The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases

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During 1999, the United States Court of Appeals for the Armed Forces (CAAF)–and the service courts–have issued several Fourth Amendment opinions, including a few dealing specifically with urinalysis. These opinions deal with a variety of search and seizure doctrines. Moreover, many comprehensively detail the facts–obviously based upon the extensive findings of facts military judges made at the trial level. Facts, very detailed facts, often decide Fourth Amendment cases. As these cases illustrate, the often very generic and even amorphous standards applied under search and seizure law require very specific facts to give those standards real meaning.

Computers: Privacy and Warrants

United States v. Tanksley

In *United States v. Tanksley*,[1] the accused, a Navy Captain, was convicted of, among other things, taking indecent liberties with a minor and was sentenced to thirty-eight months confinement and a dismissal. The Navy court dealt with many issues in *Tanksley*, but the relevant Fourth Amendment issue concerned the seizure of a computer and computer diskettes from his office.[2]

Tanksley, while being investigated for child abuse, was given an office and a "stash billet" away from his normal duty station.[3] He was allowed to use this office and a computer to help prepare his legal case.[4] However, while using the computer apparently to edit a document, he was called away from his office, subsequently apprehended, and sent to pretrial confinement.[5] Following his apprehension, the command duty officer and two Naval Criminal Investigative Service agents searched Tanksley's office and saw a document on the computer screen entitled, "Confidential Background Information on Accusations Made Against Me in Regards to Child Abuse ICO P While my Family and I Were House Guest (sic) of MP Aug 25 & 26."[6] Believing this to be relevant to the investigation of Tanksley, the agents seized the diskette that apparently contained what was being shown on the screen from the computer.[7]

At trial, the military judge held that Tanksley had no reasonable expectation of privacy in the information that was on the computer screen.[8] Alternatively he said that the command duty officer had probable cause to seize the diskette, because he observed the information on screen in "plain view."[9]

The Navy-Marine Corps Court of Criminal Appeals held that the judge ruled appropriately.[10] Tanksley's office and computer were made available for performance of official duties, regardless of whether the office and computer were capable of being secured and regardless of Tanksley's status.[11] Alternatively, the "plain view" doctrine would also justify the seizure of the diskette, because the command duty officer was in the office "in the logical and legitimate process of securing the office used by the appellant."[12]

1. United States v. Tanksley, 50 M.J. 609 (N.M. Ct. Crim. App. 1999).

2. *Id*. at 620. There was also discussion about seizure of documents from the accused's briefcase. The Navy-Marine Corps Court of Criminal Appeals held that the seizure of the documents from the briefcase was valid because the accused provided valid consent. Alternatively, the court held that the documents would have been inevitably discovered. *Id.* at 621.

3. *Id.* at 620.

4. *Id*.

5. *Id.*

6. *Id.*

7. *Id*.

8. *Id.*

9. *Id*.

10. *Id.*

11. *Id*.

This Fourth Amendment question had some overlap with Sixth Amendment concerns as well, because Tanksley was apparently already represented by counsel, and the document that was seized was part of his defense.[13] However, because the exculpatory document was not used at trial–though apparently other documents taken from the diskette were–the Sixth Amendment was not implicated.[14] In dealing with the Fourth Amendment issues, according to the court, there are four issues to examine in determining a government intrusion: (1) was evidence used at trial directly or indirectly produced by intrusion, (2) was the intrusion intentional, (3) did the prosecution receive otherwise confidential information, and (4) was the information used in any other way that might be detrimental to client.[15] In this case there was no prejudice, because the document was not used at trial, no charges were preferred as the result of the discovered document, and no otherwise discoverable evidence found.[16]

Tanksley reaffirms that reasonable expectation of privacy in government property for official purposes is very limited. One has an extremely limited reasonable expectation of privacy in things issued for official use. Obviously, a defense counsel should certainly advise a client not to use the government computer at his workstation to prepare his case. Not only is there a very diminished expectation of privacy in such government computers, they are also frequently subject to monitoring by systems administrators who are not gathering evidence, but simply performing administrative duties, and therefore not very likely subject to Fourth Amendment search requirements.[17]

At the same time, both sides need to be aware of circumstances in which the Fourth Amendment may overlap with other constitutional protections–as in this case, the Sixth Amendment. Once the prosecutorial phase of a case has begun–normally after the preferral of charges–Sixth Amendment counsel rights attach as well, and certain documents might attain a protected status because they are prepared in furtherance of a defense. This is perhaps one more reason for government counsel to make sure that preferral is not done too quickly. Although one should not unnecessarily linger in attempting to "perfect a case" before preferral, preferring does trigger a new set of possible constitutional considerations when determining whether and how searches and seizures of evidence should be conducted.

United States v. Monroe

The second significant service court opinion regarding the Fourth Amendment and computers was the Air Force court opinion in *United States v. Monroe.*[18] In *Monroe*, the accused made a conditional plea of guilty for violating a lawful general regulation, wrongfully possessing three or more depictions of child pornography in violation of 18 U.S.C. § 2252(a), and using a common carrier to transmit such images in violation of 18 U.S.C. § 1462, which proscribes "introduction of obscene, lewd, lascivious, filthy or other matter of indecent character."[19] The plea preserved his ability to contest the search of his computer at appellate level.[20]

After the Air Force court held that the acceptance of this conditional plea was proper, it then discussed the legality of the search of Monroe's personal computer, basing its discussion on a very detailed set of findings of fact made by the military judge.[21] In the fall of 1995 at Osan Air Base in the Republic of Korea, the base had an electronic mail (e-mail) host (EMH), which allowed a user, through a log-on and private password to access the Defense Data Network and the Internet. Though meant primarily for official business, users could use it to send and receive text messages to friends and family.[22]

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12. *Id.*

13. *Id.* at 621.

14. The opinion does not clearly indicate that *other* documents taken from the diskette were used as evidence. It does indicate that the "contents of the disk" were admitted into evidence, whereas the exculpatory document was not. *Id.* at 620-21.

15. *Id.* at 621 (citing United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir. 1986); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981); United States v. Walker, 38 M.J. 678 (A.F.C.M.R. 1993)).

16. *Tanksley*, 50 M.J. at 621.

17. This is best illustrated by the case to be discussed next, *United States v. Monroe*, 50 M.J. 550 (A.F. Ct. Crim. App. 1999). The CAAF issued an opinion in late March on *Monroe*, affirming the Air Force court's holding. *See* United States v. Monroe, 52 M.J. 326 (2000).

18. *Id.* The CAAF issued an opinion in late March 2000 on *Monroe*, affirming the Air Force court's holding. *See* United States v. Monroe, 52 M.J. 326 (2000).

19. *Monroe*, 50 M.J. at 552.

20. *Id.* at 552-53.

21. *Id.* at 554-56.

22. *Id.* at 554.

All incoming emails would be sent to a directory on the EMH. Approximately every fifteen minutes, a program would read and sort through these files, and send them to the e-mail account of the individual addressed. If the files were too large or defective, they would stay in the directory on the EMH, which was supposed to delete them automatically after seventy-two hours.[23]

In this particular case, however, the EMH administrator found that fifty-nine files had been "stuck" in the directory for over seventy-two hours. To determine why, he opened several of the files, and looking at the header on the files, he saw that they were addressed to Monroe, and had sexually oriented names such as "erotica" and "sex."[24] After moving the files to another directory, the administrator determined that thirty-three of the files had graphic images of adult women in sexually explicit poses.[25] After further determining that Monroe had requested the files, the administrator reported this information to the chain of command and Office of Special Investigations (OSI).[26]

Office of Special Investigations agents further determined that Monroe did not have access to government computers in his office but that he did have a computer in his dormitory room. They then received authorization from the Osan base commander to search Monroe's quarters for "all computer related data media suspected to contain pornography or child pornography," though, up to that date, no child pornography had been found on any of the searched images.[27] All items were subsequently seized in the room, including 218 floppy discs, and other equipment. As a result, child pornographic images were found in the seized items.[28]

In analyzing the facts of the case, the Air Force court first established the appropriate standard of review. It reviews the military judge's findings of fact on a "clearly erroneous" standard and the findings of law on a de novo standard. Thus, a military judge abuses his discretion on a motion to suppress if his factual findings are clearly erroneous of if he applies the law erroneously.[29]

Applying these standards, the Air Force court adopted the military judge's finding that the administrator's initial review of the files "stuck" in the directory was not a criminal search but a legitimate government activity pursuant to his duties.[30] The court also held that the government system acted as a gateway between users and the Internet with known limitations and that the system was subject to monitoring each time the person logged on.[31] The Air Force court ultimately compared the EMH to an unsecured file cabinet in a superior's work area.[32] For these and other reasons, it concluded that Monroe had no subjective reasonable expectation of privacy in the files that the administrator searched.[33]

Furthermore, the search authorization was properly issued. While the base commander authorized a search for "child pornography" even though none had been discovered at that time, this was not fatal to the authorization, because "child pornography" would naturally be included in any definition of "pornography."[34]

Additionally, the commander who issued the search authorization had probable cause to do so on the basis of a possible violation of 18 U.S.C. § 1462 (transmitting obscene materials using a common carrier). The image files contained pornographic information–pictures of adult women in sexually explicit poses.[35] The fact that the commander did not define "obscenity" in authorizing the search was not fatal to the authorization.[36]

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 555.

27. *Id.*

28. *Id.*

29. *Id.* at 557 (citing United States v. Ayala, 43 M.J. 296, 298 (1995); United States v. Burriss, 21 M.J. 140, 144 (C.M.A. 1985)).

30. *Id.* at 558.

31. *Id.*

32. *Id.* at 559.

33. *Id.*

34. *Id.* at 560.

35. *Id.* at 561.

What about making the determination that the adult pornographic images were obscene and thus violative of 18 U.S.C. § 1462? Was the First Amendment violated because the affidavit contained only a conclusory allegation that the adult pornographic images were obscene? The key case for analyzing this determination was *New York v. P.J. Video Inc.*,[37] a 1986 Supreme Court case.

The Supreme Court in *P.J. Video* held that when making determinations whether to issue warrants, the threshold for materials presumptively protected by the First Amendment is no higher or lower than those for warrant applications generally.[38] As in any warrant application, a magistrate must be provided evidence to make an independent determination under the totality of circumstances. If the appropriate search authority is informed of what the alleged obscene material is, he can make a common sense determination based upon the totality of the circumstances that the material is obscene and thus illegal.[39]

In *Monroe*, the base commander did not actually view the photographs himself before making the determination of obscenity. The chief of military justice at Osan Air Base, however, had reviewed the files and opined that probable cause existed.[40] The EMH administrator had opened files and said they contained "graphic pornographic images."[41] The base commander relied on this information, and this was considered sufficient for his determination that the adult pornography was "obscene." However, the Air Force court cautioned that this case was "borderline" and suggested any doubt as to the legality of the search could have been avoided by "simply attaching a couple of graphic images."[42] Doing so "would have averted any issue regarding the obscene nature of the images."[43]

There are several interesting points raised in *Monroe* for practitioners. The case clearly shows the necessity for a military judge to make extensive findings of fact. It also points out that it is unlikely a service member will have a reasonable expectation of privacy in a government computer system if the system is monitored on a routine basis by a systems administrator. It is also the first military case to adopt the Supreme Court standard in *P.J. Video* concerning magistrate review of materials potentially protected under the First Amendment, but issues a cautionary note to government officials seeking search authorizations or warrants to ensure that they are explicit in describing what is meant by obscene. The simplest way to do this is to attach any graphic images themselves to the affidavit or application for authorization or warrant.

Third Parties at Searches: *Wilson v. Layne*

During the 1990s, the Supreme Court scrutinized not just the basis for searches, but the way the searches were conducted.[44] The Court has held that not only do searches of private areas have to be based on probable cause supported by a proper search warrant or authorization (unless an exception applies), they also have to be conducted in a reasonable fashion. Thus, for example, it is a general requirement that law enforcement officials first "knock and announce" their presence before executing the warrant, unless the specific facts allow that requirement to be dispensed with.[45]

In *Wilson v. Layne*, the Supreme Court issued an opinion on who can be present during a search.[46] In that case, the Supreme Court held that allowing media representatives to enter private dwellings along with the officers during the execution of arrest or search warrants violated the Fourth Amendment.[47]

In *Wilson*, a photographer and reporter from the *Washington Post* accompanied federal marshals on a "ride-along" under a program known as "Operation Gunsmoke," which focused on apprehending dangerous felons.[48] One such felon, Dominic

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36. *Id.*

37. *Id.* at 560 (citing New York v. P.J. Video, Inc., 475 U.S. 868 (1986)).

38. *P.J. Video*, 475 U.S. at 876-77.

39. *Id.*

40. *Monroe*, 50 M.J. at 550, 561.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See, e.g.*, United States v. Ramirez, 523 U.S. 65 (1998); Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson v. Arkansas, 514 U.S. 927 (1995).

45. The common law requirement that police officers "knock and announce" their presence is part of the "reasonableness clause of the Fourth Amendment. *See Wilson*, 514 U.S. at 927. Every exception to this requirement must be evaluated on a case-by-case basis. *See also Richards*, 520 U.S. at 385.

46. Wilson v. Layne, 526 U.S. 603 (1999). As this opinion is not yet paginated, pinpoint cites will use the 119 S. Ct. 1692 (1999) version of the opinion.

47. *Id.* at 1695.

Wilson, was listed as living at 909 North Stone Street Avenue in Rockville, Maryland.[49] This, however, was not Wilson's home, but his parents' home. A warrant was applied for and issued for Wilson's arrest, though the presence of media officials was not mentioned in the warrant application.[50]

In the early morning, federal marshals, with photographer and reporter in tow, entered the home of Charles and Geraldine Wilson, who were still in bed.[51] Charles, dressed only in his briefs, discovered five men in street clothes with guns in his living room. His wife Geraldine, wearing only a nightgown, entered shortly afterwards, to discover her husband being physically restrained by five plain clothed, armed men.[52] As the marshals made a protective sweep of the house, the *Washington Post* reporter witnessed the unfolding event as the photographer snapped pictures, though no photos or story were ever published.[53]

Charles and Geraldine Wilson sued the law enforcement officials in their personal capacities as allowed under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*,[54] asserting a Fourth Amendment violation. The Supreme Court ruled that the right of residential privacy is "at the core of the Fourth Amendment."[55] Therefore police actions involved in the execution of a warrant must be related to the objectives of the authorized intrusion–in this case, the apprehension of Dominic Wilson.[56]

The presence of the news reporter and photographer was not so related to those objectives.[57] The rationales offered by the government to justify the presence of the media representatives–publicizing activities, minimizing police abuses, and protecting police or third parties–were insufficient to justify the media presence at the Wilson household,[58] though third parties might be justified in certain circumstances.[59]

While the Supreme Court held that the officers violated the Wilsons' Fourth Amendment protections by bringing the media representatives with them, it further held that because the law was not clearly established at the time, the officers were entitled to qualified immunity from suit.[60] The Court did not make any sort of ruling as to whether the exclusionary rule would apply, because no criminal evidence was recovered as a result of the attempted apprehension. In a footnote it said that the Fourth Amendment violation is "the presence of the media and not the presence of the police."[61] The Court thus perhaps left open the possibility that what would be potentially excludable would be evidence discovered by the third parties and not by the law enforcement officials themselves.[62]

While *Wilson* does not resolve exclusionary rule questions, it clearly sends a cautionary signal to law enforcement regarding who may accompany officers during the execution of a warrant. Government attorneys should inquire if a third party will accompany officers during the execution of a search warrant or authorization. If there are to be third parties present, their presence must have a directly related purpose to the search or seizure at hand, and not a more abstract purpose such as "educating the public" or "publicizing police activity." While media representatives are clearly prohibited, law enforcement could, for example, bring an expert to search computer data that was encrypted or "booby-trapped" to automatically erase.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1696.

52. *Id.*

53. *Id.*

54. *Id.* (citing Rev. Stat. § 1979, 42 U.S.C. § 1983; Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)). Both the statute (known as the "1983" statute) and the holding in *Bivens* allows persons to sue law enforcement officials in their personal capacities for money damages for constitutional violations.

55. *Id.* at 1698.

56. *Id.*

57. *Id.*

58. *Id.* at 1698-99.

59. *Id.* at 1699.

60. *Id.* at 1699-1700.

61. *Id.* at 1699 n.2.

62. *Id.*

Freezing the Scene: *United States v. Hall*

The CAAF issued an opinion as well in a case dealing with the manner in which a search is conducted, *United States v. Hall*.[63] In *Hall*, the unit staff duty non-commissioned officer (SDNCO) was checking barracks rooms when he smelled what he knew to be marijuana coming from Hall's room. He opened the door, saw Hall, and noticed an even stronger smell of marijuana. The SDNCO then ordered Hall to "get that marijuana out of the barracks," to which Hall replied, in soldierly fashion, "Roger, Sergeant."[64]

The SDNCO then called the company executive officer. The executive officer, who was the acting commander as well, came to Hall's room along with some military police. A military policeman confirmed the marijuana smell. After the executive officer left to contact the company commander, who was on leave, the SDNCO "froze the room" in the interim and detained anyone who tried to leave. At one point, he saw Hall moving across the room with a green backpack and told him to stop and put it on the ground.[65] While the room was thus being "frozen," the executive officer contacted the company commander, who authorized the search of Hall's room. When the search was conducted, marijuana was discovered in the green backpack.[66]

Judge Crawford, writing for the court, held that the executive officer's entry into the room before authorizing the search did not cause him to lose his neutral and detached status. Nevertheless, while he could have authorized the search, the company commander could resume command at any time and himself authorize the search, as he did, without the necessity of any sort of revocation of assumption of command orders.[67]

Additionally, the court endorsed the concept of impoundment, or "freezing a scene"–securing a premises from within to preserve the status quo while other law enforcement officials are getting a warrant. "Impoundment" as a kind of "seizure" of an entire dwelling has been held permissible by the Supreme Court in the case *Segura v. United States*.[68] *Segura* held that if officers have probable cause to enter a premises and to arrest people inside, they can secure it from within to preserve the status quo, while other law enforcement officers are getting a search warrant for the premises themselves.[69]

Judge Effron, upholding the search and seizure, but disagreeing with the "impoundment" concept under the facts of this case, argued that the facts in *Hall* did not fit the impoundment doctrine.[70] According to Judge Effron, external impoundment deals with securing unoccupied premises and prohibiting *entry* to remove or destroy evidence while authorities seek to obtain a warrant or authorization.[71] Here, the impoundment involved persons not being allowed to *exit* as well.

The question then is whether Judge Crawford's application of *Segura* is an unwarranted extension of it. Can law enforcement "freeze" people in a room whom they do not yet have probable cause to believe committed criminal acts? This is highly doubtful: reasonable suspicion of criminal activity–or some specified exception to lawful arrest–must be articulated before any sort of detention occurs, and any impoundment of persons will probably have to be analyzed to determine if that standard was met.[72]

In *Hall*, both the reasonable suspicion and more stringent probable cause requirements were met: the detained soldiers were in a barracks room where marijuana was being smoked, and one can have reasonable suspicion and even probable cause

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63. 50 M.J. 247 (1999).

64. *Id.* at 248.

65. *Id.*

66. *Id*. at 249.

67. *Id*. at 251.

68. 468 U.S. 796 (1984).

69. *Id*. at 798.

> [W]here officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment[ ] . . . .

Id.

70. *Hall*, 50 M.J. at 252.

71. *Id.*

72. Military Rule of Evidence 314(f)(1) allows law enforcement officials to "stop another person temporarily" if the stop is investigatory in nature and if the official observes "criminal activity may be afoot." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314(f)(1) (1998) [hereinafter MCM].

that the soldiers were involved in illegal drug activity. But certainly, a different scenario could be envisioned–what about a larger and much more crowded area? Could persons be detained in such a room to "freeze the scene" if there is no reasonable suspicion or probable cause to believe those persons have committed a crime? This seems a very broad reading of Segura. Prudent government counsel understand *Hall* as indicating that the impoundment doctrine applies, but it would be cautious in extending the impoundment doctrine from property to persons.

Terry Stops and Arrests: *United States v. Marine*

A case dealing with a scenario in which several people were "stopped" as defined by Military Rule of Evidence (MRE) 314(f)(1) was *United States v. Marine*.[73] This case dealt with a variety of Fourth Amendment issues, most importantly with two Fourth Amendment warrant and probable cause exceptions: the so-called "*Terry* stop" and the search incident to apprehension, and the relationship between the two.[74]

In December 1995, Marine was present at the "21 Area Enlisted Club." During the evening, an unidentified black male, wearing a striped rugby type shirt, assaulted one of the members of the 21 Area Guard patrolling the club.[75] The unidentified person ran to another section of the club, and the guard on that side rounded up several people who met that description and brought them to the area of the club where the assault took place. When the group got there, the suspect (not Marine) was immediately identified, and the others, to include Marine were left standing there, unsure if they could leave or not.[76]

At that point, the head of the guard detail, Lieutenant Moore, came over to talk to the group. Marine then said something to Moore, who was in uniform, which by its "tone, content, and absence of typical military courtesy, or of use of sir" was disrespectful. Moore identified himself, and another member of the guard told Marine that he was addressing a lieutenant. Marine then leaned over as if to check Moore's rank, which Moore again took this as disrespectful. Finally, Marine said "yes sir" in a manner Moore found mocking.[77] Moore thus apprehended Marine for disrespect and the subsequent search of his person revealed he possessed a half smoked marijuana cigarette.[78]

Judge Sullivan, writing for the court, did not determine the outcome of the case based on Marine's assertion that the initial stop and detention of Marine was based on race and thus an unlawful *Terry* stop.[79] Instead, Sullivan stated: "We need not decide appellant's claim that his initial investigative stop was illegal, because we hold that his subsequent arrest was lawful and a sufficient intervening circumstance to remove any taint from a purported illegal *Terry* stop."[80]

How can a court determine whether the taint of an initial illegal activity has been purged? As in many Fourth Amendment cases, the Supreme Court has indicated that no *per se* rule applies. Instead, factors to be considered are the temporal proximity between the illegal action and the seizure of evidence, the "presence of intervening circumstances" and the "flagrancy of the official misconduct."[81]

Marine, however, argued that there were no "intervening" circumstances, because the search took place *during* the *Terry* stop.[82] Furthermore, Marine argued that if the disrespect was such an intervening circumstance he should have been charged and prosecuted for it (he was only prosecuted for the marijuana possession).[83] Finally, he argued that the misconduct of the law enforcement officials was in fact flagrant, as it was a race-based *Terry* stop.[84]

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73. 51 M.J. 425 (1999).

74. The famous "*Terry* stop" (from Terry v. Ohio, 392 U.S. 1 (1968)) is codified in military practice as MRE 314(f)(1). MCM, *supra* note 72, MIL. R. EVID. 314(f)(1). The search incident to apprehension exception to the probable cause requirement of the Fourth Amendment is codified in MRE 314(g). *Id.* MIL. R. EVID. 314(g).

75. *Marine*, 51 M.J. at 426.

76. *Id.*

77. *Id.* at 427.

78. *Id.*

79. *Id.* at 428.

80. *Id.*

81. *Id.* at 428-29 (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

82. *Id.* at 429.

83. *Id.*

84. *Id.*

Relying on federal court case law, the court swept these arguments aside. The intervening event–Marine's disrespect–was significant enough. While several persons were initially stopped, only one, Marine, was searched, because of his disrespectful conduct.[85] That Marine was not charged for the disrespect offense did not create an impediment as far as an earlier police action, since prosecutorial decisions and police actions are not synonymous.[86] Finally, the actions of the law enforcement officials were not flagrant; the evidence suggested more of a communication mix-up and confusion than deliberate misconduct.[87]

Marine applies the intervening circumstance principle in federal law to the military, thus making it highly difficult, if a search is based upon an appropriate apprehension, to argue that an initial stop's illegality that may have given rise to the apprehension should result in suppression. Marine is thus an extremely "pro-government" opinion. *Terry* stops quite frequently lead to arrests or apprehensions and searches. Marine indicates that it will be very difficult to invalidate a search from a lawful arrest or apprehension, regardless of a previous Terry stop. Thus, the only circumstance in which one could reasonably expect a successful defense result would involve "flagrant" misconduct, for example, a *Terry* stop based both exclusively and deliberately on racially motivated reasons.

Terry Stops and Flight: *Illinois v. Wardlow*

Is flight from law enforcement enough to justify reasonable suspicion and therefore a *Terry* stop? In *Illinois v. Wardlow*, the Supreme Court decided that unprovoked, headlong flight, along with the fact that the defendant was in an area of "expected criminal activity," was enough to satisfy the reasonable suspicion standard.[88]

While all the members of the Court rejected a "bright line rule on either side"–that flight alone is always sufficient for *Terry* stop, or conversely, never sufficient–the Court split five to four on the outcome of this particular case.

The respondent Wardlow had fled after seeing police officers patrolling in an area that was known for narcotics trafficking. He was subsequently stopped, and while stopped, police officers conducted a protective pat-down search of a bag he was holding. The officer conducting the frisk felt a heavy, hard object that was similar to a gun. Removing the object from the bag, he discovered it was a .38 caliber handgun. Wardlow was arrested and convicted for unlawful use of a weapon by a felon.[89]

While the Illinois trial court denied the motion to suppress, the Illinois Appellate Court reversed, as did the Illinois Supreme Court, the latter court holding that sudden flight in such an area did not create the requisite reasonable suspicion to justify the stop.[90]

The Supreme Court reversed the Illinois Supreme Court's holding. Chief Justice Rehnquist, writing for the majority, stated that the case "is governed by the analysis first applied in *Terry.*"[91] The Court also cited *United States v. Sokolow* in holding that reasonable suspicion requires "a showing considerably less than preponderance of the evidence, [though] the Fourth Amendment requires at least a minimal level of objective justification for making the stop."[92]

In *Wardlow*, a four-car police caravan had converged on an area known for heavy drug trafficking, and the respondent had apparently fled as the vehicles approached him.[93] The Court held that "standing alone" in a high crime area is insufficient to justify a *Terry* stop, but "unprovoked flight" from such an area provided adequate justification.[94] Indeed, Chief Justice Rehnquist asserted that "[h]eadlong flight–wherever it occurs–is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[95] While acknowledging that there may be innocent reasons for such

85. *Id.*

86. *Id.*

87. *Id.* at 429-30.

88. 120 S. Ct. 673 (2000).

89. *Id.* at 674.

90. *Id.* at 675. The Illinois Appellate and Supreme Courts disagreed whether Wardlow was in a high crime area. The appellate court held he was not. The Illinois Supreme Court held that he was. *Id.*

91. *Id.*

92. *Id.* at 676 (citing United States v. Sokolow, 490 U.S. 1 (1989)).

93. *Id.*

94. *Id.*

95. *Id.*

flight, such reasons do not establish a Fourth Amendment violation. "*Terry* accepts the risk that officers may stop innocent people."[96]

Justice Stevens, writing for the dissent, stated that he concurred in the majority's rejection of a "bright line" rule regarding flight.[97] However, he asserted that the testimony of the officer who made the *Terry* stop provided insufficient justification for the stop.[98] Justice Stevens noted that even though a *Terry* stop is brief, it may nevertheless be an "annoying, frightening, and perhaps humiliating experience,"[99] and that there may be a variety of innocent reasons why people may run,[100] especially minorities and those who reside in high crime areas, who may believe that contact with police might be dangerous.[101]

Because of such concerns, and based on the "totality of the circumstances," Justice Stevens rejected the idea that the officer had reasonable suspicion to stop Wardlow. There was insufficient testimony as to how exactly the stop took place. It was unclear whether the officer was in a marked or unmarked car, nor was he asked if the other cars in the caravan were marked, or whether any of the other police officers were uniformed (though he himself was).[102] The officer's testimony did not reveal how fast the caravan was travelling, or whether he saw Wardlow actually notice the other patrol cars in the caravan, or whether the caravan, or part of it, had passed Wardlow before he started to run.[103]

Wardlow, while not necessarily a groundbreaking case[104] does at least establish that flight, more specifically "headlong" flight, is a very important factor in establishing reasonable suspicion. Yet exactly *how* important is difficult to determine. Despite the language of Justice Stevens's dissent, the majority opinion seems to indicate that headlong flight, in and of itself, comes close to establishing reasonable suspicion. Justice Stevens's opinion is much more cautious, given its discussion of the nature of *Terry* stops, the possibility of innocent motive for flight, and most importantly, the lack of factual detail. Given the narrow majority, it is probably safer for the government to develop fully any factors, in addition to the flight itself, to justify the stop, which means developing a full factual record for the appellate courts.

The Supreme Court and The "Automobile Exception"

Maryland v. Dyson

The Supreme Court dealt with "automobile exception" searches in two decisions this year. One of them, *Maryland v. Dyson*, was a brief per curiam opinion.[105] It is nonetheless important, however, because the Supreme Court reiterated that the automobile exception does not require any additional exigent circumstances to search a vehicle without a warrant.[106] In *Dyson*, Maryland police developed probable cause that Dyson would be returning to the state with a load of drugs in his car. The police never attempted to obtain a warrant. Rather, they

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96. *Id.* Chief Justice Rehnquist used the facts in the *Terry* case as an illustration of potentially innocent conduct. In *Terry*, an officer observed two individuals "pacing back and forth in front of a store, peering into the window, and periodically conferring." *Id*. (citing Terry v. Ohio, 392 U.S. 1, 5-6 (1968)). Rehnquist stated that "[a]ll of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity." *Id.*

97. *Id*. at 677 (J. Stevens, dissenting). It should be pointed out, however, that the majority opinion never explicitly announces that headlong flight *alone* is insufficient for reasonable suspicion. Indeed, Chief Justice Rehnquist's assertion–"Headlong flight–wherever it occurs–is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such"–arguably comes close to establishing such a "bright line" rule. *Id*. at 676.

98. *Id.* at 677.

99. *Id.* at 678 (citing *Terry*, 392 U.S. at 24-25).

100. *Id.*

> A pedestrian may break into a run for a variety of reasons–to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest–any of which might coincide with the arrival of an officer in the vicinity.

Id.

101. *Id.* at 681.

102. *Id.* at 683.

103. *Id.* at 683-84.

104. The case does not deal at all with the second component of *Terry v. Ohio*, the "frisk." In a footnote in the lead opinion, Chief Justice Rehnquist stated: "We granted certiorari solely on the question of whether the initial stop was supported by reasonable suspicion. Therefore, we express no opinion as to the lawfulness of the frisk independently of the stop." *Id.* at 676 n.2.

105. 527 U.S. 465 (1999). As this opinion is not yet paginated, pinpoint cites will use the 119 S. Ct. 2013 (1999) version of the opinion.

waited thirteen hours for the defendant to drive into their jurisdiction, stopped his car, searched it, and seized a bag of crack cocaine.[107]

The state appellate court stated that there were no exigent circumstances that prevented the Maryland police from obtaining a warrant while waiting, and held the search of the automobile violated the Fourth Amendment.[108] But a majority of the Supreme Court reversed without even ordering a brief or oral argument.[109] Clearly, the message sent by this brief opinion is that there is indeed a bright line rule established for automobile searches: the automobile exception requires no separate finding of exigency.[110]

Maryland v. Dyson highlights this bright line rule and also is an indication of the modern rationale for the exception. The initial rationale for the automobile exception was the automobile's inherent mobility and thus its ability to transport evidence away quickly. Because of this rationale, the exception would dispense with the time delay in obtaining a search warrant, which could be fatal in an investigation. However, a second rationale for justifying the exception has since developed: the reduced expectation of privacy one has in a motor vehicle. As a result, the two reasons taken together, mobility and reduced privacy, now make it very difficult for defense to argue the necessity of a warrant for a search, if police have probable cause.

Florida v. White

In a second Supreme Court case dealing with the automobile exception, *Florida v. White*, the Supreme Court decided that the exception applies not only to the search and seizure of items within the automobile but to the seizure of the automobile itself, at least for purposes of a civil forfeiture case.[111] In this case, police seized the automobile belonging to the defendant after having determined that there was probable cause that the car was subject to forfeiture.[112] They subsequently did an inventory search, found drugs in the vehicle, and arrested White.[113]

Justice Thomas wrote the opinion in *White*, relying on the seminal case dealing with the automobile exception, *Carroll v. United States.*[114] The opinion in *Carroll* had relied on statutes enacted soon after the Fourth Amendment was passed, which permitted warrantless searches and seizures of ships suspected of containing goods subject to duties.[115] Therefore, according to *Carroll*, warrantless searches of modes of transport were clearly envisioned by the Framers.[116] Moreover, Justice Thomas relied on the underlying premise of *Carroll*–that "recognition of the need to seize readily movable contraband before it is spirited away . . . is equally weighty when the automobile, as opposed to its contents, is the contraband the police seek to secure."[117] Finally, Thomas pointed out that the seizure took place in a public parking lot and drew an analogy to an arrest: when the person is in a public place, no warrant is required.[118]

White does not appear to be a particularly controversial decision. If the automobile itself is potential evidence, *White* indicates police can seize the entire automobile, which includes taking it back to the station, where presumably an inventory is conducted as part of storing it. Of course, this is routinely done anyway–there is no requirement that an automobile be searched at the moment it is determined that there is probable cause to believe that evidence of a crime is inside it.

While the defense may try to argue that *White* is a civil forfeiture case, government counsel should be ready to argue its even stronger applicability in a typical criminal case. In *White*,

106. *Id.* at 2014.

107. *Id.* at 2013.

108. *Id.*

109. *Id.*

110. *Id.* at 2014. Two key previous Supreme Court decisions, *United States v. Ross*, 456 U.S. 798 (1982), and *Pennsylvania v. Labron*, 518 U.S. 938 (1996), made it clear that the automobile exception does not have a separate exigency requirement.

111. 526 U.S. 559 (1999). As this opinion is not yet paginated, pinpoint cites will use the 119 S. Ct. 1555 (1999) version of the opinion.

112. *Id.* at 1557-58.

113. *Id.* at 1558.

114. *Id.* (citing Carroll v. United States, 267 U.S. 132, 149 (1925)).

115. *Id.* (citing *Carroll*, 267 U.S. at 150-51).

116. Id.

117. *Id.* at 1559.

118. *Id.*

the conduct that gave rise to the forfeiture occurred months before and was only tangentially related to the automobile's seizure.[119] In most cases, seizure of the automobile will be directly related to the case at hand and occur soon after the misconduct.

United States v. Richter: Extensive Facts, Multiple Fourth Amendment Doctrines

United States v. Richter[120] dealt with several Fourth Amendment issues, though it focused on items discovered during a search of the accused's truck. Technical Sergeant Richter was stationed at Nellis Air Force Base, Nevada, where he worked as a security policeman.[121] Another non-commissioned officer (NCO) identified Richter to an Air Force OSI agent as having stolen government property.[122] He also apparently told the OSI agent that Richter's garage was "like a warehouse."[123] Though the NCO who identified Richter did not clearly state when the property was taken, the agent believed it to have been recently. The OSI agent was also aware of three audit reports indicating a lack of accountability or control for government property in Richter's unit.[124] Furthermore, he interviewed another NCO who told him that Richter had given her a government issued medicine cabinet.[125]

Based on all this, the OSI agent decided that Richter probably had government property in his quarters (which was located at another nearby air base).[126] The NCO to whom Richter had given the cabinet was instructed to make a pretextual phone call to Richter's home, which would be observed by OSI agents while it was made.[127] During the call she told Richter that the OSI had a search warrant, had been to her house, and picked up the medical shelf. She also told him that they also had a search warrant for Richter's residence and were coming to his house.[128] A few minutes after the call, "two white individuals" were observed near a storage shed alongside the garage, one of whom seemed to be loading items in the bed of a truck.[129]

One of the individuals then got in the truck and started driving away. A second police team stopped the truck, using headlights and flashlights to illuminate the scene.[130] The investigators saw "apparent government property" in an open box in the bed of the truck.[131]

Richter, who was driving, asked why he was stopped. He was told he was under investigation for larceny. Richter then spontaneously stated that he was taking the government property back to work and that there was more at his house.[132] An agent told Richter not to make any more statements, but did not read him his Article 31 rights.[133]

After Richter consented to a search of his vehicle, he was taken to the station where he was asked to consent to search of his residence. A warrant to search his residence had already been obtained, but Richter was not told this when his consent was sought.[134] During the subsequent search of Richter's quarters, the OSI agents found government property in the house, the garage, and the storage shed.[135]

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119. *Id.* at 1557.

120. 51 M.J. 213 (1999). *Richter* was announced on the same day as another CAAF opinion by Judge Gierke, *United States v. Owens*, 51 M.J. 204 (1999). In *Owens*, another lengthy set of facts resulted in a finding that Owens's Fourth Amendment rights had not been violated.

121. *Id.* at 215. Richter's experience was in area security, not law enforcement.

122. *Id.* at 216.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 217. Some of the items seen in an open box in the truck bed, included a night viewing device, camouflage netting, and winter-weight "bunny boots."

132. *Id.*

133. *Id.*

134. *Id.*

Writing for the majority, Judge Gierke found that the trial court judge had made extensive findings of fact and conclusions of law, and thus denied the motion to suppress.[136] In Judge Gierke's opinion, the question of whether Richter's consent to search his truck was truly voluntary did not need to be decided.[137] Based upon the prior information that indicated Richter had taken government-owned property for personal use and the reaction to the pretext phone call, the OSI had "reasonable suspicion" to make a *Terry* stop of the truck.[138] Once the stop was made, the agents could lawfully observe items in open view in the truck bed. Seeing these items in public view, the agents then had probable cause that Richter had stolen government property in the truck and could, under the automobile exception, search the truck without a search authorization or warrant.[139]

Judge Gierke also examined the question of the search of Richter's quarters. Richter had argued that the search was based upon coerced consent: because of the pretext phone call, he was under the impression the OSI had already obtained a warrant.[140] However, Judge Gierke stated that consent is determined looking at the "totality of the circumstances," and mere mention of an intent to obtain a warrant would not necessarily vitiate consent.[141]

Rather, Judge Gierke held that the military judge's holding was correct. The NCO who had made the pretext call was not Richter's superior or an OSI agent.[142] Instead, she was calling as a friend and that the mentioning of the warrant was to get a reaction from Richter, not to gain his consent.[143] Furthermore, there were several intervening events between the pretext call, to include finding government property in Richter's truck, before being asked for his consent.[144] Also, Richter was advised of his right to refuse consent during the interview, and the OSI agents did not mention a warrant.[145]

Richter is less important for its actual findings than it is for its full explication of the facts. None of the conclusions of law, regarding consent, *Terry* stops, or the automobile exception are controversial or groundbreaking. This case illustrates how often Fourth Amendment issues will overlap, how one exception to search and seizure doctrine can lead to another and thus justify a more extensive search. It also illustrates the importance for the military judge to establish very extensive factual findings on the record to justify his decision. Indeed, Judge Gierke devoted most of the Fourth Amendment section of the opinion to the factual background.[146]

In cases such as *Richter*, both defense and government counsels have to present as much factual evidence as possible to make their respective cases. While the government has the evidentiary burdens (and a "clear and convincing" standard in consent issues), search and seizure law has so many exceptions to its requirements that defense counsel can never rest on simply arguing that the government has failed to meet such a burden. It must be at least as proactive as the government in arguing that the facts indicate that not only has the government failed to meet its burden, but that the particular exception it may be relying on does not apply.

135. *Id.* at 218.

136. *Id.* at 218-19.

137. *Id.* at 220. Judge Gierke used a "clearly erroneous" standard of review for the military judge's findings of fact and a *de novo* standard for his conclusions of law. *Id.*

138. *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968)).

139. *Id.* (citing MCM, *supra* note 72, MIL. R. EVID. 314(f)(1)).

140. *Id.* at 221.

141. *Id.* at 220-21 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973)).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. The case also dealt with a request for immunity and alleged unlawful command influence. *Id.* at 222-23.

Consent Through Trickery: *United States v. Vassar*

In *United States v. Vassar*,[147] the CAAF dealt with the concept of consent as well as with a judge's apparent incorrect interpretation of the law. In *Vassar*, the accused was scheduled to report for duty but called in late, saying that he had been kicked in the head playing rugby.[148] A Senior Master Sergeant overheard Vassar saying that he would drive to sick call. The Master Sergeant then told Vassar that he should not drive and that he would come to his house and take him to the hospital.[149] Arriving at Vassar's house, he smelled an odor of stale marijuana while waiting for him, but said nothing. After he took Vassar to the emergency room, the Master Sergeant called the unit First Sergeant and told him he had smelled marijuana at Vassar's house.[150]

After the First Sergeant had consulted with legal counsel, he came to the hospital and indicated to Vassar that because of the circumstances of his injury, Vassar should consent to a urinalysis test.[151] The First Sergeant never mentioned the smell of stale marijuana. Vassar was neither advised of his Article 31 rights,[152] nor was he informed of his right to withdraw consent.[153] Only after Vassar actually urinated was he given a consent form with all the proper language about the right to refuse consent.[154]

At trial, after the government argued against the motion to suppress based on lack of voluntary consent, the military judge said "considering the evidence in the light most favorable to the prosecution . . . I find that the government has established, by clear and convincing evidence, that the accused's consent was voluntary."[155] Considering evidence in light most favorable to the prosecution, however, is the standard for appellate review, not for trial.[156] Yet, despite this abuse of discretion, the CAAF found beyond a reasonable doubt that the incorrect view of the law was harmless because there was no evidence that suggested that the consent was not voluntary.[157]

The majority opinion looked at the facts surrounding the consent, particularly Vassar's state of mind.[158] Not only did he immediately give oral consent, but also "[n]otwithstanding his head injury, he was aware of his surroundings and conversed naturally. The atmosphere was non-coercive and lighthearted, as reflected by the joking about the urinalysis."[159] Vassar also signed two written consent forms after he had submitted to the urinalysis.[160]

Judge Sullivan dissented, saying: "I cannot find the key legal error was harmless."[161] Nevertheless, *Vassar* is another very pro-government case, and further indicates the extreme difficulty defense will have invalidating consent. Despite a ruse, despite that Vassar suffered a head injury, despite written consent not being obtained until after the test, the court determined that consent was voluntary. A suspect need not be completely informed for his consent to be voluntary; rather he must not be coerced. What the defense needs to establish is that, in the end, the accused had no real choice to make. Therefore, in cases involving medical treatment, the argument for an accused should be that in order to get proper medical treatment for injury, the accused had to consent. Placed in those terms, the question then is one of voluntariness, not of being informed. Otherwise, as long as the government frames the issue along the

147. 52 M.J. 9 (1999).

148. *Id.* at 10.

149. *Id.*

150. *Id.*

151. *Id.* The First Sergeant then specifically phrased it as a question: "Due to your injury, would you consent to a urinalysis test?" *Id.*

152. UCMJ art. 31 (LEXIS 2000).

153. *Vassar*, 52 M.J. at 10.

154. *Id.* at 11. In fact, first consent form was not properly executed. The hospital laboratory technician would not administer the urinalysis until a second form was properly filled out. *Id.*

155. *Id.*

156. Military Rule of Evidence 314(e)(5) states that consent to search must be shown by clear and convincing evidence. MCM, *supra* note 72, MIL. R. EVID. 314(e)(5).

157. *Vassar*, 52 M.J. at 11.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

lines of *Vassar* –indicating that, despite a ruse, the accused voluntarily consented–it will prevail in such a motion, despite the "clear and convincing" evidentiary standard.

Descriptions in Search Warrants: *United States v. Fogg*

The case *United States v. Fogg*[162] centers around the language of a search warrant. In the facts of the case, undercover law enforcement officers had been buying drugs from Fogg, who was very adept at understanding surveillance technology.[163] Indeed, Fogg actually had pictures taken of people buying drugs from him and would then check to see if they were police.[164]

After several drug buys, Fogg was also identified as being a Marine, and was tipped off that the buyers were undercover police.[165] Therefore, the detective handling the case moved quickly to get a search warrant of Fogg's off-post quarters before any evidence could be destroyed.[166] In the detective's affidavit, the detective stated that items to be searched for and seized included counter-surveillance equipment, which were things such as "RF (Radio Frequency) detectors, photos, cameras, binoculars, anything that can be used for surveillance, video."[167] This, however, was not in the warrant itself.[168] Rather, the affidavit was attached to the warrant. The warrant actually authorized seizure of "crack cocaine, packaging and repackaging equipment, papers proving occupancy, records, weapons, pagers, RF detectors, photos, cell phones, police scanners, [and] scales/paraphernalia."[169]

During the search of Fogg's bedroom in his off-post quarters, a detective picked up a video camera and noticed a tape inserted in it as well as a second tape nearby.[170] Though a video camera was not specifically mentioned in the warrant or the affidavit attached to it, the detective viewed the tape to see if he had been caught in surveillance activities.[171]

The detective believed the first tape showed marijuana being grown, though it was hard to see in the camcorder.[172] He therefore seized the tape. The detective inserted the second tape into the video camera, which showed a scene with an apparently underage female who appeared to be intoxicated.[173] Thinking that tape might be evidence of contributing to the delinquency of a minor, he also seized that tape. Later viewed, the tape showed underage girls engaging in sexual intercourse with someone who appeared to be the appellant's son.[174] The girls were identified, and as a result of their interviews, Fogg was charged and convicted of rape, indecent assault, and committing indecent acts as well as numerous drug offenses.[175]

At trial, defense counsel attempted to suppress the tapes saying the search of the tapes exceeded the warrant.[176] The judge denied the motion, stating that the warrant granted police the right to search for and seize "photos," which therefore also gave them the authority to search for, view, and seize the videos.[177]

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162. United States v. Fogg, 52 M.J. 144 (1999).

163. *Id.*

164. *Id.* at 146. He also had a RF detector that could detect wires.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* At trial, the detective indicated that he thought that because "counter-surveillance equipment" was listed in the warrant application and that photos were listed in the warrant itself, he had authority to look at the video in the camcorder. *Id.* at 146-47.

172. *Id.* at 147.

173. *Id.*

174. *Id.*

175. *Id.* at 145, 147.

176. *Id.*

177. *Id.*

Chief Judge Crawford, writing for the majority, also stated that the videotapes were included within the scope of the warrant.[178] To support her position, she relied on case law that stated that officers are not obligated to interpret a warrant narrowly.[179] She specifically relied upon an Eighth Circuit case, *United State v. Lowe*,[180] in which the court applied the "practical accuracy" test for warrants. In *Lowe*, because the search warrant permitted a search and seizure for "photographs" and "items of personal identification," the videotape that had been seized depicting Lowe and co-conspirators holding firearms was included reasonably in the warrant.[181] Judge Crawford also relied upon the definition of photographs in MRE 1001(2), as well as North Carolina Rule of Evidence 1001(2).[182] In both rules, the definition of "photographs" also includes videotapes.[183] Those definitions are "indicative of the plain meaning of the word," even if such language would not be necessarily controlling.[184]

Judge Gierke dissented. In his dissent, he stated that the trial court itself had stated the tapes were not within the scope of the warrant either.[185] He further distinguished the *Lowe* case cited by Chief Judge Crawford. According to Judge Gierke, *Lowe* held that the warrant authorized searches and seizures of items of "personal identification, and that the videotapes were such because they were labeled with the defendant's 'street name.'"[186] Therefore, according to Gierke, *Lowe* did not support the position that "photos" included videotapes. Rather, a warrant must specifically list the items to be seized.

The whole idea of the particularity requirement of the Fourth Amendment is to prevent general searches, a concept most famously asserted in *Marron v. United States*.[187] "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."[188] Yet in practice, the courts have been more or less generous in permitting the law enforcement official to seize something not specifically mentioned in a warrant, depending upon the *type* of item seized. Thus for example, contraband–property which by its nature is illegal–generally does not require specificity.[189]

Yet nevertheless, the items the police were looking for in *Fogg*–surveillance equipment–were not inherently contraband. Indeed, the seizure of literature, pictures, films, and recordings, because of First Amendment concerns, is generally thought to require a higher degree of specificity than other items.[190] Furthermore, the language in the warrant appeared to be clear, and thus did not appear to require a review of the underlying affidavit to aid in its interpretation, which may be permitted if the affiant is the investigating officer, as is the case here.[191]

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178. *Id.* at 148.

179. *Id.*

180. United States v. Lowe, 50 F.3d 604 (8th Cir. 1995).

181. *Fogg*, 52 M.J. at 148 (citing *Lowe*, 50 F.3d at 604).

182. *Id.*

183. *Id.*

184. *Id.* Judge Crawford asserted that alternative theories of admissibility applied as well. She stated that the "plain view" doctrine justified the seizure. The detective who had seized the evidence knew that Fogg was monitoring him, knew that videotapes are often used by drug dealers to record transactions, and therefore once in the house legally could seize evidence related to that monitoring. Judge Crawford also asserted that the good faith exception and the independent source doctrine applied. *Id.* at 149-52. Judges Sullivan concurred, affirming the case on the basis that the videotape evidence was seized during a lawful search and within the scope of the warrant. Judge Effron concurred with Chief Judge Crawford, but joined Judge Gierke's dissent as to the alternative theories that Judge Crawford presented. *Id.* at 152-53. In his dissent Judge Gierke disagreed the videotapes met the "plain view" doctrine, since nothing indicated the videos were evidence of a crime. He also disagreed that the good faith exception or independent source doctrine applied. *Id.*

185. *Id*. While it is unclear what theory of admissibility justified the inclusion of the videos at trial, the lead opinion states that "The judge denied the [defense's] motion by ruling that the word "photos" in the warrant gave the police authority to seize and view the videotapes. He also found the officers acted in good faith." *Id.* at 147.

186. *Id.*

187. 275 U.S. 192 (1927).

188. *Id.*

189. *See* 2 WAYNE LAFAVE, SEARCH AND SEIZURE, ch. 4.6(b), 560 (3d ed. 1996).

190. *Id.* at 577-80.

191. *See, e.g.*, United States v. Occhipinti, 998 F.2d 791 (10th Cir. 1993); State v. Dye, 250 Kan. 287 (1992).

Fogg thus seems to be lacking in precedential value, because it does not fully explore the specificity requirement in a warrant enough to justify the majority's main premise. Perhaps given the nature of search authorizations in the military (not required to be under oath or in writing, and issued by commanders as well as military judges and magistrates), the military case law on warrant specificity is lacking. Defense counsel, when confronted with a search that exceeds the face of the warrant should not allow Fogg to end the inquiry. Rather, defense should fully present all the specificity requirements and their rationales when aiming to defeat a search.

A Crime Scene Exception? *Flippo v. West Virginia*

Is there a "crime scene exception" to the Fourth Amendment? That is, does the fact that a location is an apparent crime scene allow law enforcement officials to dispense with a warrant requirement to search an area and seize discovered evidence? In another per curiam Fourth Amendment decision issued by the Supreme Court, *Flippo v. West Virginia*,[192] the Court answered no.

In 1996, Flippo, who had been vacationing with his wife at a cabin in a state park, called 911 to report that he and his wife had been attacked. Police arrived and found Flippo had been apparently injured, and inside the cabin, found his wife with fatal head wounds.[193] Police then closed off the area and searched the exterior and interior of the cabin for footprints or signs of forced entry.[194] Later a police photographer arrived, and for the next sixteen hours, police "processed the crime scene," which included taking photographs, collecting evidence, and searching through the cabin.[195] They found evidence implicating Flippo, but at no point obtained a warrant.[196]

Flippo claimed at trial that the evidence obtained from the scene should be suppressed because the police had not obtained a warrant, and that no exception to the warrant requirement existed in this case. The prosecution argued that police may conduct an immediate investigation to preserve evidence from intentional or accidental destruction, and that this was a "crime scene inventory exception."[197] The trial court agreed that this was a "homicide crime scene" exception and denied Flippo's motion.[198]

The Supreme Court unanimously reversed the West Virginia Supreme Court's upholding of this ruling, stating that "[a] warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement."[199] It further indicated that the trial judge's decision directly conflicts with the Supreme Court's holding in *Mincey v. Arizona*, which rejected the "murder scene exception."[200] Furthermore, the Court determined that the trial judge did not consider other possible avenues of admissibility, such as implied consent on the part of Flippo as he apparently directed the police to the scene of the attack. As the question of consent was factual, the Court held that is was a question that was not to be resolved for the first time at its level.[201]

In *Flippo*, the Supreme Court broke no new ground, but simply reaffirmed the necessity to fit the warrantless search within the context of clearly carved-out warrant exceptions. The Supreme Court indicates in a footnote that while the prosecution had argued under theories of plain view (which is not a search doctrine at all, but a seizure doctrine, and thus would not get the police into the area on its own), exigent circumstances, and inventory, the trial judge's ruling "undermine[d] the State's interpretation."[202]

Flippo reminds us of the importance of carefully distinguishing facts to fit into exceptions. Thus, it seems implausible to claim that, after police had secured the crime scene, "exigent circumstances" justified the search of that scene–the evidence was secure. More plausible perhaps would have been the argument that the police's initial entry was an "emergency search" that justified a securing of the cabin and its environs. The police could have also argued the search was consensual, and perhaps that by Flippo himself calling 911, had forfeited a "rea-

192. Flippo v. West Virginia, 120 S. Ct. 7 (1999).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 8. The prosecution also relied upon the "plain view" exception.

198. *Id.*

199. *Id.* The West Virginia Supreme Court of Appeals had denied discretionary review of Flippo's appeal. *Id.*

200. *Id.* (citing Mincey v. Arizona, 437 U.S. 385 (1978)).

201. *Flippo*, 120 S. Ct. at 8.

202. *Id.* at 8 n2.

sonable expectation of privacy" in a cabin that was government property anyway. Finally, based upon some or all of the circumstances and justifications above, perhaps it could have argued that the evidence would have been "inevitably discovered," thus rendering the need for a warrant superfluous. What *Flippo* thus tells the prosecutor is to reject novel search exceptions, and focus on fitting the facts to the (multiple) existing exceptions. Furthermore, a prosecutor should be cautious on relying on one "sweeping" exception, but should look to the facts to indicate that one exception might lead to another (for example, an emergency search might lead to inevitable discovery).

Urinalysis Cases

Jackson Extended: United States v. Brown

In *United States v. Brown*,[203] the Army Court of Criminal Appeals (ACCA) extended the holding in *United States v. Jackson*,[204] which dealt with an inspection for drugs in the barracks, to an inspection for drugs in soldiers' urine. Indeed, the ACCA stated that "[t]he facts of this case are remarkably similar to those in *Jackson*."[205] In *Jackson*, the CAAF presented a significant interpretation of MRE 313(b);[206] in *Brown*, the ACCA applied that interpretation to urinalysis cases.

Brown was convicted of, among other things, wrongful use of cocaine, the primary evidence of which was a positive urinalysis test result.[207] Brown had been assigned to a transportation company, whose commander had been informed by his first sergeant of several soldiers suspected of using drugs in the unit.[208] The commander, however, had no other information that the soldiers were using drugs other than that they were named. Relying in part on advice from his legal advisor, the commander determined that there was insufficient probable cause to command-direct a urinalysis of the soldiers allegedly using drugs, but instead decided to conduct a unit urinalysis.[209]

After determining further that a one-hundred-percent urinalysis was not logistically feasible, he instead decided upon a thirty-percent test.[210] The commander then ran a computer generated program that produced the names of soldiers to be tested. Four of the five soldiers named as having used drugs were listed, as was Brown.[211] While the defense challenged whether the commander ran a program that produced a truly random cross-section of soldiers in his unit, this was evidently refuted by the list itself which listed "US," meaning unit sweep, indicating a random selection. Furthermore, the evidence indicated only one run of the computer program had been done.[212]

The defense counsel also argued that the unit urinalysis test was simply "a subterfuge for an otherwise illegal search."[213] The defense counsel argued that the examination followed immediately the report of an offense and was not previously scheduled. Because of this–and because the commander had selected specific individuals for testing and because Brown was subjected to a substantially different intrusion–the "subterfuge rule" of MRE 313(b) was triggered. As a result, the government had to prove by clear and convincing evidence that the primary purpose of the examination was an administrative inspection and not a search for criminal evidence.[214]

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203. 52 M.J. 565 (Army Ct. Crim. App. 1999).

204. 48 M.J. 292 (1998). In *Jackson*, the company commander had received an anonymous tip that Jackson had drugs in his barracks room. Lacking probable cause, he ordered an inspection of all the barracks rooms under his command, using Criminal Investigation Command agents and drug dogs. Marijuana was found in a speaker in Jackson's room. Judge Effron held that the commander's primary purpose for ordering the inspection was administrative not criminal, and thus did not violate MRE 313(b), the so-called "subterfuge" rule. The commander testified that his primary purpose in ordering the inspection was to ensure his unit did not have drugs. Primarily because of the commander's testimony, the government thus met its "clear and convincing" burden that the primary purpose of the inspection was administrative, and the evidence was deemed admissible. *Id.* at 292-98.

205. *Brown*, 52 M.J. at 570.

206. MCM, *supra* note 72, MIL. R. EVID. 313(b).

207. *Id.* at 566.

208. *Id.* at 566-67. The first sergeant had been approached by an NCO from another unit who told him that several soldiers in the company were using drugs.

209. *Id.* at 567.

210. *Id.*

211. *Id.*

212. *Id.* at 568. The defense also argued that there were serious deviations in the urine collection and transport process. However, the ACCA stated that his "failure to object [to the litigation packet, urine collection bottle, chain of custody document, and expert witness] was a tacit acknowledgement that the flaws in the collection process went to the weight to be accorded in the evidence, not its admissibility." *Id.* at 571.

213. *Id.* at 569.

214. *Id.*

The military judge applied the "clear and convincing" standard to MRE 313(b), but nevertheless held that the commander's primary purpose was not criminal. Rather, the commander's "primary purpose . . . was because he wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs."[215]

Using the "clearly erroneous" standard to examine the military judge's findings of fact, the ACCA concluded that they were "amply supported by the record."[216] Relying upon *Jackson*, the ACCA stated that there is "no requirement" that an inspection be preplanned or previously scheduled, as long as the primary purpose is unit readiness, as opposed to disciplinary action.[217] Relying again on *Jackson*, it further stated that "[b]ecause drug use has significant potential to damage a unit, the commander and the military judge may consider such potential for damage in determining if the primary purpose of the inspection was administrative . . . [t]he record here amply supports the conclusion that the 9 July 1996 urinalysis was a valid inspection . . . ."[218] Again, as in *Jackson*, the source of the information that supported such a finding was the commander's own testimony. On the witness stand, he testified that his primary reason in ordering the test was the "effect drug abuse could have on his unit" and testified that "you don't want someone . . . that's doing drugs operating a Super-HET [heavy equipment transporter]."[219]

Brown may appear to be a logical extension of *Jackson.* The latter case dealt with drugs in the barracks, the former deals with soldiers using drugs. Yet it should raise some concerns with how MRE 313(b) is to be interpreted. A reading of *Jackson* and *Brown* together suggests that MRE 313(b) is without much effect when it comes to deterring a commander from announcing an inspection in the wake of a report of drug possession or use in his unit. All he apparently has to do is, rather than ordering a test of the one targeted soldier, order a test of several of them, assert that his primary purpose is "unit readiness," and he overcomes even the "clear and convincing" standard. It was suggested last year, after *Jackson* came out, that perhaps defense counsel could try to distinguish *Jackson*, which dealt with drugs being possessed in the barracks (and thus possibly distributed to other soldiers) from drug use.[220] The ACCA in *Brown* appears to reject such a distinction. Indeed, when it comes to possession or use of illegal drugs, following *Brown* and *Jackson*, it appears unlikely in nearly any case that a commander's subsequent inspection will fail.

Oddly enough, however, while *Brown* might indicate a gigantic "win" for the government in urinalysis inspections, it is counterbalanced by the holding in *United States v. Campbell.*[221] Thus, what ultimately may defeat the government in using such a test at a court-martial is not a military rule of evidence premised on search and seizure doctrine, but rather the CAAF's interpretation of the "permissive inference" rule.[222] At any rate, one may wonder whether, when concerning illegal drugs, MRE 313(b) has much effect anymore at all.

The Innocent Ingestion Defense and Its Requirements: *United States v. Lewis*

In *United States v. Lewis*,[223] the CAAF reversed a urinalysis result because the military judge apparently did not allow defense to present an innocent ingestion defense at the court-martial. In the case, the accused was charged with wrongfully using cocaine.[224] The government case rested on the positive urinalysis result alone. In a pretrial conference, the military judge stated, when a potential innocent ingestion defense was brought up by defense counsel, that innocent ingestion was "an affirmative defense in which she [defense counsel] would have to put on evidence of persons and places to which the events of innocent ingestion took place."[225] Shortly afterwards, the defense counsel withdrew the innocent ingestion motion and

215. *Id.*

216. *Id.*

217. *Id.* at 570.

218. *Id.* (citing United States v. Jackson, 48 M.J. 292, 295-96 (1998)).

219. *Id.*

220. *See* Major Walter M. Hudson, *A Few New Developments in the Fourth Amendment,* ARMY LAW., Apr. 1999, at 36.

221. United States v. Campbell, 50 M.J. 154 (1999).

222. *Id. See* Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell*: A Major Change for Urinalysis Prosecutions? ARMY LAW., May 2000, at 39.

223. 51 M.J. 376 (1999).

224. *Id.* at 377.

225. *Id.* at 377-78.

the defense counsel indicated on the record that there would be no innocent ingestion defense raised.[226]

During the direct examination of the accused at the court-martial, the defense indicated it was going to present a diagram of the club where the accused was on a particular evening prior to the urinalysis. The trial counsel objected, stating this diagram was to be used to elicit possible innocent ingestion defense testimony.[227] The defense in response asserted that she had understood that no innocent ingestion defense could be presented unless witnesses could testify about it, but that she could still "present the circumstances of the evening where something could have happened."[228] The military judge allowed the defense to elicit testimony concerning where the accused was during the evening and what he did, but the judge indicated that further questioning would move into an innocent ingestion defense, and presumably not be allowed.[229]

The CAAF reversed and set aside the findings of guilty and the sentence.[230] Rules for Courts-Martial (R.C.M.) 701(b)(2) does require the defense to disclose notice of the defense of innocent ingestion, to include the place(s) where, and the circumstances under which the accused claims he innocently ingested, and the names and addresses of witnesses upon whom the accused intends to rely on to establish the defenses.[231] Judge Sullivan, writing for the majority, held however that the provision does not *require* corroborative witnesses or direct evidence for an affirmative defense.[232] Defense is simply required to disclose such facts if it has them. Case law clearly allows an accused to testify that someone may have spiked a drink with no corroborative witnesses.[233]

Because the military judge apparently misread R.C.M. 701, he thereby substantially prevented the defense counsel from presenting and framing the issue, to include barring the counsel from mentioning it during opening or closing.[234] Under either standard of constitutional or non-constitutional error, the CAAF held that reversal was required.[235]

Why did the CAAF hold that the judge's error warranted reversal? Although the accused was allowed to testify "as to his visits to the karaoke clubs on the nights in question, his voracious drinking of beer, and his repeated trips to the bathroom leaving his drinks unguarded and mingled with the drinks of other bar patrons" as well as argue that these circumstances "created the possibility that someone put something in his beer without his knowledge, or that he picked up someone else's drink," he was nonetheless "prejudically chilled" in presenting his case.[236] The accused could not present evidence to rebut the government's cross-examination, in which he admitted he had no enemies at the bars on the nights in question.[237] The judge also failed to give instructions on innocent ingestion that could have favored the defense.[238]

Judges Crawford and Cox dissented. The dissent was premised in part on whether or not the military judge actually did refuse to permit the defense to put an innocent ingestion defense on. The confusion is in whether the judge simply indicated that the military judge was prepared to preclude the defense due to a lack of witnesses, or whether, because of the lack of witnesses, the military judge wanted to have the ability to raise the defense litigated on the record.[239] The issue was never again litigated since the defense counsel withdrew the

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226. *Id.* at 378.

227. *Id.*

228. *Id.*

229. *Id.* The military judge stated: "Well, I'll allow you to indicate where he was that evening and what he did. But, again, if you start threading over into this innocent ingestion defense, I'm going to call a 39(a) session awfully quick." *Id.* Thus, the clear implication was that such questioning would not be allowed.

230. *Id.* at 383.

231. MCM, *supra* note 72, R.C.M. 701(b)(2).

232. *Lewis*, 51 M.J. at 380.

233. *Id.* (citing United States v. Ford, 23 M.J. 331, 333 (C.M.A. 1987); United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986)).

234. *Id.* The Navy-Marine Corps Court of Criminal Appeals and the government on appeal also conceded the judge erred applying R.C.M. 701(b)(2). *Id.*

235. *Id.* at 380-81. If the errors were constitutional in nature, then the government is required to show they were harmless beyond a reasonable doubt. If they were non-constitutional, the accused must show they substantially prejudiced material rights. *Id.* (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (constitutional error standard); United States v. Barnes, 8 M.J. 115, 116-17 (1979) (non-constitutional error standard)).

236. *Id.* at 381.

237. *Id.* The government was also allowed to argue that the spiking of his drink was thus improbable. *Id*.

238. *Id.* at 382.

239. *Id.* at 384.

motion voluntarily, although the defense counsel apparently understood she could still "present the circumstances of the evening where something could have happened."[240]

Lewis is an example of unresolved ambiguity that works to the benefit of the accused. Indeed, reading the excerpts quoted by both the majority and dissenting opinions, it is difficult to know exactly what the limitations were regarding the innocent ingestion defense. Was the military judge actually misreading R.C.M. 701(b)(2)? Was the judge reading it correctly, but simply notifying the defense that if she wanted to assert the defense, she would have to first litigate it, and since she did not, she could not raise it? Was she allowed to bring in evidence of the defense anyway from the accused? Did the military judge read R.C.M. 701(b)(2) correctly, but did the defense counsel read it wrong?

While the dissent makes a case that the military judge did not misread R.C.M. 701(b)(2), the record has enough vague language from judge and counsel to indicate the opposite. When the defense counsel said, for example, that she could still present "circumstances of the evening where something could have happened"[241] does that mean she understands that she *was* permitted to pursue the defense? What does "where something could have happened" mean? *Lewis* should thus serve as a signal for the military judge to address matters with clarity, and to make sure counsel address such matters with the same clarity, and to resolve ambiguities clearly on the record.

Addendum: Anonymous Tips and Reasonable Suspicion: *Florida v. J.L.*

On 28 March 2000, the Supreme Court issued an opinion in the case *Florida v. J.L.*,[242] in which it held that an anonymous tip without further corroboration was insufficient to justify a *Terry* stop and frisk. In the facts of the case, an anonymous caller informed the Miami-Dade police that a young black male in a plaid shirt standing at a certain bus stop had a gun on his person.[243] No other information corroborated the tip, the caller was never identified, and no audio recording of the tip was made. Six minutes after receiving the tip, the police saw three black males, one of whom, J.L., was wearing a plaid shirt. An officer approached J.L. frisked him, and seized a gun from his pocket.[244] He was arrested and charged with carrying a concealed firearm without a license and possessing a firearm under the age of eighteen.[245]

Justice Ginsburg, writing for a unanimous Court,[246] pointed out that in certain situations, the Court had recognized an anonymous tip has a basis for a *Terry* stop. Specifically, in *Alabama v. White*,[247] the Court held that suspicion was reasonable when the police had received an anonymous tip indicating a woman had cocaine and that she would "leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel."[248] However, Justice Ginsburg stated that *White* was considered "borderline" and thus distinguishable from the present case. The anonymous tip in *Florida v. J.L.* provided no "predictive information" and left police without a way to test the anonymous tipster's reliability or credibility.[249]

Justice Ginsburg's language is slightly puzzling, because clearly the anonymous tipster's language *was* predictive. The tipster said that a young black male in a plaid shirt would be standing at a certain bus stop and would be armed. Six minutes later, police found such a person. If, in *Alabama v. White* there was a predictability of movement on the part of the suspect, in *Florida v. J.L.* there was predictability of location and description. The basic problem was not that no predictive information was provided, but that it was insufficient.[250] For this reason, *Florida v. J.L.* provides little new information to clarify the often muddy waters of "stop and frisk" exceptions, but simply

240. *Id.*

241. *Id.*

242. Florida v. J.L., No. 98-1993, 2000 U.S. LEXIS 2345 (U.S. Mar. 28, 2000).

243. *Id.*

244. Id.

245. The trial court suppressed the gun, holding the search was unlawful. The intermediate appellate court reversed, but the Florida Supreme Court agreed with the trial court, holding the search invalid under the Fourth Amendment. *Id.*

246. Justice Kennedy filed a concurring opinion, which Chief Justice Rehnquist joined.

247. 496 U.S. 325 (1990), *cited in J.L.*, 2000 U.S. LEXIS 2345.

248. *Id.* at 328.

249. *J.L.*, 2000 U.S. LEXIS 2345.

250. One wonders if the result would be the same if the tipster had given considerable more detail to police in describing the suspect, regardless of his possible movements.

draws a line based upon a (perhaps easily) distinguishable set of facts.