New Developments in Search and Seizure and Urinalysis

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Introduction

"I ordered the inspection of my soldiers after I got information that some of my men were using crack. I did it because we drive tanks, and I can't take that risk."

—Commander

"I stopped him because he didn't use his turn signal. And yes, the real reason I stopped him was because I thought his passenger was selling heroin in the food court, and I wanted to get him out of the car and see what would develop."

—Military Policeman

Primary purpose and pretext once again loomed large over Fourth Amendment jurisprudence. As the fictional quotations above suggest, decisions this year helped to clarify the nature and extent of a commander's authority in conducting urinalysis inspections and the scope and authority of police in conducting traffic stops.

Notwithstanding these and other important cases, it was a slow year for the Fourth Amendment. Of the few road signs erected by the courts, the most visible continues to be the push, highlighted above, for even broader police authority over motorists and extensions of these new rules into other search and seizure contexts. Although there are no discernible trends or patterns flowing from the Court of Appeals for the Armed Forces (CAAF) or the service courts, the cases contain important developments for trial lawyers and law enforcement organizations.

The Touchstone

The Supreme Court maximizes every opportunity to remind practitioners that the touchstone of the Fourth Amendment is reasonableness.[1] This point was made abundantly clear in two important cases this year. In both *Chandler v. Miller*,[2] a suspicionless urinalysis case from Georgia, and *Richards v. Wisconsin*,[3] a no-knock warrant case, the Court reemphasized that the reasonableness of a search is not always dependent on whether there is a warrant supported by probable cause. Indeed, when viewed together, the cases crystallize the overarching prerequisite of reasonableness in Fourth Amendment analysis. Only with a focus on reasonableness can one explain why a suspicionless search might be lawful and why a search made pursuant to a warrant might be unlawful. Both trial and defense counsel, therefore, must understand the role that reasonableness plays in the garden-variety criminal investigation.

Suspicionless Search, Special Needs, and Primary Purpose

In *Chandler*, the State of Georgia enacted a statute which required political candidates to submit a urine sample as a prerequisite to candidacy. This requirement was not linked to identified abuse. Thus, the state had neither reasonable suspicion nor probable cause to believe any particular candidate was using drugs.[4] Georgia explained that, although unable to demonstrate a drug problem among candidates, elected officials are responsible for important affairs of state, to include public safety, the economic well-being of the citizens, and law enforcement. Such a prerequisite ensures that officials exercise sound judgment in these matters and are not subject to blackmail as a result of drug use. This was Georgia's expressed "special need."[5]

1. *See* Ohio v. Robinette, 117 S. Ct. 417 (1996) (stating, "We have long held that the 'touchstone of the Fourth Amendment is reasonableness'"); Florida v. Jimeno, 500 U.S. 248, 250 (1991). The Fourth Amendment has two principal clauses. The first clause provides that citizens will be free from *unreasonable* searches and seizures. U.S. CONST. amend. IV, cl. 1. The second clause requires that warrants will issue only if based upon probable cause, supported by oath, and describing with particularity the place to be searched. *Id*. cl. 2. Historically, these two clauses were viewed as interdependent, that is, that one modified the other. A search could only be *reasonable* if it was done pursuant to a *warrant* based on *probable cause*. The modern view finds the two clauses utterly independent of one another. A search can be entirely reasonable and not be done pursuant to a warrant. The reasonableness prong, therefore, has emerged as the overarching principal of the Fourth Amendment. *See generally id.* amend. IV.

2. 117 S. Ct. 1295 (1997).

3. 117 S. Ct. 1416 (1997).

4. *Chandler*, 117 S. Ct. at 1299.

5. *Id.* at 1299-1300.

Certain candidates objected,[6] arguing that this suspicionless search was unreasonable and in violation of the Fourth Amendment. The district court and the Court of Appeals for the Eleventh Circuit disagreed and found it a reasonable search under the Fourth Amendment. The Eleventh Circuit found that Supreme Court precedent permits exceptions to normal Fourth Amendment requirements[7] for individualized suspicion if special needs, beyond the normal need for law enforcement, are identified. Under the reasonableness prong of the Fourth Amendment, a context-specific inquiry is made to assess the competing public and private interests involved. Finding the Georgia law in concert with the Supreme Court's decisions sustaining suspicionless drug testing programs,[8] the court of appeals held that the State of Georgia satisfied the special needs test for a suspicionless urinalysis test.

In an eight to one opinion, the Supreme Court found that Georgia failed to show a real and substantial safety threat to the citizens of Georgia. The Court, therefore, held the law unconstitutional and reversed.[9] Justice Ginsburg, writing for the majority, begins by making clear that suspicionless collection and testing of urine "effects a search."[10] In certain settings, however, a suspicionless search can be reasonable and lawful.

Although a search must ordinarily be based on individualized suspicion, the touchstone of the Fourth Amendment is reasonableness.[11] In suspicionless searches, the test for reasonableness is whether a "special need" is shown.[12] A special need must be something other than crime detection and is typically viewed as a demonstrated risk to public safety. This context-specific inquiry examines whether the risk is substantial and real. Ultimately, a special need is reasonable if a substantial and real public interest outweighs the private interest.[13] "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[14]

The special need identified by Georgia "rests primarily on the incompatibility of drug use with holding high office."[15] In Georgia's view, the requirement deterred unlawful drug use. The Court quickly dismissed this notion. Georgia, said Justice Ginsburg, failed to provide any evidence of a "concrete danger demanding departure from the Fourth Amendment's main rule."[16] Indeed, Georgia acknowledged that the statute was not enacted in response to any fear or suspicion of drug use.

Justice Ginsburg then spent considerable time reviewing precedent wherein the Court approved such testing. Common to each case was a demonstrated safety risk to which the urine test responded. In *Skinner v. Railway Labor Executives' Ass'n*,[17] "surpassing safety interests" in railway safety justified the testing scheme.[18] In *Treasury Employees Union v. Von Raab*,[19] customs agents who were directly involved in drug interdiction or those carrying firearms were tested. Given their unique mission as the nation's first line of defense in drug

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6. *Id*. at 1299. Libertarian Party candidates filed suit, alleging violations of the First, Fourth, and Fourteenth Amendments.

7. *See* U.S. CONST. amend. IV. The Fourth Amendment normally requires that, prior to a search, government agents will obtain a warrant or authorization supported by probable cause.

8. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (approving random drug testing of students who participate in interscholastic sports); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (approving drug tests for United States Customs Service employees who seek transfer or promotion to certain positions); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (approving drug and alcohol tests for railway employees who were involved in train accidents and for those who violate particular safety rules).

9. Chief Justice Rehnquist filed the lone dissent, lamenting that the "novelty of [the statute] led the Court to distort Fourth Amendment doctrine." *Chandler*, 117 S. Ct. at 1305 (Rehnquist, C.J., dissenting).

10. *Id.* at 1300.

11. Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

12. *Chandler*, 117 S. Ct. at 1301.

13. *Id.*

14. *Id.* (citing *Skinner*, 489 U.S. at 624).

15. *Id.* at 1303.

16. *Id.*

17. *Skinner*, 489 U.S. 602.

18. *Id.* at 634.

19. 489 U.S. 656 (1989).

smuggling, and the ultimate safety of those involved, suspicionless testing was deemed reasonable.[20]

In *Chandler*, however, the safety threat was neither substantial nor real. Further, and significant for all military practitioners, since suspicionless testing is grounded in safety, a law enforcement or crime detection purpose is not a permissible special need. If crime detection is the animating concern, the normal requirements for probable cause and authorization control.

Practice Pointers

Chandler is significant for two reasons. First, the court restates its view that the Fourth Amendment is, fundamentally, an amendment concerned with the reasonableness of state action. Thus, searches not based on probable cause and a warrant may, nonetheless, be lawful, so long as they are *reasonable*.

Second, and perhaps not so obvious, is that *Chandler* crystallizes the Department of Defense (DOD) urinalysis program. The urinalysis program, in fact, falls within the reasonableness clause of the Fourth Amendment because it uses the special needs scheme. At its core, the DOD program permits suspicionless testing of military personnel so long as certain special need prerequisites are satisfied. The DOD's special need includes the deterrence of drug use, which ensures the health and welfare of military personnel.[21] Indeed, when upholding the urinalysis program in other contexts, the CAAF has cited with approval the special needs cases of the Supreme Court.[22]

More specifically, practitioners must remember that the special needs test is embodied in the subterfuge test of Military Rule of Evidence (MRE) 313(b).[23] In any inspection, counsel should examine whether the primary purpose (that is, the special need) was administrative (safety, health, and welfare) or for crime detection and prosecution. If the primary purpose is the latter, the test is presumptively a search, and the government must show by clear and convincing evidence that the primary purpose was, instead, administrative.[24]

Chandler is instructive in that it captures the nature of the Army's urinalysis program and reemphasizes the fundamental purpose behind the commander's inspection authority.

The Reasonableness Prong and Warrant Cases

While *Chandler* focuses on reasonableness when there is no warrant or probable cause, *Richards v. Wisconsin*[25] shows that reasonableness is important even when probable cause and a warrant are present. Indeed, as *Richards* and other cases show, evidence seized pursuant to a warrant based on probable cause may be surpressed because of an *unreasonable execution*.[26]

Background to Richards

In 1995, the Supreme Court, citing centuries-old English common law, made the knock-and-announce rule a constitutional imperative. In *Wilson v. Arkansas*,[27] the Court held that the Fourth Amendment reasonableness clause requires that police knock-and-announce their presence and authority prior to entry.[28] Failure to do so, or insufficient delay after a knock,[29] may render a search unreasonable. In such circumstances, the evidence may be suppressed—even when there is a warrant based on probable cause.

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20. *Id.* at 668. It is interesting to note that, like Georgia, there was no demonstrated drug problem to which the *Von Raab* testing responded. Instead, the program was justified and approved by the Court, given the Customs Service's unique mission relating to drugs.

21. U.S. DEP'T OF DEFENSE, DIR. 1010.1, MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM (9 Dec. 1994). It is DOD policy to "use drug testing to deter Military Service members . . . from abusing drugs . . . [and] to permit commanders to detect drug abuse and [to] assess the security, military fitness, readiness, good order, and discipline of their commands." *Id.*

22. *See* United States v. Taylor, 41 M.J. 168, 171 (1994).

23. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313(b) (1995) [hereinafter MCM]. The "subterfuge" rule grants the commander broad authority to conduct preemptive strikes on drugs and contraband without probable cause. Using his inspection authority, the commander may order, for example, an "examination of the whole or part of a unit . . . as an incident of command . . . ." *Id.* When the inspection is conducted immediately after the report of an offense and was not previously scheduled, or personnel are targeted differently or are subjected to substantially different intrusions, the examination is presumed to be an unlawful search. If such is the case, the government must prove by clear and convincing evidence that the commander's primary purpose was administrative, not disciplinary. *Id.*

24. *Id.*

25. 117 S. Ct. 1416 (1997).

26. Suppression may occur despite arguments of inevitable discovery. *See* People v. Condon, 592 N.E.2d 951 (Ill. 1992); Griffin v. United States, 618 A.2d 114 (D.C. 1992).

27. 514 U.S. 927 (1995).

28. Prior to *Wilson*, there was only the federal statute which codified this requirement. *See* 18 U.S.C. § 3109 (1994). *Wilson*, given its constitutional mantle, applied this requirement to the states.

In *Wilson*, the court highlighted two exceptions to the knock-and-announce rule. When either danger to police is present or the destruction of evidence is likely, officers may dispense with the knock-and-announce requirement. Typically, police seek no-knock warrants from the magistrate, who gives ex ante permission to omit the knock-and-announce requirement. As often happens, police are unsuccessful in getting no-knock warrants from the magistrate because the proof of danger or destruction fails to persuade. The police often break-in, nonetheless, after hearing suspicious noises that suggest danger or destruction of evidence. In either setting, after *Wilson*, police, magistrates, and courts struggled with the amount and nature of evidence needed to justify a no-knock warrant.

No-Knock and Reasonable Suspicion

Richards is the most visible and vocal response to *Wilson*. Steiney Richards was targeted by Milwaukee police as a drug dealer who was operating out of a hotel. Police requested, and the magistrate denied, a no-knock warrant. Although their request for a no-knock warrant had been denied, the police, nevertheless, knocked on Richards's door at 3:40 a.m. and announced, "maintenance man." At the door was a cleverly disguised police officer in a maintenance uniform. Behind him was a "concealed" uniformed officer. When Richards opened the door, he immediately saw the uniformed officer and slammed the door, whereupon the officers kicked-in the door and found Richards escaping out of the window. A search of the hotel room uncovered cocaine in the ceiling.[30]

At trial, the judge denied a motion to suppress based on the failure to knock-and-announce, and Richards was convicted.[31] The Wisconsin Supreme Court affirmed and announced that *Wilson* had no impact on Wisconsin's pre-*Wilson* bright-line rule that the knock-and-announce rule is inapplicable in felony drug cases. Given the modern drug culture, the inherent danger of harm, and the likelihood of destruction of evidence in felony drug cases, a no-knock warrant must be the default standard.[32]

A unanimous Supreme Court rejected Wisconsin's presumptive no-knock position.[33] Blanket exceptions are no substitute for a case-specific inquiry. The Court stated two chief concerns with blanket exceptions. First, many drug investigations that pose no special risks would be insulated from judicial review. Second, the knock-and-announce rule would be meaningless if blanket exceptions were allowed by excepting out certain criminal categories.[34] Instead, "it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement."[35]

The Test

After casting overboard Wisconsin's blanket exception, the Court provided essential guidance to police, magistrates, and judges. To justify a no-knock warrant, officers must have *reasonable suspicion* that the knock-and-announce would be "dangerous" or must believe that destruction of evidence is likely. The Court observed that reasonable suspicion, not probable cause, "strikes the appropriate balance between legitimate law enforcement" interests and the individual privacy interest affected.[36]

Interestingly, despite the jettisoned bright-line rule, the Court found that under the facts of this case the police were reasonable in thinking that destruction of evidence was likely and affirmed the conviction. Richards' reaction to the presence of police was sufficient to conclude that he would flee or destroy evidence.[37]

Practice Pointers

29. Courts debate the time police must wait for occupants to open the door. *See* United States v. Markling, 7 F.3d 1309 (7th Cir. 1993) (holding seven seconds a sufficient wait); Commonwealth v. Means, 614 A.2d 220 (Pa. 1991) (holding a five to ten second delay unreasonable).

30. *Richards*, 117 S. Ct. at 1418-19.

31. *Id.* The trial court ruled that Richards' reaction gave cause to believe that he might destroy evidence. This obviated the need to knock and announce.

32. *Id.* at 1419-20.

33. *Id.* at 1418.

34. *Id.* at 1421.

35. *Id.* On 13 January 1998, the Court heard arguments in *United States v. Ramirez*, 118 S. Ct. 992 (1998). In *Ramirez*, officers executing a no-knock warrant broke a windowpane to effect the no-knock entry. The defendant argued that the damage to his property made the search unreasonable. He argued that, when damage is caused, the police must satisfy a higher standard to justify a no-knock. *Id.* The Court disagreed and announced that the reasonableness prong requires no greater showing of exigency to justify a no-knock entry, whether or not there is damage to property. *Id.* at 996.

36. *Richards*, 117 S. Ct. at 1421.

37. *Id.* at 1422.

Trial and defense counsel must be especially sensitive to the threshold evidentiary showing to a magistrate or military judge to obtain a no-knock warrant, or to justify one after the fact, in a suppression motion. At a minimum, the police must show that there is either reasonable suspicion of danger to police or the likelihood of destruction of evidence. Law enforcement agents must be trained in how to identify, to prove, and to articulate this threshold requirement.

Of equal importance is the training of trial attorneys and especially law enforcement agents in the knock-and-announce arena. Although frustrating to some, if counsel decides that a warrant is required to search a barracks room, for example, the default position should be to knock-and-announce. Essentially, by seeking a search authorization for a barracks room, the government has conceded some expectation of privacy. In such a setting, a knock-and-announce is required.[38]

Expectations of Privacy

Since 1993 and the case of *United States v. McCarthy,*[39] a debate has raged over whether soldiers have an expectation of privacy in a barracks room. An expectation of privacy is one of the threshold requirements for protection under the Fourth Amendment and is determined by application of a two-part test.[40] First, does the soldier have a subjective expectation of privacy in the area to be searched? Second, does society view the expectation as objectively reasonable?[41] In *McCarthy*, the Court of Military Appeals ignited the debate by holding that soldiers have no expectation of privacy in their barracks rooms.[42]

While the debate has fermented and practitioners have treated *McCarthy* as either an investigative free-fire zone in the barracks, or alternatively, limited it to its facts, all have awaited a new barracks case in the hopes that the CAAF would clarify its view of privacy in the barracks. The CAAF may have that opportunity in *United States v. Curry.*[43] In *Curry*, the Navy-Marine Corps Court of Criminal Appeals considers a number of Fourth Amendment issues in the barracks room context, including expectations of privacy and plain view.

In this premeditated murder case, marine investigators received an anonymous tip of a murder in progress in a barracks room. Arriving at the room, the marines knocked on the door and received no answer. The room, which was fronted by a common-area walkway, had a window with drawn curtains that faced the walkway. *An officer was lifted and managed to peer into the room through a gap between the top of the drawn curtains and the ceiling.* He saw a man on the bed who was apparently unconscious. After knocking again and observing no reaction from the man on the bed, the police entered the room with a passkey and without the commander's authorization.[44] They discovered that the accused had just attempted suicide[45] and found letters on a desk linking the accused to a murder committed one week earlier.

The accused moved to suppress evidence gathered in the room that implicated him in the murder. He argued that the "peek" through the window was an unlawful search because it violated his expectation of privacy and thereby tainted all subsequent seizures.[46] The Navy-Marine Corps court held that the observation was not a search and, therefore, there was no Fourth Amendment violation. In reaching this result, the court tackled the sometimes difficult interplay between what it mistakenly called "plain view" and expectations of privacy.

Plain view, strictly speaking, is a rule of seizure and refers to an exception to the warrant/authorization requirement. It traditionally requires three elements. First, there is a valid prior intrusion into a lawfully protected area, such as a home. Second, an item of evidence is in plain view. Third, there is probable cause to believe that the item in plain view is evidence of a crime. If all three elements are met, the item may be seized immediately and without prior authorization.[47]

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38. Fourth Amendment protection normally exists if a person has a reasonable expectation of privacy in the place to be searched. Katz v. United States, 389 U.S. 347 (1967). When such an expectation of privacy exists, a warrant or authorization supported by probable cause is required before entering the location to be searched.

39. 38 M.J. 398 (C.M.A. 1993).

40. The test was first announced in *Katz*. 389 U.S. at 361 (Harlan, J., concurring).

41. *Id.* at 351.

42. *McCarthy*, 38 M.J. at 403. In *McCarthy*, a military policeman entered McCarthy's room at 0400 hours with the Charge of Quarters key. He did not have authorization to enter, and the accused moved to suppress evidence found. The court denied the motion, holding that no authorization was needed since there was no expectation of privacy.

43. 46 M.J. 733 (N.M. Ct. Crim. App. 1997).

44. *Id.* at 736.

45. Indeed, it was the accused who called police and, arguably, "invited" them to his room. *Id.*

46. *Id.*

Significantly, the *Curry* court is *not* dealing with this more traditional plain view doctrine, despite the court's misleading use of this term. Instead, the court is dealing with what is more commonly referred to as the *public view* exception, or what the concurring judge refers to as "plain view from a public area."[48] A public view is, by definition, *not a search* under the Fourth Amendment. Fundamentally, this is because a public view is made into an area where there is no expectation of privacy. Specifically, in order to classify this "intentional official government observation"[49] as a non-search, two requirements must be met. First, the police must be in a place where they have a right to be. Second, the place must be one where the public would regularly make such observations.

The *Curry* court had little difficulty addressing the first prong. Clearly, the officers had every right to be in the barracks hallway. As to the second prong, however, the court evaluated the legal significance of lifting the officer up to look from a vantage point from which the public would not normally look. Whether this act constitutes an unlawful search turns on the existence of a reasonable expectation of privacy.[50] Significantly, the court observed that had this been a private home with its associated curtilage[51] there is no doubt that an expectation of privacy would have been violated.

The court noted, however, that a barracks room is not a home. Given this reality, the court found that there is a *reduced* expectation of privacy. The court wrestled with the troublingly broad language of *United States v. McCarthy*, concluding defensively, "[w]e need not read *McCarthy* to say that there is no circumstance under which a military member would have a reasonable expectation of privacy in a . . . barracks room . . . ."[52] The court recognized the broad language and potential interpretation of *McCarthy* that soldiers have no expectation of privacy in the barracks, yet sidestepped this reading. Charting a slightly different course, the court acknowledged *McCarthy* but held that Curry had a *reduced* expectation of privacy.

The finding of a reduced expectation of privacy was critical to the court's public view analysis and its ultimate finding that the observation was not a search. First, the court noted that there was no physical entry into the room. Second, all observations were with the naked eye, unaided by technology. Third, "the police looked from a place, a public sidewalk, where they had a right to be although not at a height from which the public would regularly be expected to look into the room."[53]

The importance of finding a reduced expectation of privacy now becomes evident.

> This latter factor [the height from which the officer observed] would be determinative if the observation were of a home or its curtilage, but not in a place where one would have a reduced expectation of privacy . . . . Since the appellant had a reduced expectation of privacy in the barracks room, the observation by the police through the gap at the top of the curtains from a place where they had a right to be and without physical intrusion *was not a search*.[54]

Practice Pointers

The finding of a reduced expectation of privacy was absolutely critical to the court's analysis of the public view exception and the ultimate lawfulness of the subsequent search once inside the room. Although the court talks of the "curtain peek" as a plain view inquiry, practitioners should view it more appropriately as a public view analysis. For Fourth Amendment purposes, this distinction is significant in regard to what test is used to determine lawfulness. The court's use of the term plain view is imprecise and misleading.

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47. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE 396-99 (3d ed. 1996). The authorization is omitted, since waiting for an authorization may result in the loss or destruction of evidence.

48. *Curry*, 46 M.J. at 743 (Dombroski, J., concurring).

49. *Id.*

50. *See* Florida v. Riley, 488 U.S. 445 (1989) (holding that an observation of a fenced-in greenhouse from a hovering helicopter at 400 feet was not a search); California v. Ciraolo, 476 U.S. 207 (1986) (holding that an observation of a fenced-in marijuana plot from an airplane at 1000 feet is not a search).

51. Curtilage is defined as:

> The inclosed space of ground and buildings immediately surrounding a dwellinghouse . . . . [It] includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.

BLACK'S LAW DICTIONARY 346 (5th ed. 1979).

52. *Curry*, 46 M.J. at 740.

53. *Id.*

54. *Id.*

Significantly, the first court to revisit *McCarthy* in the barracks setting retreats from *McCarthy's* broad language. Nonetheless, while the court may feel better about finding a reduced expectation of privacy, it produces the same result. Most intriguing is whether the CAAF certifies the case for appeal. Practitioners must stay tuned to the CAAF's disposition of this case.

Exigent Circumstances and the Medical Emergency Exception

United States v. Curry, discussed above, is a bonanza of Fourth Amendment issues. In addition to arguing suppression based on a violation of his expectation of privacy, the accused also argued that entry into his room was unjustified and, therefore, unlawful. The government responded that the apparent medical emergency created exigent circumstances.[55]

The Navy-Marine Corps court had little difficulty finding a medical emergency. After receiving the report of a murder and seeing a man (the accused) on the bed who did not respond to repeated knocks on the door, the officers entered and rendered first aid. The court found that the officers clearly had probable cause to believe a crime was being or had been committed and that there appeared to be a medical emergency.[56]

When faced with the potential need for urgent medical care, the authorization requirement of the Fourth Amendment dissipates. It is also evident that the court was hypersensitive to the accused's moxie and potential windfall. The officers who entered his room likely saved his life. The accused cannot be heard to complain about an entry that ultimately saved his life. Although the Navy-Marine Corps court professes that it did not consider this merits evidence, it is noteworthy that it was the *accused's* phone call that brought the police to his room.[57]

Probable Cause and Authorization

In a landmark case, the CAAF upheld the admissibility of hair analysis to prove drug use. In *United States v. Bush*,[58] the accused was convicted of cocaine use based on hair analysis. The accused argued that not only is hair analysis inadmissible in a court-martial as the sole proof of drug use, but also, and more fundamentally, there was, in his case, no probable cause even to order a urinalysis.

During a normal unit inspection, the accused provided a urine sample. Three months later, the lab determined that the sample was saline.[59] Aware that drug use is only detectable for a short period of time in urine, the command opted for hair analysis.[60] Evidence of drug use may be present in hair for months. The commander, after a briefing by a CID agent, granted a search authorization for Bush's hair. Probable cause was based on the submission of the saline three months before. The evidence was plucked and sent to the lab, where it tested positive for cocaine.[61]

At trial, Bush was convicted of dereliction of duty for his original failure to provide a urine specimen and of use of cocaine based on the hair test results.[62] Hair analysis was the sole basis for the finding of use.

Probable Cause

On appeal, Bush argued that the search authorization was based on insufficient probable cause. He argued that the agent knew that hair grows about one-half inch per month.[63] As a result, any drug filled hair from three months before would now be at the one to one and one-half inch length. The agent further knew that the accused's hair was only about one-half inch long, that is, that any drug-filled hair would be on the barbershop floor. Worse yet, according to Bush, the agent failed to give this critical information to the commander. Given this, a reasonable person would not conclude that his current one-half inch hair contained drugs.

In a four to one opinion, the court rejected this probable cause argument. The CAAF observed that the agent did not

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55. *Id.*

56. *Id.*

57. *Id.* at 736.

58. 47 M.J. 305 (1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 19, 1997) (No. 97-1026).

59. At trial, the government introduced evidence that the accused was capable of "reverse catheterization," replacing the urine in his bladder with a saline solution. *Id.* at 307.

60. *Id.*

61. *Id.*

62. *Id.* at 306.

63. *Id.* at 307.

know the accused's exact hair length. Most important, the agent and commander were not required to apply a "strict mathematical formula" to determine probable cause.[64] Probable cause is, instead, the practical judgment of the commander that the sample seized would be reasonably likely to contain evidence of drugs.[65] It is worth noting that the determination that the submitted sample was saline provided the bulk of probable cause for the authorization.

As a strict matter of probable cause, the accused's argument is quite persuasive. Given the accused's hair length, there was no reason to think his hair still contained evidence of drug use from three months before. The commander used this same common sense staleness analysis when he originally concluded that a urine sample could not be taken. Why is the assessment of hair length any more difficult than the assessment of the body's drug retention capacity? The court's resolution of this issue, therefore, tastes a bit contrived. More illuminating is that both the Air Force court and the CAAF reveal that their real concern is the success or failure of the accused's artifice. His submission of a manufactured sample and the resulting delay should not, indeed must not, defeat probable cause. The lower court was explicit when it said the accused "may [not] by his own misconduct frustrate [the] inspection and require the government to produce probable cause for any subsequent search or seizure."[66] The accused must not profit by the "delayed discovery of his subterfuge."[67]

The fallacy of this view is that, indeed, the government *did* force itself to produce probable cause. The plucking of hair and chemical analysis was done pursuant to a search authorization. The stated probable cause was his prior submission of a sample composed largely of saline. As the lower court intimates, the government could have *reinspected* Bush without probable cause. Once a search is ordered, however, it must be based not on our sense of outrage but on probable cause. In *Bush*, although probable cause was found to exist, on close analysis it is still a very large pill to swallow.

Inadmissible Science

Bush's second argument focused on the unreliability of hair testing. He argued that this testing was unable to prove a one-time use and should automatically be excluded. He also argued that the scientific community views hair testing not as primary evidence of use but only as confirmatory evidence of use. Since there was no other evidence, he argued, the military judge was in error.

The CAAF disagreed. It found that MRE 702[68] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[69] "give the military judge broad discretion to regulate admission of scientific evidence at courts-martial with due regard to the advisory opinions of the scientific community."[70] The military judge did not err in admitting such evidence. Citing with approval the watershed case of *Daubert* and the trial judge's thorough ruling, the CAAF affirmed the admission of chemical analysis of hair. The court closed by observing the irony that the accused's ploy has led to permission to use a new and effective weapon in the war on drugs.[71]

Practice Pointers

It is unlikely that *Bush* will change military practice in any dramatic way. The DOD's money is still "in urine." The drug labs and the urinalysis program are deeply embedded features in the DOD landscape. Further, and notwithstanding the result in *Bush*, there is also great debate in the scientific community about the viability and accuracy of hair analysis.[72]

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64. *Id.* at 309.

65. *Id.* at 312.

66. United States v. Bush, 44 M.J. 646, 649 (A.F. Ct. Crim. App. 1996).

67. *Id.*

68. MCM, *supra* note 23, MIL. R. EVID. 702.

69. 509 U.S. 579 (1993), *aff'd on remand*, 43 F.3d 1311 (9th Cir. 1995). *Daubert* rejected the old *Frye* standard—"general acceptance within the scientific community"—and replaced it with a non-exclusive five-factor test. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The trial judge acts as the evidentiary gatekeeper when it comes to novel scientific techniques. The focus of this initial judicial inquiry shifts from acceptance of the scientific proposition itself to acceptability of the methodology used to reach it. The nonexclusive factors the trial judge uses in making this determination include: (1) whether the technique or theory can be tested; (2) whether the technique or theory has been subjected to publication or peer review; (3) the error rate of the scientific method; (4) the existence of any control standards; and (5) the degree to which the technique or theory has been accepted within the scientific community. *Daubert*, 509 U.S. 579. For background on the application of *Daubert* to military practice, see Major Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., Apr. 1997, at 92.

70. *Bush*, 47 M.J. at 310.

71. *Id.* at 312.

72. *Id.*

Nonetheless, hair analysis can be a valuable investigative tool, especially in settings where time has passed and urine is outside the window of detection. Counsel must remember that, since hair analysis can show accumulated use over a period of time, such evidence may rebut evidence of innocent ingestion or claims of a single use.

Commander's Authority

In *United States v. Hall*,[73] the Army Court of Criminal Appeals approved a commander's ability, while on leave, to assume command for a brief period of time for the purpose of authorizing a search. In *Hall*, a noncommissioned officer reported smelling burning marijuana outside the accused's barracks room. The acting commander went to the room with a military policeman to investigate.[74] After talking with the accused in his room, the acting commander and military policeman concluded that they, too, smelled marijuana. The acting commander then telephoned and briefed the commander. The commander, who was on leave, authorized a search of the room that uncovered marijuana.[75] The accused was apprehended and, during his interview, admitted using marijuana some months earlier.

At trial, the accused argued that the search was based on an improper authorization which tainted his subsequent confession. He argued that the acting commander's personal involvement disqualified not only him, but also the commander. The trial judge agreed and suppressed much of the evidence, including most of the accused's confession.[76] Nevertheless, he was convicted of one of two use specifications. On appeal, Hall argued taint as to the portion of his confession which the trial judge admitted.

The Army court affirmed, concluding that the acting commander was, indeed, disqualified, but that the commander *was not*. A commander may resume command at his discretion, at anytime, even for a brief period of time. Furthermore, the evidence disclosed no partiality in the commander's authorization and no basis for imputing the actions of the acting commander.[77]

Two important points emerge from *Hall*. First, trial counsel should always be aware that a commander can be brought back on-line, if only for a few minutes, to perform command functions. Although *Hall* involves an authorized leave setting, temporary duty or other settings presumably would be treated similarly. Second, the courts have repeatedly shown dislike for arguments which impute knowledge or behavior of subordinates to a commander.[78] Counsel who are aware of this can adjust their strategies accordingly.

Exceptions to the Authorization Requirement

Traffic Stops, Seizures, and Pretext

"Liberty comes not from officials by grace, but from the constitution by right."[79]

In the last three years, the Supreme Court has significantly broadened the powers of police over motorists. In a series of cases, the Court has given its imprimatur to the use of pretext in traffic stops[80] and rejected a bright-line rule which would alert drivers when they were legally free to leave after traffic stops.[81]

Two years ago, in *Whren v. United States*,[82] the Supreme Court announced that, so long as probable cause exists for a traffic stop, police may stop a car to pursue other, more serious suspicions. "[S]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[83] Courts must use a purely objective test for evaluating the reasonableness of a stop. Thus, an officer may suspect a person of drug sales, have no probable cause or reasonable suspicion, but may, nevertheless, stop the person for some unrelated traffic infraction to pursue his more serious suspicions.

One year ago, in *Ohio v. Robinette*,[84] the Supreme Court ruled that a request to search a car after the conclusion of a law-

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73. 45 M.J. 546 (Army Ct. Crim. App. 1997).

74. *Id.* at 547.

75. *Id.* Practitioners should recognize that, typically, the smell of burning marijuana from a room creates exigent circumstances, which obviates the need for authorization. United States v. Lawless, 13 M.J. 943 (A.F.C.M.R. 1982). Waiting for authorization may result in loss of the evidence.

76. *Hall*, 45 M.J. at 547.

77. *Id.* at 548.

78. *See, e.g.*, United States v. Taylor, 41 M.J. 168 (C.M.A. 1994) (holding that knowledge of a subordinate about the report of an offense is not imputed to a commander for purposes of triggering the subterfuge rule of MRE 313(b)).

79. Maryland v. Wilson, 117 S. Ct. 882, 891 (1997) (Stevens, J., dissenting).

80. Whren v. United States, 116 S. Ct. 1769 (1996).

81. Ohio v. Robinette, 117 S. Ct. 417 (1996).

ful traffic stop does not require a bright-line "you are free to go" warning for subsequent consent to be voluntary. The test, as with any consent issue, is the totality of the circumstances.

This year was no exception to this trend. In *Maryland v. Wilson*,[85] the Court continued this trend by extending the rule of *Pennsylvania v. Mimms*.[86] In *Mimms*, the Court held that police may, as a matter of course, order the driver of a lawfully stopped car to exit his vehicle. In *Wilson*, the Court announced that, in addition to the driver, an officer may now order a *passenger* out of a lawfully stopped car—even when there is no probable cause or reasonable suspicion as to the passenger.

In *Wilson*, a Maryland state trooper followed a speeding car and noticed two passengers. During the one and one-half mile chase, the passengers turned and looked at the trooper several times, ducked repeatedly out-of-sight, and reappeared. The car finally stopped. There was no question that the officer had probable cause to stop the car. The officer, however, was nervous about one passenger, Wilson, who was sweating and appeared nervous. The officer ordered Wilson out of the car, and crack cocaine fell to the ground.[87]

Wilson argued that ordering him out of the car was an unreasonable seizure since there was neither reasonable suspicion nor probable cause. The Supreme Court, in a 7-2 opinion, rejected this argument and found the seizure lawful. In the court's view, "the additional intrusion on the passenger is minimal."[88] The passenger was already stopped, given that the driver had halted the car. The officer's action, therefore, merely changed the location of the stop from inside the car to outside the car.[89]

"Regrettably, traffic stops [are] dangerous encounters," observed Justice Ginsburg.[90] The same "weighty interest in officer safety is present regardless of whether the occupant of the . . . car is a driver or passenger."[91] Given that the intrusion was minimal, the court announced that "an officer making a traffic stop may order passengers out of the car pending completion of the stop."[92]

On its face, *Wilson* seems to be a reasonable approach to officer safety, given the often dangerous work of modern day law enforcement. *Wilson* is troubling in part, however, because of its broad language. As the dissent correctly notes, while the facts in *Wilson* support a lawful *Terry*[93] stop of Wilson, the Court's language imposes no such limitation. Indeed, *Wilson*

82. *Whren*, 116 S. Ct. 1769. In *Whren*, District of Columbia police were patrolling a known high drug crime area at night. They observed a car whose driver was looking into the lap of his passenger. When the officers made a U-turn to return to the car, the suspect's car immediately made a right turn without a signal and sped away. The officers made a stop based on the failure to signal and immediately observed cocaine in plain view in the passenger's lap. *Id.* at 1772.

At trial and on appeal, the defendant argued that the stop for a traffic violation was merely a pretext for investigating a hunch about a more serious drug crime. Given the potential for abuse, defendants argued, the test for whether a stop is constitutional is whether a reasonable officer *would have* made the stop, absent the improper purpose or pretext. *Id.* at 1773.

A unanimous Court rejected this test, stating that it is "plainly and indisputably driven by subjective considerations." *Id.* at 1774. Justice Scalia, who authored the opinion of the Court, continued, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 1775 (emphasis in original). "[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." *Id.* at 1772 (quoting United States v. Whren, 53 F.3d 371, 374-75 (D.C. Cir. 1995)) (emphasis in original). Adopting the "could have" test and rejecting the "would have" test, the Court flatly dismissed the idea that an ulterior motive might operate to strip the agent of legal justification. *Id.* at 1774.

Given that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," courts must use a purely objective test for evaluating the reasonableness of a stop. *Id.* Thus, so long as probable cause exists for a traffic stop, police may stop a car to pursue other, more serious suspicions.

83. *Id.* at 1774. *Whren* was recently applied to the military in *United States v. Rodriquez*, 44 M.J. 766 (N.M. Ct. Crim. App. 1996).

84. 117 S. Ct. 417 (1996).

85. 117 S. Ct. 882 (1997).

86. 434 U.S. 106 (1977).

87. *Wilson*, 117 S. Ct. at 884.

88. *Id.* at 886.

89. Note that *Wilson* does not address whether the officer may forcibly detain a passenger for the duration of the stop. The Court refuses to address this issue and, in fact, recently denied a petition for certiorari in a case that squarely addresses this point. *See* Maryland v. Dennis, 693 A.2d 1150 (Md. Ct. App. 1997) (an officer ordered a passenger to *stay in the car* after passenger tried to exit).

90. *Wilson*, 117 S. Ct. at 885.

91. *Id.*

92. *Id.* at 886.

suggests that not even reasonable suspicion is needed to order the passenger to exit. "[The rule] applies equally to traffic stops in which there is not even a scintilla of evidence of any potential risk to the police officer."[94]

> [W]holly innocent passengers in a taxi, bus, or private car have a constitutionally protected right to decide whether to remain comfortably seated within the vehicle rather than exposing themselves to the elements and the observation of curious bystanders. The Constitution should not be read to permit law enforcement officers to order innocent passengers about simply because they have the misfortune to be seated in a car whose driver has committed a minor traffic offense."[95]

Worse yet is the synergistic effect of *Wilson* when combined with *Whren* and *Robinette*. This very combination is decried by the two dissents in *Wilson*. Using this combination, police officers may now follow a car while targeting the passenger and wait for a driver's infraction. Using the infraction as a *pretext* (*Whren*), the officer may then order the passenger out of the car without probable cause or reasonable suspicion. In this setting, the officer hopes that plain view or consent will activate to confirm what are otherwise suspicions and hunches.

In the wake of these cases, there can be little doubt that police departments nationwide, including military police, will establish the routine practice of ordering passengers to exit. When officer safety is involved, it will reign supreme when left in the hands of a local police chief. It is on the margins that the abuse of this new authority will manifest itself. The combination of *Whren's* pretext with *Wilson's* broad language represents a broad inroad into the liberty interests of motorists.

Urinalysis

Permissive Inference of Wrongfulness

The urinalysis arena was relatively quiet over the past year. In addition to *United States v. Bush*, discussed earlier, *United States v. Bond*[96] provided meaningful developments in urinalysis law. In *Bond*, the CAAF resolved a nagging question about the survivability of the permissive inference of wrongfulness in drug cases after introduction of an innocent ingestion defense.

Bond was a Navy patrolman who was relieved of his duties.[97] To salvage himself, he volunteered to work undercover to investigate drug use by dependent wives on base.[98] Bond's handlers learned that Bond was, in fact, using drugs. When confronted with this report, Bond consented to a urinalysis. It was then scheduled. Bond had full notice of the impending test, which was over a week away. On the day of the test, he gave a sample that was positive for cocaine.[99]

Following conventional proof of use at trial (a lab test explained by an expert witness), the defense counsel argued innocent ingestion and reasonable doubt based on common sense in defense. He argued that someone spiked Bond's beer at a baseball game because people knew he was undercover. In addition, he argued that Bond knew when the test would be given, and, therefore, he would not use cocaine since he knew the test was imminent.[100] As a result, the defense argued that the government must introduce evidence to rebut innocent ingestion and the common sense defense.

In one of its more humorous opinions, the CAAF first reminds practitioners of its standard of review—whether any rational trier of fact could find the essential elements of the offense. No further evidence is needed to rebut if the defense may be reasonably disbelieved. The permissive inference of wrongfulness remains.[101]

The court quickly dispatches the common sense defense by calling upon the trial counsel's closing argument. "Drug use and stupidity are not . . . mutually exclusive."[102] Continuing, the trial counsel reminds us that the accused "would not be the first stupid person to be convicted . . . of drug use."[103] With this, the

93. *See* Terry v. Ohio, 392 U.S. 1 (1968).

94. *Wilson*, 117 S. Ct. at 887.

95. *Id.* at 889 (Stevens, J., dissenting).

96. 46 M.J. 86 (1997), *cert. denied*, 118 S. Ct. 181 (1997).

97. *Id.* at 87. He was relieved of his normal duties because of his failure to obey a lawful order. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 88-89.

101. *Id.* at 90.

102. *Id.*

court concludes that a rational trier of fact could conclude the accused's guilt beyond a reasonable doubt without further evidence.

Practice Pointers

Bond finally settles the issue whether additional evidence is required to rebut defense evidence of innocent ingestion.[104] It is, nevertheless, still important for counsel to recognize the limits of *Bond*. While the standard is clearly low for the government, every effort should still be made to rebut defense suggestions of innocent ingestion. Not only does the anticipated aggressive use of rebuttal temper defense tactical decisions, but also, it assists in argument and leaves the panel with its final impression of the evidence. In response, defense counsel may still argue that the permissive inference does not mean a *required* inference.

Innocent Ingestion

In *United States v. Graham*,[105] the Air Force Court of Criminal Appeals examined the admissibility of a prior urinalysis acquittal in a subsequent trial for wrongful use of marijuana. The court found the evidence admissible under MRE 404(b).[106]

In 1992, the accused was charged with marijuana use. He presented an innocent ingestion defense and was acquitted.[107] Less than four years later, he again tested positive for marijuana. He had, without debate, an "extraordinarily good military record, had nearly all 'firewall' performance reports, and had over 20 years of service" at the time of trial.[108] In the second trial in 1995, recognizing the potential difficulties of presenting an innocent ingestion defense a second time, the appellant offered instead a good soldier defense. Defense counsel, worried about the earlier positive urinalysis, sought a motion in limine to bar the government's use of the earlier positive. The military judge deferred ruling, acknowledged it was not admissible in the government's case-in-chief, but held that it might be admissible in rebuttal.[109]

After the government's case, the appellant took the stand in his defense and began to stray on direct. In response to one question denying that he knowingly used marijuana, he added, "there's no way I would knowingly use marijuana."[110] He described himself as "shocked, upset, flabbergasted,"[111] when he learned that his sample was positive. The large double doors swung open, and the trial counsel, waiting anxiously and breathing heavily in anticipation, rushed in.

On cross-examination, trial counsel maneuvered with the military judge to ask a number of questions to try to draw out the previous court-martial. The military judge would not allow it. The judge limited the trial counsel to one question and no follow-up. The judge was emphatic that counsel was not to mention the prior court-martial.

The stage was set. The defense counsel felt safe, as did his client, that they could dodge this swift bullet, even having appeared to open the door. Trial counsel asked the appellant if he had ever tested positive before. The appellant, reaching critical mass, answered, "Yes, but I was found not guilty."[112] The appellant was convicted, and the members sentenced him to confinement for six months, reduction to the lowest enlisted grade, and a bad conduct discharge. On appeal, the appellant argued that the prior acquitted misconduct was improperly admitted in the subsequent court-martial.

The court made quick work of this argument. Prior acquitted misconduct is admissible under MRE 404(b) to prove, as in this case, knowledge or absence of mistake. The appellant's earlier acquittal "did not mean that the court-martial had disbelieved that his urine had tested positive for THC. Ironically, what it meant . . . was that at least some . . . members entertained a reasonable doubt as to whether appellant had knowingly ingested that marijuana."[113] It is "axiomatic that uncharged misconduct cannot be used to demonstrate so-called 'propensity' evi-

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103. *Id.*

104. In *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993), the Army court suggested that when the defense reasonably raises the innocent ingestion defense, this trumps the presumption of wrongfulness, and the accused must be found not guilty as a matter of law unless the government introduces additional evidence to establish the wrongfulness of the use. *Bond* resolves this issue.

105. 46 M.J. 583 (A.F. Ct. Crim. App. 1997).

106. MCM, *supra* note 23, MIL. R. EVID. 404(b).

107. The appellant alleged that a civilian had spiked a birthday cake with marijuana. *Graham*, 46 M.J. at 584.

108. *Id.*

109. *Id.* at 585.

110. *Id.*

111. *Id.*

112. *Id.*

dence."[114] This evidence, however, was admissible under MRE 404(b) because it proved knowledge and the absence of mistake or accident. Although his stated defense was good soldier, it was unmistakably a second innocent ingestion defense. As such, the evidence became relevant and extremely probative.

Judge Morgan closed by observing: "[a] first visit of the dope fairy to an unsuspecting innocent is at least plausible. A second visit to the same victim approaches statistical impossibility. Nobody is that unlucky."[115]

Graham has more than entertainment value. It is highly instructive to both trial and defense counsel on the tactical side of trial work. It reminds counsel about the limits of uncharged misconduct and the wide expanse of MRE 404(b). Generally, propensity evidence is inappropriate. Counsel, however, must aggressively use the various categories of MRE 404(b) to achieve success. It is also clear that counsel must gameplan the various ways such evidence may come in and, as always, prepare the client thoroughly.

Conclusion

Practitioners must continue to pay close attention to developments in the Fourth Amendment. The impact of these sometimes subtle changes immediately seeps into and affects the day-to-day activities of CID agents, military policemen, and the judge advocates who prosecute and defend their work-product. Judge advocates must take the time to understand these changes and to communicate them to law enforcement agents. Special attention in the areas of pretext, primary purpose under MRE 313(b), and expectations of privacy will pay big dividends to both trial and defense counsel.

113. *Id.*

114. *Id.* at 586. Note, however, that M.R.E. 413 and 414 *appear to allow* the use of prior sexual misconduct as propensity evidence in sexual assault cases. *See* MCM, *supra* note 23, MIL. R. EVID. 413, 414.

115. *Graham*, 46 M.J. at 586.