mail digest of the group's daily postings,[237] and Clayton's Yahoo! account was accessed by a government-owned computer in Kuwait after the website was shut down.[238] At the time that the group was shut down by Google, Clayton had not "unsubscribed" to the group.[239] No evidence was presented to the magistrate concerning Clayton's ownership of a private computer or access to the internet, although the magistrate had personal knowledge that Clayton could purchase internet service capability for his quarters.[240] In the affidavit, the Special Agent did not state any information regarding the likely locations that child pornography would be stored.[241]

The following sections discuss the sufficiency of the nexus information presented to the magistrates in *Macomber* and *Clayton* when compared to other types of evidence.

1. Nature of the Material and Likelihood of Location

In cases not involving child pornography, courts use facts presented to a magistrate to infer there is a fair probability that varying types of

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[235] *Id.* at 217.
[236] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting).
[237] *Id*. at 422 (majority opinion) (limited to twenty-five postings each day).
[238] Final Brief on Behalf of Appellant at 9, United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010) (No. 08-0644), 2009 WL 2729705. There was evidence that Clayton's Yahoo! account had been accessed by a private server while in Kuwait. *Clayton* ROT, *supra* note 105, at 40, 45–46. While this information would have greatly increased the nexus evidence to his private residence in Kuwait, this key piece of information could not be considered by the court because it was not listed in the affidavit nor orally presented to the magistrate. *Id.* at 76, 196–98.
[239] *Clayton*, 68 M.J. at 422.
[240] *Id.* at 423. It is unclear if the issue of internet access was considered by the magistrate or only discussed at the motions hearing when probable cause was called into question. *Id.* at 427 n.2 (Ryan, J., dissenting).
[241] *Clayton* Affidavit, *supra* note 221.

evidence will be found at a specific location. With controlled substances, courts look for the link between the location to be searched and the drug possession or sale.[242] Some courts are willing to presume that drugs were located in the place where the suspect had just left.[243] The majority of the circuit courts have allowed the inference that drug dealers typically store evidence of their crimes in their own homes.[244] The agent's experience is vital in establishing the relevant inference in the affidavit.[245]

The courts also use a "likelihood" analysis when dealing with non-controlled substance crimes. Specifically, when involving physical objects, the military courts permit reasonable inferences in logical locations that a servicemember might store such items.[246] In a case of stolen night-vision goggles, without any direct evidence pertaining to the location of the goggles, the CAAF reasoned that "the logical place to search would be areas under appellant's control—his truck and his apartment."[247] When in a foreign country and there is probable cause to

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[242] United States v. Otero, 495 F.3d 393, 398 (7th Cir. 2007) (holding that, in light of the totality of the circumstances test, an informant identifying the apartment in which he bought drugs was sufficient to establish a nexus to search the apartment).

[243] United States v. Servance, 394 F.3d 222, 230–31 (4th Cir. 2005) (holding that normal inferences established that contraband would be found in the apartment of the suspect when he was arrested for the sale and possession of narcotics shortly after leaving the apartment), *vacated on other grounds*, 544 U.S. 1047 (2005). *But see* United States v. McPhearson, 469 F.3d 518, 524–25 (6th Cir. 2006) (finding no substantial basis to infer probable cause to search a home when the defendant was found with cocaine on his person when being arrested outside his home for a non-drug offense and he was not a known drug dealer).

[244] United States v. Whitner, 219 F.3d 289, 297–98 (3d Cir. 2000) (citing eight circuit courts which have drawn a similar conclusion).

[245] Texas v. Brown, 460 U.S. 730, 742–43 (1983) (stating the importance of the officer's experience as it related to the establishment of probable cause); United States v. Feliz, 182 F.3d 82, 87–88 (1st Cir. 1999) (discussing the importance of the agent's experience in establishing probable cause to search a known drug trafficker's home for evidence of drug trafficking); United States v. Gunter, 266 F. App'x 415, 419 (6th Cir. 2008) (unpublished) (holding that the agent's experience combined with the suspect's visit to his home immediately before the sale established sufficient nexus necessary to provide a substantial basis for probable cause).

[246] United States v. Figueroa, 35 M.J. 54, 56 (C.M.A. 1992) ("The most logical place for appellant to store the weapons was either his quarters or his automobile."); *see also* United States v. Queen, 26 M.J. 136, 138–39 (C.M.A. 1988) (finding the search of a car reasonable because it was the most logical place to find the pistol). *But see* United States v. Lidle, 45 C.M.R. 229, 232 (C.M.A. 1972) (finding that inferences to search a car for drugs were insufficient).

[247] United States v. Light, 48 M.J. 187, 191 (C.A.A.F. 1998) (citing United States v. Johnson, 23 M.J. 209 (C.M.A. 1987)); *see also* United States v. Sparks, 44 C.M.R. 188,

believe a suspect stole physical objects, the CAAF has stated that "there is an inference that the property will be either at the residence, barracks, or home of the individual."[248] In addition, the search of one location has been found valid even when the items could be located at other locations.[249] The affidavit must establish only that there is a fair probability that the items will be found in one of the possible locations.[250]

2. Child Pornography and Nexus to the Home

The issue of nexus to the home involving child pornography is treated just like other items with evidentiary value. The investigator may receive a report from a roommate, friend, or supervisor who saw child pornography on the suspect's digital media.[251] An investigator may develop the required nexus by intercepting a transmission of child pornography with a specific Internet Protocol (IP) address that connects to the suspect's residence[252] or by viewing possessed files through a

190 (C.M.A. 1971) ("[T]he most logical place to search for [the stolen items] was among his personal possessions in his quarters."); United States v. Walters, 48 C.M.R. 1, 3 (C.M.A. 1973) (finding it logical to search the suspect's car and wall locker for stolen items); United States v. Barnard, 49 C.M.R. 548, 551 (C.M.A. 1975) ("[When looking for stolen jewelry, t]he two logical and reasonable places that met these requirements were the accused's living quarters and his locker at his work station."); United States v. Owens, 51 M.J. 204, 211 (C.A.A.F. 1999) (finding the quarters of the defendant was a logical place to search when some of the stolen items were found in his car).

[248] United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992) (citing United States v. Johnson, 23 M.J. 209, 212 (C.M.A. 1987)).

[249] *Johnson*, 23 M.J. at 212 ("[T]he stereo expander could only be in one place at one time . . . . [T]he evidence here was adequate, even though it left open the possibility that the stereo expander was in the off-base residence, rather than in the barracks room; and *vice versa*."); *see also* United States v. Cervini, 16 F. App'x 865, 868 (10th Cir. 2010) (unpublished) (finding no requirement to eliminate all possible locations).

[250] *Id.* ("[I]t suffices if the commander authorizing the search has probable cause to believe that the property being sought will be found in one of the several identified areas which are under the suspect's direct control.").

[251] United States v. Leedy, 65 M.J. 208, 216–17 (C.A.A.F. 2007) (finding probable cause to search computer media when roommate with no apparent ulterior motive saw titles of files that appeared to be child pornography); United States v. Strader, No. NMCCA 200600385, 2008 CCA LEXIS 132, at *7–8 (N-M. Ct. Crim. App. Apr. 3, 2008) (unpublished) (same); United States v. Camnetar, No. ACM 36448, 2009 CCA LEXIS 40, at *4–9 (A.F. Ct. Crim. App. Jan. 30, 2009) (unpublished) (finding probable cause to search all computer media when roommate saw child pornography on DVD video located in quarters).

[252] United States v. Vosburgh, 602 F.3d 512, 526–27 (3d Cir. 2010) (citing circuit courts which upheld search warrants based on Internet Protocol (IP) information) ("[E]vidence

peer-to-peer network.[253] When there is no direct evidence, investigators must substantiate the nexus requirement through other means.[254]

The Sixth Circuit has found that, unlike suspicion for simple possession of controlled substances, child pornography possession is "much more tied to a place of privacy, seclusion, and high–speed internet connectivity (e.g., a home or office) . . . ."[255] Even with this inferential link, courts have made the same logical and common sense conclusions to find that drug dealers[256] and thieves likely store evidence of their crime in their residence.[257] The analysis for child pornography possession should be no different. A search should not be declared invalid when using inferential evidence just because child pornography could be found in a location other than the home.

It is an accepted presumption that child pornographers usually secret their collections in the privacy of their home.[258] Kenneth V. Lanning

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that the user of a computer employing a particular IP address possessed or transmitted child pornography can support a search warrant for the physical premises linked to that IP address.").

[253] United States v. Stults, 575 F.3d 834, 838, 843–44 (8th Cir. 2009) (describing the peer-to-peer file-sharing process and finding probable cause when agent found child pornography on appellant's computer through a file sharing program); United States v. Jameson, 371 F. App'x 963, 966 (10th Cir. 2010) (unpublished) (finding probable cause to search when investigator viewed child pornography through peer-to-peer network and connected the IP address to the appellant); United States v. Saxman, 69 M.J. 540, 541 (N-M. Ct. Crim. App. 2010) (describing process of agent who used peer-to-peer file sharing program to establish probable cause that appellant possessed child pornography).

[254] *Compare* United States v. Doyle, 650 F.3d 460, 472-73 (4th Cir. 2011) (stating that "evidence of child molestation alone does not support probable cause to search for child pornography"), *with* United States v. Colbert, 605 F.3d 573, 577-78 (8th Cir. 2010) (finding probable cause to search for child pornography after appellant attempted to entice a young girl back to his home).

[255] United States v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006), *quoted in* United States v. Lapsins, 570 F.3d 758, 766 (6th Cir. 2009); *see also* United States v. Terry, 522 F.3d 645, 648 (6th Cir. 2008) ("[A]s a matter of plain common sense, if . . . a pornographic image has originated or emanated from a particular individual's e-mail account, it logically follows that the image is likely to be found on that individual's computer or on storage media associated with the computer." (citation omitted)).

[256] *See supra* notes 244–45 and accompanying text.

[257] *See supra* notes 247–50 and accompanying text.

[258] United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008) ("The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases . . . . [C]ollectors will want to secret them in secure places, like a private residence. This proposition is not novel in either state or federal court . . . ." (quoting United States v. Riccardi, 405 F.3d 852, 861 (10th Cir. 2005) (citing cases from the 3d, 8th, and 9th

acknowledges that the collection could be located at a place of business, in a safety deposit box, or in a rented storage locker, but he asserts that the "collection is usually in the offender's home."[259] This assertion is supported by research. According to the National Juvenile Online Victimization Study, 91% of arrested child pornography possessors stored child pornography mainly on their home computer and only 7% stored child pornography only on their work computer.[260] Of those, 18% had child pornography in more than one place, usually their home and work computers.[261] If the courts use these statistics to limit the locations in which an inferential nexus may be found, Judge Ryan's concern that "the government is free to search for that pornography *anywhere*" is without merit.[262]

For this information to be relevant to the probable cause analysis, the agent must inform the magistrate of these facts.[263] Like in the non-child pornography cases, the CAAF has allowed the agent to use his experience to fill in the "gaps" to establish the required nexus.[264] This requires the agent to inform the magistrate of reasonable inferences which identify where evidence is likely to be stored based on the type of offense and nature of the evidence.[265]

In *Macomber*, the affidavit listed five specific connections to Macomber's dormitory address coupled with the information that child pornographers usually store their collections in their own home.[266] When considering Macomber's refreshed desire to possess child pornography by ordering videos using his home address and his paid subscription to a

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Circuit Courts))).

[259] LANNING, *supra* note 2, at 92.

[260] Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 7–8 (2005), http://www.missingkids.com/en_US/publications/NC144.pdf (leaving a mere 2% of possessions at other locations).

[261] *Id.*

[262] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting) (emphasis in original). For example, without more, the data is not sufficient to infer a suspect is storing child pornography in a rented storage locker.

[263] MCM, *supra* note 10, MIL. R. EVID. 315(f)(2).

[264] United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001) (holding that an expert can use his experience to establish the likelihood that child pornography is stored in the home).

[265] *Id.* (citing United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986); United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987)).

[266] *See supra* notes 234–35 and accompanying text.

child pornography website,[267] the trial court and the CAAF treated this case involving child pornography just like they and the circuit courts have treated cases involving physical objects. The court properly found that there was a substantial basis to form a "practical, common sense" opinion that Macomber probably possessed child pornography in his dormitory.

In contrast, the agent in *Clayton* failed to provide the magistrate with any information regarding the location of likely storage.[268] This mistake should have proven fatal to the sufficiency of the warrant considering the agent did not provide any evidence that Clayton was receiving and storing child pornography in his Kuwait residence. Failure to provide this critical piece of information requires a finding of no probable cause in accordance with the standard established in MRE 315(f)(2). The sole piece of information linking child pornography to Kuwait was that Clayton's Yahoo! account had been accessed by a government computer in Kuwait after the internet group was shut down. While the majority relied on the fact that Clayton possessed a laptop and the laptop could have been taken to his residence, the laptop Clayton was known to possess was a government issued laptop.[269] The CAAF provided no evidence to support the conclusion that the possession of a government laptop made it likely that Clayton transferred contraband to personal media devices.[270] From the information provided to the magistrate, there was no evidence indicating that this behavior was or could be occurring. Thus, while there may have been probable cause to search Clayton's government laptop, the agent failed to establish a nexus to Clayton's Kuwait quarters for personally owned media.

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[267] *See infra* Part IV.E (discussing subscriptions to child pornography based websites).

[268] *Clayton* Affidavit, *supra* note 221; *Clayton* ROT, *supra* note 105, at 191–294 (the testimony of the agent and magistrate did not indicate this topic was discussed). At the motion to suppress hearing, the magistrate stated that actual knowledge of computer ownership and private internet access would have made the case much stronger. *Id.* at 192.

[269] United States v. Clayton, 68 M.J. 419, 424 (C.A.A.F. 2010); *id.* at 427 (Ryan, J., dissenting).

[270] *See* United States v. Gallo, 55 M.J. 418, 421–22 (C.A.A.F. 2001) (holding evidence of files being transferred to external media on a government computer created probable cause to search the appellant's residence).

3. The Failed Controlled Delivery in Macomber

While the CAAF found that the magistrate's probable cause determination in *Macomber* was not based on the receipt of the package from the undercover agents,[271] a controlled delivery of illicit items can form the basis for probable cause to search via an anticipatory warrant.[272] In order for an anticipatory warrant to be valid, the condition in the warrant must be met before probable cause is established to execute the warrant.[273] However, when the child pornography is not delivered directly to the place to be searched, some courts have held that the agents must establish the likelihood that the contraband will be taken to the place to be searched.[274] In addition, the agent should produce some evidence establishing that there is a fair probability that the suspect possesses child pornography other than that delivered by the undercover operation because possession of the delivered package by itself does not establish probable cause to search for more than the contents of the package.[275]

The agents in *Macomber* may have been "hedging their bets" by executing a controlled delivery after obtaining what first appears to be an anticipatory warrant. Had the *Macomber* warrant needed to rely on a successful delivery of the target package, the CAAF would probably still

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[271] United States v. Macomber, 67 M.J. 214, 217 (C.A.A.F. 2009) ("[T]he [search] request was based on Appellant's subscription to the 'LustGallery.com' child pornography website using his dorm room address, his self-proclaimed interest in children engaged in sex, and his attempt to order movies containing child pornography.").

[272] United States v. Grubbs, 547 U.S. 90 (2006). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.'" *Id.* at 94 (quoting 2 W. LAFAVE, SEARCH AND SEIZURE § 3.7(c), at 398 (4th ed. 2004)).

[273] *Id.* at 94–97 (holding that the triggering event of a person accepting the controlled delivery of child pornography and taking the package into the residence was sufficient to establish probable cause to search the residence).

[274] United States v. Ricciardelli, 998 F.2d 8, 14 (1st Cir. 1993) (holding anticipatory warrant not valid, even when the suspect took the package home, when agents did not produce evidence in the affidavit that suspect would take the package to his home) (citing United States v. Hendricks, 743 F.2d 653, 655 (9th Cir. 1985) (same)); *see also Investigations and Police Practices*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 3, 25–26 n.67 (2010) (listing cases from the circuit courts involving anticipatory warrants).

[275] United States v. Weber, 923 F.2d 1338, 1344 (9th Cir. 1990) (holding that the affidavit must establish probable cause that the suspect possesses child pornography other than what was delivered by law enforcement to search for additional evidence of child pornography) (citing State v. Sagner, 506 P.2d 510, 514–15 (Ct. App. Ore. 1973) (holding that probable cause to search for two stolen items does not give law enforcement probable cause to search for other stolen property)).

have upheld the search. The affidavit provided evidence to support the conclusion that Macomber possessed other child pornography, his paid subscription, and that Macomber was likely to take the target package to his dormitory because he used his dormitory address to order the package. This, along with his unique status as a servicemember living on a military installation, would lead his dormitory to be the most likely secure and private location to store contraband.[276]

4. What About Evidence of Computer Ownership and Internet Access?

In Judge Ryan's dissents in both *Macomber* and *Clayton*, she argued that probable cause was not established in the affidavit because there was no evidence showing either appellant possessed a computer or had access to the internet.[277] While the majority opinion in *Macomber* used common sense inferences to establish these two facts,[278] these are easy facts for investigators to include in an affidavit to help solidify the probable cause analysis.

Investigators should always give some information concerning computer ownership and internet access when seeking digital media. If these facts are not known, the investigator could include profile type information, as routinely done concerning other aspects of child pornography and drug dealer cases.[279] The affidavit could state something as simple as the following: "The majority of servicemembers own a personal computer and have internet access where they live." The investigators can base this statement off their personal experiences or research.[280] The U.S. Census Bureau reports that, as of 2009, over 80% of employed Americans have internet access in their home.[281] When the

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[276] *See supra* notes 246–50 and accompanying text.
[277] United States v. Macomber, 67 M.J. 214, 221 (C.A.A.F. 2009) (Ryan, J., dissenting); United States v. Clayton, 68 M.J. 419, 427–28 (C.A.A.F. 2010) (Ryan, J., dissenting).
[278] *Macomber*, 67 M.J. at 220 (majority opinion) ("[The magistrate] reasonably relied on the common sense inference that a military member who subscribed to an Internet website while listing his dormitory as his address owned a computer . . . ."). *But see Clayton*, 68 M.J. at 424–25 (majority opinion) (ignoring the issue).
[279] *See supra* notes 204–06, 231, 245, 263–65 and accompanying text.
[280] *Cf. id.* The agent in *Clayton* opined that a majority of deployed soldiers owned personal computers. *Clayton* ROT, *supra* note 105, at 159. The agent did not state that this opinion factored into the probable cause analysis, and acknowledged not knowing if Clayton owned a computer or had internet access. *Id.* at 91–162.
[281] U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES tbl.2 [hereinafter U.S.

person has at least a bachelor's degree, as did Lieutenant Colonel Clayton, these numbers rose to over 90%.[282] While data regarding computer ownership was last compiled in 2003, past research showed computer ownership was at least seven points higher than internet access.[283] When considering that these statistics are lowered by including older individuals not in the military population and those that live in areas with less developed internet access,[284] the investigator can easily make a common sense argument that a servicemember is over 90% likely to own a computer and have internet access in his residence. Using the totality of the circumstances test, this helps create a fair probability that evidence of child pornography will be found on digital media in the suspect's residence.

D. Guilty by Association and the Child Pornographer Profile

As discussed above in Part IV.B–C (staleness and nexus to the place searched), an agent's inclusion of "profile" evidence is often used to support the probable cause analysis. Judge Ryan's dissents in *Macomber* and *Clayton* make it clear why every affidavit regarding child pornography should include information regarding child pornography collectors and, if relevant, pedophiles. Judge Ryan criticized the majority in *Macomber* because of their reliance on a "pedophile profile."[285] Judge Ryan stated that she "cannot agree that all the government ever need do to defeat nexus concerns is provide boilerplate language about the habits of the theoretical 'collector.'"[286] Yet, in *Clayton*, Judge Ryan correctly

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CENSUS BUREAU, Tbl. 2], *available at* http://www.census.gov/population/www/socdemo /computer/2009.html (last visited Mar. 11, 2011) (Reported Internet Usage for Individuals three Years and Older, by Selected Characteristics: 2009).

[282] *Id.*

[283] U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES app., tbl. A (2009), *available at* http://www.census.gov/population/www/socdemo/ computer/2009.html (last visited Mar. 11, 2011) (Appendix, Tbl A. Households with a Computer and Internet Use: 1984 to 2009).

[284] Only 53% of persons sixty-five and older have internet access in their home. tbl.2, *supra* note 282. Only 56% of Mississippi residents have internet access in their home compared to nearly 85% in New Jersey. U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES tbl.3 (2009), *available at* http://www.census.gov/population/www/ socdemohttp://www.census.gov/population/www/socdemo/computer/2009.html (last visited Mar. 11, 2011) (Table 3. Reported Internet Usage for Individuals Three Years and Older, by State: 2009).

[285] United States v. Macomber, 67 M.J. 214, 217, 221–22 (C.A.A.F. 2009) (Ryan, J., dissenting).

[286] *Id.* at 222.

faulted the affidavit for not containing "even this constitutionally minimally relevant evidence."[287]

In *United States v. Gallo*, the CAAF found a "pedophile profile" crucial in the probable cause analysis.[288] While stating that "conclusory statements should not be in an affidavit," the court accepted the agent's conclusion that the "appellant fit the pedophile profile."[289] The court found the conclusion was proper because Gallo had solicited child pornography and "downloaded and uploaded child pornography from his work computer."[290]

While Judge Ryan acknowledges the CAAF's decision in *Gallo*,[291] her attempt to distinguish *Gallo* from *Macomber* is unpersuasive. In *Gallo*, the appellant sought out child pornography and used his work computer to transfer child pornography to electronic media.[292] These facts provided "other factors" allowing the magistrate to rely on the pedophile profile.[293] In *Macomber*, the appellant had paid to at least have access to child pornography on the internet, and, nearly fourteen months later, he was still trying to obtain child pornography when he ordered two videos in an undercover sting operation.[294] Considering the court's opinion in *Gallo*, Judge Ryan fails to describe adequately why Macomber's continuing quest to obtain child pornography should have been insufficient for the magistrate to consider collector profile information.[295]

While the *Macomber* court titled this information a "pedophile profile," the agent used the more general language of "child pornographers and persons with a sexual attraction to children."[296] The court in *United Sates v. Pappas* equates this information to a

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[287] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting).
[288] 55 M.J. 418, 421–22 (C.A.A.F. 2001).
[289] *Id.*
[290] *Id.*
[291] United States v. Macomber, 67 M.J. 214, 222 (C.A.A.F. 2009) (Ryan, J., dissenting); *see also Clayton*, 68 M.J. at 428 (Ryan, J. dissenting) (distinguishing *Gallo*).
[292] *Gallo*, 55 M.J. at 422.
[293] *Macomber*, 67 M.J. at 222 (Ryan, J., dissenting).
[294] *Id.* at 215–16 (majority opinion).
[295] Judge Ryan's only argument differentiating the cases is that the affidavit in *Macomber* could not definitively establish that Macomber had actually downloaded child pornography. *Id.* at 222 (Ryan, J., dissenting).
[296] *Id.* at 217 (majority opinion).

"collector."[297] The *Pappas court* said,

> [T]he moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors."[298]

For profile information to be relevant, "the affidavit must lay a foundation which shows that the person subject to the search is a member of the class."[299] The affidavit must demonstrate a substantial connection to child pornography,[300] as a single request to purchase child pornography, which is never delivered, is not sufficient.[301] In addition, the affidavit must not be "rambling boilerplate recitations."[302] While some courts have allowed the magistrate to make his own conclusions,[303]

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[297] 592 F.3d 799, 804 (7th Cir. 2010).
[298] *Id.* at 804.
[299] United States v. Weber, 923 F.2d 1338, 1345 (9th Cir. 1990); *Macomber*, 67 M.J. at 220 ("[A] profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search.").
[300] United States v. Gourde, 440 F.3d 1065, 1071 (9th Cir. 2006) (en banc) (accepting the agent's conclusion that the appellant "fit the collector profile because he joined a paid subscription website"); United States v. Pappas, 592 F.3d 799, 804 (7th Cir. 2010) (receiving eleven e-mails containing child pornography was sufficient to include "child pornography collector boilerplate" (citing United States v. Prideaux-Wentz, 543 F.3d 954, 961 (7th Cir. 2008) ("Because the warrant connected Prideaux-Wentz to several e-mail accounts responsible for uploading or possessing child pornography, we cannot say that it required too much of an inferential leap to conclude that Prideaux-Wentz might be a collector of child pornography."))). *But see* United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) (accepting trends of a collector when appellant was known to have downloaded two files of child pornography); United States v. Hay, 231 F.3d 630, 632, 636 (9th Cir. 2000) (holding the profile information included in the affidavit was relevant when appellant received only one internet transfer of nineteen child pornography pictures); United States v. Martin, 426 F.3d 68, 75 (2d Cir. 2005) (accepting trends of a collector when appellant was a member of the child pornography website "girls12–16").
[301] *Weber*, 923 F.2d at 1344–45, *cited with approval in Lacy*, 119 F.3d at 745.
[302] *Weber*, 923 F.2d at 1345 ("It is clear that the 'expert' portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind.").
[303] United States v. Schwinn, 376 F. App'x 974, 979 (11th Cir. 2010) (unpublished) ("[T]he magistrate was entitled to infer that Schwinn was a collector based on other information in the affidavit, including his status as a sex offender and the alleged pattern

the affidavit should draw from the facts in the case to tie the suspect to the relevant class of people.[304]

These "collector" conclusions have received criticism from some judges because they presume guilt by a "person's mere propinquity to others independently suspected of criminal activity."[305] This argument is based on the Supreme Court's *Ybarra v. Illinois* ruling that there was no individual suspicion to search a patron in a public tavern when the warrant only authorized the search of the bartender and tavern for the presence of controlled substances.[306] In *United States v. Perez*, the court found this rationale persuasive when it held that the simple subscription to one free child pornography website where the appellant received no e-mails to be insufficient to establish probable cause to search Perez's home.[307] *Perez* appears analogous to walking into a public tavern located

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of purchasing brief memberships to multiple websites containing child pornography.") (citing *Pappas*, 592 F.3d at 803–04) ("[W]here evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the 'collector' profile to justify including the child pornography collector boilerplate in a search warrant affidavit.").

[304] *Compare Weber*, 923 F.2d at 1341, 1345 (finding the profile insufficient when there was no evidence that appellant actually possessed child pornography, the affidavit did not describe how much material must be purchased for a suspect to be "defined as a 'collector,'" and the affidavit did not even make a "conclusory recital" that the suspect was a pedophile, molester, or collector), *with* United States v. Clark, 668 F.3d 934 (7th Cir. 2012) (finding that appellant fit the collector profile when he showed pornography to one child, sexually assaulted one child, and made sexual advances towards a third child), *and* United States v. Rabe, 884 F.2d 994, 995–97 (9th Cir. 1988) (holding profile information relevant to probable cause determination when appellant was known to actually possess child pornography from a controlled delivery and appellant described a small collection that he possessed while seeking to expand his experience as an "avid photographer" (distinguished in *Weber*, 923 F.2d at 1345–46)), *and* United States v. Henley, 48 M.J. 864, 869–70 (A.F. Ct. Crim. App. 1998) (allowing a magistrate to consider an investigator or expert's opinions in the probable cause analysis).

[305] United States v. Coreas, 419 F.3d 151, 156 (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)); *see also* United States v. Martin, 426 F.3d 68, 81–82 (2d Cir. 2005) (Pooler, J., dissenting), *reh'g denied*, 426 F.3d 83, 89 (2d Cir. 2005) (Pooler, J., dissenting) (cited by United States v. Falso, 544 F.3d 110, 119 (2d Cir. 2008)); United States v. Gourde, 440 F.3d 1065, 1084 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting). *But see Martin*, 426 F.3d at 87–88 (majority opinion) (distinguishing child pornography websites from the tavern in *Ybarra*); United States v. Shields, 458 F.3d 269 (3d Cir. 2006) (discounting the *Ybarra* argument when appellant subscribed to two child pornography websites with a suggestive username in his e-mail address).

[306] 444 U.S. at 91–92.

[307] 247 F. Supp. 2d 459, 462, 482 (S.D.N.Y. 2003) ("The affidavit did not represent or assert that the sole or principal purpose of the Candyman Egroup was to engage in unlawful conduct."). While the first page of the website gave an indication to a potential subscriber that the website may contain illegal content, the viewer would not have seen

in the "bad part of town," unaware that the tavern's primary purpose was drug distribution.

However, the tavern analogy can often be distinguished when additional facts regarding the "tavern" and the "patron" are added to the equation. The Supreme Court did not say that the police could never have probable cause to search the patron. The police must have additional facts to tie the patron to criminal activity when the patron is sitting in an establishment that appears legitimate.[308] When the welcome message indicates the primary purpose of the website is illegal activity, the situation appears to be more akin to a tavern that advertises that its primary purpose is drug trafficking. The *Ybarra* case is only analogous if the website primarily dealt in legal pornography, and the visitor has to delve deep into the site to participate in illegal functions. In *Macomber*, the website's primary purpose was the distribution of illegal child pornography.[309] While the website may have had some legal features, such as a chat room, there was still a fair probability of child pornography receipt by the website's subscribers.

In addition, *Macomber* can be distinguished from *Perez*. In *Macomber*, the appellant paid for his subscription to a website whose name indicated a criminal purpose by using common child pornography terms in "A Secret Lolitas Archive."[310] Then, less than fourteen months later, Macomber was still seeking out child pornography when he ordered two videos from undercover investigators.[311] The inferential step that Macomber was a collector is not tenuous considering the evidentiary standard is less than a fifty-percent probability and Macomber twice paid to receive contraband.[312]

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any illegal content or confirmed such suspicion until the viewer became a subscriber and was granted access to the full website. *Id.* at 464.

[308] *Ybarra*, 444 U.S. at 91 ("[A] person's mere propinquity to others independently suspected of criminal activity does not, *without more*, give rise to probable cause to search that person." (emphasis added)).

[309] *See infra* note 343.

[310] United States v. Macomber, 67 M.J. 214, 215 (C.A.A.F. 2009); *see* United States v. Gourde, 440 F.3d 1065, 1067, 1072 (9th Cir. 2006) (en banc) (finding the conclusion that Gourde fit the collector profile reasonable when Gourde paid to subscribe to a child pornography website called "Lolitagurls.com").

[311] *Macomber*, 67 M.J. at 216.

[312] *Id.* at 220 (allowing the magistrate to draw the inference even when the affidavit "did not expressly conclude or state that Appellant fit the profile").

The agent in *Clayton* did not include any profile information in the affidavit, nor did she provide any information allowing the magistrate to make such an inference.[313] The agent acknowledged in her testimony at the motion to suppress hearing that the investigation produced no "specific information" that Clayton had viewed or downloaded any child pornography to give her an indication that Clayton fit the profile to make it likely that he possessed a "library" of child pornography.[314] The specific request to receive daily e-mails without ever unsubscribing to the e-mail list demonstrates the likely intent of Clayton if the e-mails contained child pornography, but there was no evidence that the e-mails contained child pornography or that Clayton was a member of the group when the one picture of child pornography was posted on the website.[315] Considering the additional facts that the website may have had a legal primary purpose,[316] the website was free, the website did not contain numerous pictures of child pornography, and that Clayton had not participated in any posts or even made one request for child pornography, [317] the evidence did not support an inference that Clayton fit the collector profile.[318] Thus, profile information could not be used to support the affidavit. When considering the weaknesses discussed in Part IV.C (nexus to the place searched) and Part IV.E (sufficiency of website description), the CAAF appears to have been on an affidavit saving mission as opposed to truly analyzing the basis for probable cause.

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[313] *Clayton* Affidavit, *supra* note 221. While the affidavit notes that the group moderator and another individual who posted the one purported child pornography picture were arrested and found to possess child pornography, *id.*, these facts should not be sufficient to impute their crimes on Clayton when the website contained only one photograph of child pornography and no posts by Clayton. Had the website contained numerous postings of illicit images or posts by Clayton indicating possession of child pornography, probable cause would have easily been established.

[314] *Clayton* ROT, *supra* note 105, at 148.

[315] *Id.* at 79, 128–30. The Immigration and Customs Enforcement Agency (ICE) agent assumed that the e-mail digest would have included the one picture of child pornography posted on the website, but there was no confirmation that the digest contained anything more than text. *Id.*

[316] The ICE report did not detail the functions or content of the discussion group other than describing the one illicit image and only four posts over a four month period concerning the desire to receive child pornography, to find a "preteen escort," and the general preference for child pornography. *Id.* at Appellate Exhibit I (ICE Report). There were "numerous photos of graphic Adult Pornography" in the record of trial, but it was unclear if those pictures were taken from the discussion group or Clayton's digital media. *Id.* at Court Order to Seal Exhibits.

[317] *Id.* at 32–34, 67.

[318] *Clayton* is very similar to *Weber* where the court refused to draw the profile inference. *See supra* notes 300–305 and accompanying text.

E. Subscription to a Child Pornography-Based Website

As the internet explosion took hold in the 1990s, the internet became the primary tool to acquire child pornography.[319] This transfer is often accomplished by the creation of pay-for-access websites,[320] barter websites,[321] or discussion group websites[322] where members can share their collections with fellow group members. When these websites are discovered, in cooperation with the host servers such as Google or Yahoo!, investigators seek to acquire the e-mail addresses, physical addresses, and credit card information of the subscribers. Courts have found a reasonable expectation of privacy in private e-mails,[323] but have generally refused to extend similar privacy expectations for information provided to websites.[324]

The point of contention is whether or not simply subscribing to a website that traffics child pornography creates probable cause to search a residence for the actual possession of child pornography. Judge Ryan believes that allowing this result requires too many inferences: that the subscriber has access to a computer, that the computer is in his residence, and that membership results in the downloading and possession of child pornography.[325] However, when dealing with "fair probability" and an evidentiary requirement that is less than fifty-percent, Judge Ryan's

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[319] AKDENIZ, *supra* note 2, at 5–6; LANNING, *supra* note 2, at 119.
[320] *See infra* note 330.
[321] United States v. Grant, 218 F.3d 72, 76 (1st Cir. 2000) (citing the requirement to possess 10,000 images of child pornography to join the group).
[322] United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010); *Clayton* ROT, *supra* note 105, at 81.
[323] United States v. Maxwell, 45 M.J. 406, 419 (C.A.A.F. 1996) ("Expectations of privacy in e-mail transmissions depend in large part on the type of e-mail involved and the intended recipient. Messages sent to the public at large in the 'chat room' or e-mail that is 'forwarded' from correspondent to correspondent lose any semblance of privacy. Once these transmissions are sent out to more and more subscribers, the subsequent expectation of privacy incrementally diminishes.").
[324] United States v. Bynum, 604 F.3d 161, 164 (4th Cir. 2010) (finding no reasonable expectation of privacy in information provided to an internet service provider (citing United States v. Perrine, 518 F.3d 1196, 1204 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy exception.")); United States v. Hambrick, 55 F. Supp. 2d 504, 508 (W.D. Va. 1999) (finding no reasonable expectation of privacy in personal information supplied to an internet service provider when the suspect knowingly reveals his name, address, credit card number, and telephone number (cited by United States v. Allen, 52 M.J. 402, 409 (C.A.A.F. 2000))); United States v. Ohnesorge, 60 M.J. 946 (N-M. Ct. Crim. App. 2005) (same).
[325] *Clayton*, 68 M.J. at 428 (Ryan, J., dissenting).

claim that drawing these inferences requires a "leap of faith"[326] is unsubstantiated.

Some courts have found a simple subscription to a child pornography-based website is insufficient to establish probable cause, but most of these decisions are at the district court level.[327] At the circuit courts of appeal, the results have been nearly unanimous that such a subscription provides a common sense basis that the suspect probably possesses child pornography in his home.[328] As the Sixth Circuit said in *United States v. Wagers*, "evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion the he has likely downloaded, kept, and otherwise possessed the material."[329]

Using the totality of the circumstances test, the courts usually point to some additional information to support their decision. These factors typically include one or more of the following: payment for access,[330] the

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[326] United States v. Macomber, 67 M.J. 214, 223 (C.A.A.F. 2009) (Ryan, J., dissenting).

[327] United States v. Gourde, 382 F.3d 1003 (9th Cir. 2004), *overruled by* 440 F.3d 1065 (9th Cir. 2006) (en banc); United States v. Perez, 247 F. Supp. 2d 459, 471, 481 (S.D.N.Y. 2003) (holding there was no probable cause when appellant subscribed to the Candyman child pornography group nine days before it was shut down when the welcome message did not make it clear that the website was solely for child pornography trafficking); United States v. Strauser, 247 F. Supp. 2d 1135, 1144–45 (E.D. Mo. 2003) (holding there was no probable cause when appellant subscribed to the Candyman child pornography group for over a month without unsubscribing when there was no evidence that he received e-mails of the groups postings); *see also* United States v. Coreas, 419 F.3d 151 (2d Cir. 2005) (upholding warrant solely because of *stare decisis* (citing United States v. Martin, 418 F.3d 148 (2d Cir. 2005), *amended by* 426 F.3d 128 (2d Cir. 2005)). *But see* United States v. Bailey, 272 F. Supp. 2d 822, 824–25 (D. Neb. 2003) (finding that the courts in *Strauser* and *Perez* "fail[ed] to apply the common sense test for probable cause"); United States v. Coye, No. 02 Cr. 732, 2004 WL 1743945, at *3 (E.D.N.Y. Aug. 4, 2004) (unpublished) (finding the *Strauser* court's reasoning unpersuasive).

[328] *See infra* notes 330–38; United States v. Terry, 522 F.3d 645, 649 (6th Cir. 2008) ("[T]he courts universally found that the probable cause threshold had been satisfied because the defendants had purchased *access* to child pornography."); United States v. Garlick, 61 M.J. 346, 352–53 (C.A.A.F. 2005) (Baker, J., concurring) (stating that "[c]onsistent with the majority of courts," he would find probable cause existed when the appellant belonged to the no-fee Candyman website); *cf.* United States v. Hutto, 84 F. App'x 6, 8 (10th Cir. 2003) (unpublished) (finding probable cause solely on the factors that the website's purpose was to share child pornography, child pornography was available, and the appellant voluntarily joined).

[329] 452 F.3d 534, 540 (6th Cir. 2006) (citing United States v. Froman, 355 F.3d 882, 890–91 (5th Cir. 2004); United States v. Martin, 418 F.3d 148, 157 (2d Cir. 2005)).

[330] United States v. Wagers, 452 F.3d 534, 538–43 (6th Cir. 2006) (finding probable

receipt of e-mails from the child pornography website containing illicit images,[331] the number of websites visited,[332] the failure to "unsubscribe" to the website,[333] the website title or welcome message indicating content and purpose,[334] the username of the suspect,[335] the prior conviction of the suspect for child pornography possession,[336] and the requirements to

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cause when appellant had a prior conviction for child pornography and subscribed for one to two months to three paid websites containing child pornography); United States v. Paull, 551 F.3d 516, 522 (6th Cir. 2009) (finding probable cause when the appellant paid for a subscription to a child pornography website); United States v. Frechette, 583 F.3d 374, 380 (6th Cir. 2009) (same); United States v. Schwinn, No. 08-14592, 2010 U.S. App. LEXIS 8851, at *4, *10–11 (11th Cir. Apr. 28, 2010) (unpublished) (finding probable cause when registered sex offender appellant purchased one-month subscriptions to four child pornography websites).

[331] United States v. Bailey, 272 F. Supp. 2d 822, 824–25 (D. Neb. 2003) ("[K]nowingly becoming a computer subscriber to a specialized internet site that frequently, obviously, unquestionably and sometimes automatically distributes electronic images of child pornography [via e-mail] to other computer subscribers alone establishes probable cause for a search of the target subscriber's computer . . . ."); United States v. Kunen, 323 F. Supp. 2d 390 (E.D.N.Y. 2004) (affirming three appellant's convictions because investigators believed all members of the "Candyman" group were receiving e-mails from the illicit website and reversing the conviction of a fourth appellant whose warrant relied on this fact but was executed after investigators knew that all members were not receiving the illicit e-mails).

[332] United States v. Ramsburg, 114 F. App'x 78, 79–80 (4th Cir. 2004) (unpublished) (finding probable cause when appellant registered with two websites whose "primary purpose was to facilitate the exchange and distribution of child pornography" after sending an illicit image to an undercover officer seven years prior).

[333] *Froman*, 355 F.3d at 890; United States v. Martin, 430 F.3d 73 (2d Cir. 2005) (Wesley, J., concurring) (explaining the rehearing petition was denied because the website's illicit purpose was apparent from the welcome message and the appellant had subscribed two weeks prior to the website being shut down without unsubscribing), *cert denied*, 547 U.S. 1192 (2006).

[334] United States v. Martin, 426 F.3d 68, 71, 74–75 (2d Cir. 2005), *reh'g denied*, 426 F.3d 83 (2d Cir. 2005) (finding probable cause when the e-group was titled "girls 12-16" and contained a welcome message inviting the posting of pictures and videos of "11 to 16 yr old[]" girls); United States v. Gourde, 440 F.3d 1065, 1067–71 (9th Cir. 2006) (en banc) (finding probable cause when the appellant paid to subscribe to a website for three months which advertised "Over one thousand pictures of girls age 12-17! Naked Lolita girls").

[335] *Froman*, 355 F.3d at 890 (finding probable cause when the appellant subscribed to a website which sole purpose was to traffic child pornography when he had registered usernames of "Littlebuttsue and Littletitgirly"); United States v. Shields, 458 F.3d 269, 275 (3d Cir. 2006) (finding probable cause when the appellant registered for two child pornography sharing websites with the suggestive username of "LittleLolitaLove").

[336] United States v. Wilder, 526 F.3d 1, 5–7 (1st Cir. 2008) (finding probable cause when convicted child pornography possessor paid for a subscription to the same website as Macomber—"LUST GALLERY—a Secret Lolita Archive").

become a member.[337] Probable cause has been found even when it was not conclusive that the website exclusively contained illegal images.[338] However, the affidavit must give sufficient facts to demonstrate the features of the website are designed to make child pornography acquisition an easy process.[339]

In *Macomber*, the appellant purchased a subscription to a website with the sexually suggestive name of "LustGallery.com-A Secret Lolitas Archive."[340] Had Macomber not subsequently attempted to purchase two child pornography videos from undercover agents, the CAAF would have had to give the staleness analysis more attention in finding probable cause to search Macomber's residence. The CAAF would likely still have found the fourteen-month old purchase to not be stale, consistent with the circuit court's decisions discussed above, [341] as the facts meet the common sense test required by *Illinois v. Gates*.[342] With a paid subscription to a website that contained thousands of images of child pornography, to include naked children on the preview page,[343] it would seem nearly impossible that Macomber accidently gained access to the site. When combined with the title words "Lolitas Archive," it is hardly a stretch of the imagination to conclude that the subscriber was attempting to obtain child pornography. These simple conclusions result in the "fair probability" that the suspect possesses child pornography.

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[337] United States v. Grant, 218 F.3d 72, 76 (1st Cir. 2000) (finding that the requirement to possess 10,000 images of child pornography to join the group established probable cause to search appellant's home). *But see* United States v. Falso, 544 F.3d 110, 121 (2d Cir. 2008) (finding no probable cause when it could not be confirmed that the appellant actually accessed the child pornography website).

[338] United States v. Wagers, 452 F.3d 534, 538–39 (6th Cir. 2006).

[339] United States v. Falso, 544 F.3d 110, 121 (2d Cir. 2008); *see* United States v. Gourde, 440 F.3d 1065, 1067 (9th Cir. 2006) (en banc) (citing the affidavit which described the website's primary features).

[340] United States v. Macomber, 67 M.J. 214, 216 (C.A.A.F. 2009). The word "lolita" is commonly associated with child pornography. United States v. Allen, 53 M.J. 402, 407 (C.A.A.F. 2000).

[341] *See supra* notes 213–19 and 336.

[342] *See supra* Part II.A.3 (discussing the test instituted in *Illinois v. Gates*).

[343] United States v. Wilder, 526 F.3d 1, 3 (1st Cir. 2008) (describing the same website that Macomber visited as charging $57.90 per month, portraying naked children on the preview page, and readily displaying thousands of images of child pornography upon entering the website).

The problem with basing probable cause solely on the website subscription in *Clayton* is that the investigators did not confirm any of the additional factors that the circuit courts relied on in finding probable cause.[344] The investigation did not discover a large number of contraband images, how long Clayton had been a member, if Clayton was a member when the picture was posted, or whether the daily e-mail digest would have even contained that picture.[345] The ICE agent confirmed that the postings indicated that Clayton did not make any requests to receive or offers to distribute child pornography.[346] The only known access of the free website was the one time Clayton requested a digest,[347] and the ICE report did not give sufficient details of the website to determine its primary purpose.[348] In addition, ignoring the recommendation of the ICE agent, the military investigator did not subpoena Clayton's Yahoo! records to determine what digest e-mails Clayton had received or if Clayton had contact with members of the group outside the public postings.[349] This simple subpoena could have added significant depth to the evidence presented to the magistrate. With the lame excuse that the investigator did not want Clayton to be tipped off and destroy evidence,[350] the investigator was content to "cut and paste" portions of

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[344] *See* cases *supra* notes 331–38 and accompanying text. Clayton did not pay for access, there was no confirmation of illicit images in any e-mails, Clayton was not found to have visited other child pornography websites, it was unknown if Clayton was a member long enough to "unsubscribe," the website did not have a welcome message inviting the posting of illicit images, Clayton did not have an illicit username, Clayton did not have criminal history of sexual deviance, and there were no special requirements to become a member.

[345] *Clayton* ROT, *supra* note 105, at 59, 79–80, 128–30.

[346] *Id.* at 67.

[347] *Id.* at 161. Weighing in favor of probable cause is that Clayton took proactive steps to become a member of the website. Clayton did not simply click a few buttons and become a member. Clayton had to be approved by the moderator from whom Clayton requested to receive a daily e-mail containing up to twenty-five of the group's daily postings. United Sates v. Clayton, 68 M.J. 419, 422 (C.A.A.F. 2010).

[348] *See supra* note 316 (describing only four posts over a four-month time period).

[349] *Clayton* ROT, *supra* note 105, at 74, 132–33. Had the investigator found e-mail communication with other group members, this would have provided a significant indication that Clayton was actively using the website to find child pornography trading partners. The investigator did not tell the magistrate that the ICE agent recommended additional investigation. *Id.* at 135.

[350] *Id.* at 103. This excuse is illogical as Clayton was out of the country and not scheduled to return for nearly two weeks. *Id.* If Clayton had returned before the evidence was obtained, Clayton's room could have been secured until Yahoo! responded and the magistrate ruled on the search request. United States v. Hall, 50 M.J. 247 (C.A.A.F. 1999).

the ICE report into the affidavit[351] in hopes of receiving the search authorization without additional work or concern for the possible encroachment on Fourth Amendment privacy rights. The investigator's failure to adequately investigate Clayton's participation in the website made the probable cause conclusion mere speculation.

Thus, Macomber's and, assuming a thoroughly investigated case, Clayton's "status as a member manifested [their] intention and desire to obtain illegal images."[352] This well-supported conclusion leads to five common arguments against finding probable cause in website subscription cases. While these arguments are more suited for trial on the merits, they are often cited by disapproving judges and commentators who argue against finding probable cause based on website subscription.

1. "Ooops! I Didn't Mean to Subscribe to that Filth!"

An argument against finding probable cause in website subscription scenarios is that a person may have signed up for a group in which he did not know the true purpose. After discovering the true purpose, the subscriber never returns to the website and inadvertently fails to unsubscribe. The court in *United States v. Strauser* analogized this situation to finding probable cause to search a person who subscribes to a "drug legalization organization or newsletter."[353] Such a hypothetical subscription is far off the mark from being analogous to child pornography possession unless that newsletter includes a little baggie of an actual illegal substance as an insert. If the newsletter delivered actual illegal substances, it would seem likely that an investigator would find that illegal substance where the newsletter was delivered, providing probable cause to obtain a search warrant. When the website required payment or the subscriber chose to receive e-mail digests containing child pornography from the group, this "accidental" subscription scenario seems even less likely.

In addition, the argument ignores the standard for finding probable cause. It has long been settled that probable cause is an evidentiary showing of less than fifty-percent and the investigator need not exclude

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[351] *Clayton* ROT, *supra* note 105, at 133.
[352] United States v. Gourde, 440 F.3d 1065, 1070 (9th Cir. 2006) (en banc).
[353] 247 F. Supp. 2d 1135, 1144 (E.D. Mo. 2003).

every innocent purpose behind the information.[354] Critics of this evidentiary basis have not shown that a majority of subscribers who are searched do not possess child pornography, which would then negate the fair probability assertion. Lacking this information, applying a "practical, common sense" analysis would indicate to any reasonable investigator that the subscriber most likely intentionally became a member specifically because the website provided access to child pornography. While some innocent citizens may undergo the invasiveness of a search, it hardly flies in the face of the Bill of Rights when investigators use magistrates like the Fourth Amendment intended.

2. "I Just Wanted to Use the Chat Room!"

Even "repugnant" speech is protected by the First Amendment.[355] But "[t]here is no requirement for a higher standard of probable cause for material protected by the First Amendment."[356] A "fair probability" that child pornography is located in the home is all that is required.[357] The court in *United States v. Coreas* argued that probable cause did not exist because Coreas may have been using the legal features of the website while abstaining from downloading child pornography.[358] The simple fact that a child pornography website has some lawful features does not significantly alter the common sense probability that a person who subscribes to such a website, which primary purpose is to trade child pornography, is attempting to acquire child pornography, particularly when combined with additional information to support such a conclusion.[359] Holding otherwise is injecting a "hypertechnical" thought process to the analysis; just the type of analysis the Supreme Court rejected in *Gates*.[360]

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[354] *Cf.* Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983) (discussing the probability standard and acknowledging the possibility that innocent behavior may still result in probable cause).
[355] United States v. Coreas, 419 F.3d 151, 156–57 (2d Cir. 2005).
[356] United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000) (citing New York v. P. J. Video, Inc., 475 U.S. 868 (1986)).
[357] *Id.*
[358] *Coreas*, 419 F.3d at 156–57.
[359] *See supra* notes 330–38 and accompanying text; United States v. Terry, 522 F.3d 645, 649 (6th Cir. 2008) ("[T]he courts universally found that the probable cause threshold had been satisfied because the defendants had purchased *access* to child pornography.").
[360] *See supra* Part III.A.3 (discussing the standard established by *Illinois v. Gates*).

3. "But I Was Trying to Catch the Real Perverts!"

The "concerned civilian" defense sometimes arises.[361] This defense is also without merit as it relates to probability analysis. In no other criminal enterprise does a non-law enforcement person get a free pass to unilaterally engage in a criminal enterprise with the purpose of ferreting out crime.[362] The U.S. Code does not create such an exception,[363] nor should the judiciary find that a few citizens' attempted "good deeds" diminishes probable cause. These citizens consciously put themselves at risk of search, seizure, and prosecution, and they should present their excuses to those who determine if their case will go to trial.

4. "But I Was Doing Research!"[364]

In 1996, freelance reporter Lawrence Matthews was caught sending and receiving child pornography over the internet.[365] Mr. Matthews presented the defense that he was conducting research for an article that he was supposedly planning to write.[366] The Fourth Circuit found no special First Amendment protection for journalists and affirmed his conviction.[367] Judge Pooler of the Second Circuit offered the unsupported, and illogical, possibility that a concerned parent could be caught while researching "potential threats to his children."[368] While this scenario makes little sense,[369] 18 U.S.C. § 2252 does not allow for a

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[361] LANNING, *supra* note 2, at 123–26 (discussing the reasons why some "concerned civilians" find illicit images and seek legal justification for their involvement).

[362] Informants sometimes purchase controlled substances, but these acts are done in conjunction with law enforcement as opposed to solo vigilantes.

[363] 18 U.S.C. § 2252(c) (2006) (creating an affirmative defense only when the recipient immediately destroys or reports to law enforcement the possession of less than three files of child pornography).

[364] In 2003, rock guitarist Pete Townshend of "The Who" was arrested for subscribing to a pay-for-access website. Townshend claimed to have been doing research for his autobiography. Warren Hoge, *British Rock Star Receives Lesser Punishment in Internet Case*, N.Y. TIMES, May 8, 2003, at A7.

[365] United States v. Matthews, 209 F.2d 338, 340 (4th Cir. 2000).

[366] *Id.* (noting Mr. Matthew's lack of notes or research on the subject of child pornography).

[367] *Id.* at 350.

[368] United States v. Martin, 426 F.3d 68, 82–83 (2d Cir. 2005) (Pooler, J., dissenting).

[369] If this scenario were to occur, the parent would likely be ecstatic that law enforcement was proactively seeking out and shutting down those who would traffic such material. Regardless, no common sense reason is apparent as to why the parent would need to download and possess child pornography to conduct such research. Judge Pooler also

research exception, and the Fourth Circuit rejected the "reporter conducting research" argument as a valid defense.[370] Thus, as these possibilities have not been shown to even account for a minute number of subscribers, this possibility should have no part in the probable cause analysis of whether a search is warranted.

5. "There is No Proof of Actual Possession!"

Judge Ryan claims that mere access to child pornography does not provide probable cause to show that a suspect actually possesses child pornography.[371] A closely related argument is that the subscriber just desires to view the material in order to avoid going to jail for possession.[372] While the CAAF has held that simple viewing of child pornography does not constitute possession, the court's holding was limited since the accused viewed the child pornography through a briefcase portal on a computer located in an internet café.[373] Granted, unlike a case where an e-mail is intercepted or a computer's contents are viewed through a peer-to-peer portal, the subscription itself does not conclusively mean that illicit images have been downloaded. If the argument is simply that the agent did not make the magistrate aware of the presumptions that subscribers (1) are highly likely to possess child pornography, and (2) possessors usually do so in their own home, the point is valid. However, when no evidence has been presented in the public debate to the contrary, the argument that a subscription to a website full of illegal images does not provide at least something near fifty-percent probability of possession is ludicrous.[374] Just because the

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equates the majority's holding to mean the government could search the home of a person who subscribes to a website which unlawfully traffics music. *Id.* at 83. This is not an analogous situation because the possession of music is not unlawful nor does it indicate obtaining the music in an unlawful manner.

[370] *Matthews*, 209 F.2d at 347.

[371] United States v. Macomber, 67 M.J. 214, 222 (C.A.A.F. 2009) (Ryan, J., dissenting).

[372] United States v. Gourde, 440 F.3d 1065, 1077–84 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting).

[373] United States v. Navrestad, 66 M.J. 262, 267–68 (C.A.A.F. 2008) (this holding is further limited because the trial court used the definition of possession of controlled substances, Article 112a, Uniform Code of Military Justice, and charged the appellant for possession of child pornography under Article 134, clause 1 or 2, for acts to the prejudice of good order and discipline or of a nature bringing discredit to the armed forces).

[374] *Gourde*, 440 F.3d at 1071 (majority opinion) ("It neither strains logic nor defies common sense to conclude, based on the totality of these circumstances, that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer.").

subscriber may be skirting the line of criminality does not invalidate the common sense conclusion that the subscriber possesses the contraband in the one area that most possessors store their illegal images. Judge Ryan's standard appears to seek evidence indicating possession by a clear and convincing evidence standard while ignoring the "principles of *Gates*—practicality, common sense, a fluid and nontechnical conception of probable cause . . . ."[375]

F. Sufficiency of Description

As part of the probable cause analysis, the magistrate must receive sufficient information to determine that evidence of a crime, child pornography for example, is likely located in a certain location. The circuit courts have generally required at least a detailed description of the suspected child pornography so that the magistrate can make his own determination on the illegality of the alleged contraband.[376] This requirement is to prevent the magistrate from simply ratifying the "bare conclusions of others."[377]

The CAAF stated in *United States v. Monroe* that it is "preferable" that the agent include exemplars or a detailed description of the pictures on which the affidavit is based.[378] As pictures "speak for themselves,"[379] this requirement significantly bolsters the finding of probable cause.[380]

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[375] *Id.* (citing United States v. Gates, 462 U.S. 213, 246 (1983)).

[376] *Compare* United States v. Lowe, 516 F.3d 580, 586 (7th Cir. 2008) (finding a detailed description sufficient), *and* United States v. Chrobak, 289 F.3d 1043, 1045 (8th Cir. 2002) (finding sufficient the agent's descriptions that the pictures "depict sexually explicit conduct involving children under the age of 16," and "graphic files depicting minors engaged in sexually explicit conduct"), *with* United States v. Doyle, 650 F.3d 460, 73-74 (4th Cir. 2011) (finding insufficient the agent's description of an image as "nude children"), *and* United States v. Brunette, 256 F.3d 14, 18–19 (1st Cir. 2001) (finding insufficient the agent's description of an image as "'prepubescent boy lasciviously displaying his genitals'").

[377] *Brunette*, 256 F.3d at 18 (quoting *Gates*, 462 U.S. at 239).

[378] 52 M.J. 326, 332 (C.A.A.F. 2000); *see also* United States v. Miknevich, 638, F.3d 178, 184 (3d Cir. 2011) (same recommendation). When dealing with a search for obscene materials, the Supreme Court has stated that a verbal description is sufficient, as a magistrate does not have to actually view the alleged obscene material to issue the warrant. New York v. P.J. Video, Inc., 475 U.S. 868, 874 (1986).

[379] *Id.* Considering the respect for the victims depicted in child pornography, the need to secure the material, and the court's acceptance of detailed descriptions, the author does not recommend attaching child pornography to the affidavit.

[380] *See* United States v. Prideaux-Wentz, 543 F.3d 954, 959–60 (7th Cir. 2008) (finding

While the CAAF went on to find the agent's terminology of "graphic pornographic photographs" adequately communicated the picture's content, the CAAF discouraged future use of such bare conclusions.[381]

However, affidavits continue to include barely sufficient descriptions of the pictures on which probable cause is based. In *United States v. Gallo*, the CAAF allowed for the search of the appellant's home when, without further description, "images of children 'in various sexual encounters'" were found on the appellant's work computer.[382] Likewise, in *United States v. Orona*, the Air Force Criminal Court of Appeals took at face value that the agent had "personally verified that the [web]site contained child pornography."[383]

Interestingly, although the picture files were never opened, Judge Ryan joined the majority in *United States v. Leedy* in finding that one file name could provide sufficient information to indicate its likely content even when no actual child pornography had been seen.[384] The CAAF acknowledged that requiring a picture or description in all circumstances would in effect require conclusive proof of possession.[385] Although the CAAF stated that an affidavit that "describes th[e] pornography is more likely to substantiate probable cause than one that does not,"[386] it is also clear that the military courts have ignored the circuit court's decisions by not requiring any more than an experienced agent's conclusions.

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that the affidavit sufficiently established the agent's experiences when considering, among other things, the detailed descriptions the agent provided of the suspected child pornography and erotica images).

[381] *Id. But see* Nebraska v. Nuss, 781 N.W.2d 60, 65–68 (Neb. 2010) (holding an affidavit was insufficient to establish probable cause when the affidavit provided "mere conclusions" as opposed to a "detailed verbal description" or photographs (citing *Brunette*, 256 F.3d at 18–19 (same))).

[382] 55 M.J. 418, 420 (C.A.A.F. 2001).

[383] No. ACM 36968, 2009 CCA LEXIS 345, at *12–13 n.4 (A.F. Ct. Crim. App. Sept. 14, 2009) (unpublished).

[384] 65 M.J. 208, 215–17 (C.A.A.F. 2007) (holding a picture titled "14 Year Old Filipino Girl" sufficiently indicated the possible presence of child pornography when the file was located among other files that were sexually explicit); *see also* United States v. Miknevich, 638 F.3d 738, 782–85 (3d Cir. 2011) (finding probable cause based on explicit file name and Secure Hash Algorithim that had been previously confirmed as child pornography).

[385] *Id.* at 217 (quoting United States v. Eichert, 168 F. App'x 151, 152 (9th Cir. 2006) (unpublished)).

[386] *Id.*

In *Macomber*, when the affidavit "described in fairly graphic detail" the child pornography, the magistrate was able to draw his own inferences to find probable cause.[387] In *Clayton*, the ICE report provided a minimally detailed description that the one image of child pornography depicted "a nude minor female and a nude adult male engaged in sexually explicit conduct."[388] While this description would likely be deemed insufficient in some jurisdictions,[389] the description meets the lower standard established by the CAAF,[390] which allowed the magistrate to determine that Clayton at least had access to one illicit image. Along with the detailed description of two posts requesting child pornography,[391] this report gave the CAAF enough evidence to find good faith reliance by the investigator, but the affidavit's other weaknesses should not have been determined sufficient for a finding of probable cause.

G. Sufficiency of Particularity

The Fourth Amendment requires that the warrant "particularly describe[e] the place to be searched, and the persons or things to be seized."[392] In *United States v. Grubbs*, the Supreme Court stated that "[the Fourth Amendment] specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.'"[393] In order to prevent investigators from executing warrants akin to the general warrants of the mid-1700s,[394] this description may not be "general or overbroad."[395] If these requirements are only met in the affidavit, the affidavit must specifically be incorporated in the warrant.[396] These requirements are significantly

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[387] United States v. Macomber, 67 M.J. 214, 217, 220 (C.A.A.F. 2009).
[388] *Clayton* ROT, *supra* note 105, at Appellate Exhibit I (ICE Report). The military investigator briefing the magistrate never saw the image. *Id.* at 124.
[389] *See* cases cited *supra* notes 376, 381 and accompanying text.
[390] *See* cases cited *supra* notes 381–83 and accompanying text.
[391] *Clayton* ROT, *supra* note 105, at Appellate Exhibit I (ICE Report).
[392] U.S. CONST. amend. IV.
[393] 547 U.S. 90, 97 (2006).
[394] Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").
[395] United States v. Allen, 53 M.J. 402, 408 (C.A.A.F. 2000).
[396] United States v. Tracey, 597 F.3d 140 (3d Cir. 2010); United States v. Allen, 625 F.3d

tied to probable cause because the inability to sufficiently describe the place to be searched and the things to be seized indicates a lack of probable cause and gives the appearance of a general warrant.[397]

In child pornography cases, a somewhat generic description of "computer equipment" is permissible when a more detailed description cannot be obtained.[398] This allowance is granted because it would often be impossible for an agent to know on which exact piece of computer equipment that child pornography is held.[399] The description may also use statutory language, such as "images of child pornography," if defined in the statute.[400]

The affidavits and authorizations to search in *Macomber* and *Clayton* were sufficient to meet the Fourth Amendment requirements. In *Macomber*, the affidavit sought to search the appellant's dormitory room,[401] and the defense did not raise any issue concerning the sufficiency of the descriptive language regarding the items to be seized.[402] Likewise, in *Clayton*, the search and seizure authorization specifically authorized the investigator to search Clayton's room for "child pornography material in violation of 18 U.S.C. § 2252A [on] any computer files, hardware, or media . . . ."[403] This language was sufficient

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830 (5th Cir. 2010).

[397] LAFAVE, *supra* note 272, § 4.6(a).

[398] Thomas K. Clancy, *The Search and Seizure of Computers and Electronics Evidence: The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 MISS. L.J. 193, 199–202 nn.14–17 (2005) (compiling cases discussing the sufficiency of language in warrants); *see* United States v. Monroe, 52 M.J. 326, 329 (C.A.A.F. 1999) (detailing search authorization which allowed seizure of "all computer related data media suspected to contain pornography or child pornography"); United States v. Cote, No. 2009-15, 2010 CCA LEXIS 186, at *2 (A.F. Ct. Crim. App. Apr. 6, 2010) (unpublished) (detailing the affidavit which sought "electronic devices and storage media"). *See generally* CCIPS, *supra* note 226, at 242–46 (sample affidavit with proposed language for child pornography cases).

[399] United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997).

[400] United States v. Weber, 923 F.2d 1338, 1342–43 (9th Cir. 1990) (citing VonderAhe v. Howland, 508 F.2d 364, 369–70 (9th Cir. 1974) ("[T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971))).

[401] United States v. Macomber, 67 M.J. 214, 217 (C.A.A.F. 2009) (disregarding any possible issues with the description of the items to be seized).

[402] Brief in Support of Petition Granted, United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009) (No. 08-0072), 2008 WL 2214359.

[403] U.S. Dep't of Army, DA Form 3745, Search and Seizure Authorization (20 Apr. 2006) (on file with author). The standard form used by military magistrates to authorize

to instruct the investigator where she could search and what she could seize.

V. Conclusion

While *Macomber* and *Clayton* may appear to be limited to the facts of each case, the prevalence of case law in the circuit courts, and the growing trade of child pornography on the internet, indicate that investigators will see more of these types of case. The investigator, supervising trial counsel, and approving magistrate must ensure the affidavits sufficiently detail the information required to establish probable cause in order to protect the Constitutional rights of our servicemembers.

Military justice practitioners can learn from *Macomber*. When the agents received information that was more than a year old, even though some courts would have found probable cause at that point, the agents conducted an undercover sting operation to ensure that they could present sufficient information to the magistrate. The agents then provided a detailed twelve-page affidavit to support their search request.[404]

Judge Ryan's concerns are valid that the CAAF gave a *de minimis* review of the Fourth Amendment issue in *Clayton*.[405] While the government won a narrow 3-2 decision, the decision would have been more palatable if the court had not relied on probable cause sufficiency, but based their conclusion primarily on the substantial deference the courts grant both magistrates and the warrant process, or even the good faith reliance of the investigator. Thus, military justice practitioners should be careful to not rely too heavily on *Clayton's* finding sufficiency of probable cause. While the meager two-page affidavit provided enough information so that the search authorization did not resemble a "general warrant" used prior to the Bill of Rights,[406] using the totality of the circumstances test, the amount of information presented was closer to "bare suspicion" than a "fair probability" that Clayton possessed child pornography in his Kuwaiti quarters. The agent did little more than pass

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searches specifically incorporates the affidavit as part of the authorization. *See id.* The affidavit in *Clayton* requested a similar search. *Clayton* Affidavit, *supra* note 221, at 2.

[404] Brief in Support of Petition Granted at 6, United States v. Macomber, 67 M.J. 214 (C.A.A.F. 2009) (No. 08-0072), 2008 WL 2214359.

[405] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010) (Ryan, J., dissenting).

[406] *Clayton Affidavit*, *supra* note 221.

information from ICE to the magistrate; consequently, the agent failed to establish a nexus to the place searched, inadequately described the website that Clayton joined, and presented no evidence that Clayton was a collector, which limited the inferences the magistrate could make in finding probable cause. Like in *Macomber*, investigators should be trying to clear the probable cause hurdle with as much evidence as possible, to include the establishment of a nexus to the place searched, as opposed to pulling together just enough information to satisfy the magistrate.

The CAAF should realign its Fourth Amendment standard on child pornography with that established by the circuit courts. Declaring that the nearly bare bones *Clayton* affidavit provided sufficient evidence to establish probable cause sends a bad message to our investigative community. The CAAF should not condone minimum effort in investigations which pierce the security and liberty accorded to our servicemembers by the Fourth Amendment. The probable cause standard is not an overwhelming one, but it is a standard that must be upheld in order to protect the freedoms accorded to us all.

Appendix

Probable Cause Analysis Checklist for Child Pornography Search Authorizations

Over the past two decades, the federal and military courts have heard countless cases involving the sufficiency of evidence to substantiate probable cause as the basis of a search authorization or warrant. This Appendix is a compilation of some of those cases recognizing common factors used to establish probable cause in child pornography cases. The military justice practitioner—investigator, trial counsel, magistrate or defense counsel—can use this list as a starting point in evaluating the sufficiency of probable cause. Under the totality of the circumstances test, no one piece of evidence is necessarily conclusive. Only when looking at all the factors as they interrelate with each other can a probable cause determination be made. Not knowing what piece of evidence the appellate courts might find relevant,[407] the affidavit should be as thorough as possible.[408] The below factors are a list of some factors that courts have relied on in finding probable cause.

The Standard: A probable cause determination is "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a *fair probability* that contraband or evidence of a crime will be found in a particular place."[409] "[Probable cause] does not demand any showing that such a belief be correct or more likely true than false."[410]

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[407] United States v. Krupa, 658 F.3d 1174 (9th Cir. 2011) (finding relevant to the probable cause analysis that the home contained fifteen computers, the home was under the control of a non-resident, and the home was in "complete disarray").

[408] *See* U.S. DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROP. SECTION, CRIMINAL DIV., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 241 (3d ed. 2009), *available at* http://www.justice.gov/criminal/cybercrime/ssmanual/ ssmanual2009.pdf (sample affidavit with proposed language for child pornography cases).

[409] Illinois v. Gates, 462 U.S. 213, 238 (1983) (emphasis added).

[410] United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (holding that probable cause "requires more than bare suspicion," but less than a fifty-percent probability).

1. Professional Experience of Agent or Consultants[411]

2. Description of Material being used to Establish Probable Cause
   a. Description of titles and how they fit with other titles[412]
   b. Description or exemplar of images, videos or other files[413]

3. Pedophile/Collector Profile and Facts Linking Suspect to Profile[414]

4. Nexus to Place Searched
   a. Direct Evidence – Roommate, Friend, or Other Person Viewed[415]
   b. Peer-to-Peer access to personal computer with description of the P2P process[416]
   c. Sent e-mails[417]
   d. Received e-mails[418]
   e. IP address[419]
   f. Home address connected to child pornography[420]
   g. Computer ownership and internet service[421]
      - If unable to confirm, data indicating likelihood of ownership and internet access
      - U.S. Census Bureau: >80% of employed persons have internet access at home[422]
   h. Expert opinion on most likely location for storage[423]
      - NJOV Study, NCMEC – 91% of child pornography found on

[411] United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001); United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007).
[412] *Leedy*, 65 M.J. at 215–17.
[413] United States v. Monroe, 52 M.J. 326, 332 (C.A.A.F. 1999).
[414] United States v. Weber, 923 F.2d 1338, 1341–45 (9th Cir. 1990); United States v. Pappas, 592 F.3d 799, 804 (7th Cir. 2010); United States v. Clark, 668 F.3d 934 (7th Cir. 2012); United States v. Macomber, 67 M.J. 214, 220 (C.A.A.F. 2009).
[415] United States v. Camnetar, No. 36448, 2009 CCA LEXIS 40 (A.F. Ct. Crim. App. Jan. 30, 2009) (unpublished).
[416] United States v. Saxman, 69 M.J. 540, 541 (N-M. Ct. Crim. App. 2010).
[417] United States v. Terry, 522 F.3d 645, 648 (6th Cir. 2008).
[418] United States v. Kelley, 482 F.3d 1047, 1051–55 (9th Cir. 2007).
[419] United States v. Vosburgh, 602 F.3d 512, 526–27 (3d Cir. 2010).
[420] United States v. Macomber, 67 M.J. 214, 219–20 (C.A.A.F. 2009).
[421] United States v. Clayton, 68 M.J. 419, 428 (C.A.A.F. 2010).
[422] U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES (2009), *available at* http://www.census.gov/ population/www/socdemo/ computer/2009.html.
[423] United States v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006); United States v. Gallo, 55 M.J. 418, 422 (C.A.A.F. 2001).

home computer, 7% on work computer, nearly 18% on both[424]

i. Controlled delivery[425]

j. Transfer of child pornography from work computer to external media[426]

k. Enticement and sexual abuse of a minor[427]

5. Information from an "Informant"

a. "Concrete indicia of reliability"[428]

b. No ulterior motive[429]

6. Subscription to a Child Pornography Website

a. Website's name and welcome message indicating illicit purpose[430]

b. Description of website features indicating ease of access to child pornography[431]

c. Username of a deviant sexual nature[432]

d. Active participation by posting or commenting on website[433]

e. Number of websites joined[434]

f. Paid subscription[435]

g. Request to receive e-mails with description of contents[436]

7. Staleness (unlike most contraband, case law supports "years" old information when dealing with child pornography)

a. Dates of involvement in child pornography for staleness analysis[437]

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[424] Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 7–8 (2005), http://www.missingkids.com/en_US/publications/NC144.pdf.

[425] United States v. Grubbs, 547 U.S. 90 (2006); *Macomber*, 67 M.J. at 217.

[426] *Gallo*, 55 M.J. at 421–22.

[427] United States v. Colbert, 605 F.3d 573 (8th Cir. 2010). *But see* United States v. Doyle, 650 F.3d 460 (4th Cir. 2011).

[428] United States v. Cowgill, 68 M.J. 388, 393–94 (C.A.A.F. 2010).

[429] United States v. Leedy, 65 M.J. 208, 216–17 (C.A.A.F. 2007).

[430] United States v. Martin, 426 F.3d 68, 71–75 (2d Cir. 2005).

[431] United States v. Falso, 544 F.3d 110 (2d Cir. 2008).

[432] United States v. Froman, 355 F.3d 882, 890 (5th Cir. 2004).

[433] United States v. Clayton, 68 M.J. 419, 425 (C.A.A.F. 2010).

[434] United States v. Shields, 458 F.3d 269, 275 (3d Cir. 2006).

[435] United States v. Gourde, 440 F.3d 1065, 1070–71 (9th Cir. 2006); United States v. Macomber, 67 M.J. 214, 220 (C.A.A.F. 2009).

[436] United States v. Bailey, 272 F. Supp. 2d 822, 824–25 (D. Neb. 2003); *Clayton*, 68 M.J. at 424.

[437] *Macomber*, 67 M.J. at 220.

b. Hoarding nature of pedophiles and retention evidence[438]
c. Ability to retrieve deleted files with forensic tools[439]
d. "Infinite Life Span" of child pornography[440]

8. Specificity on Where to Search and What to Seize[441]

9. Magistrate's Action
a. Neutral and detached[442]
b. Does not act as "rubber stamp"[443]

[438] United States v. Perrine, 518 F.3d 1196, 1206 (10th Cir. 2008).
[439] United States v. Allen, 625 F.3d 830, 843 (5th Cir. 2010); United States v. Leedy, 65 M.J. 208, 216 (C.A.A.F. 2007).
[440] United States v. Burkhart, 602 F.3d 1202, 1207 (10th Cir. 2010).
[441] U.S. CONST. amend. IV; United States v. Allen, 52 M.J. 402, 408 (C.A.A.F. 2000).
[442] United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996).
[443] *Leedy*, 65 M.J. at 217–18.