New Developments in Search and Seizure: A Little Bit of Everything

Major Michael R. Stahlman
United States Marine Corps
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

The law must be stable, but it must not stand still.

—Roscoe Pound[1]

2000 was a light year for new developments in search and seizure. Combined, the Supreme Court and the Court of Appeals for the Armed Forces (CAAF) decided only a handful of Fourth Amendment cases that had any noteworthy significance in the criminal law field.[2] In addition, there was very little added or changed in published opinions by the service courts. Regardless, the body of search and seizure law has continued to grow and change. It is not standing still. The wide diversity of Fourth Amendment issues addressed over the last year by a variety of courts is evidence of a dynamic and evolving area of the law.

Computers

New Department of Justice Manual

The Department of Justice recently promulgated a new manual on computers and criminal investigations.[3] This new manual replaces the *1994 Federal Guidelines for Searching and Seizing Computers* along with its 1997 and 1999 supplements. For military practitioners, the manual is a superb resource because only a handful of military cases have touched on this growing area of law. It is the most comprehensive overview of computer-related search and seizure issues that is readily available to government practitioners. The major improvement with the new manual is that it covers federal statutes on wiretapping and electronic surveillance,[4] and the Electronic Communications Privacy Act (Title II).[5] Although the two cases discussed below deal with computer search and seizure issues, this area of the law is still very new in the military. The manual provides a useful tool for practitioners to fill the many gaps in this area of search and seizure in military law.

United States v. Tanksley

In *United States v. Tanksley*,[6] appellant, a Navy doctor and an O-6, was convicted of a variety of offenses related to the molestation of his natural daughters. He was sentenced to thirty-eight months confinement and a dismissal.[7] On appeal to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the CAAF, he claimed that a document he left open on his computer screen was seized in violation of the Fourth Amendment[8] and Military Rules of Evidence (MRE) 314 and 316.[9]

When the misconduct first came to light, Captain Tanksley was relieved of his duties and then temporarily assigned to another base where he was allowed to use an office with a computer.[10] Captain Tanksley had been working on his computer in his office when he was called away.[11] He left his computer on, but closed the office door without locking it.[12] He also left the document he was working on, entitled "Regarding the Charges

1. INTRODUCTION TO THE PHILOSOPHY OF LAW (1922), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 610 (1992).

2. This does not include *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000). *Campbell* will not be discussed in this article. The CAAF heard oral argument in two cases applying *Campbell* on 3 October 2000, but has not decided either case as of the date of this article.

3. COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION (CCIPS), UNITED STATES DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (2001), *available at* http://www.usdoj.gov/criminal/cybercrime/searchmanual.htm.

4. 18 U.S.C. §§ 2510-2511 (2000).

5. *Id.* §§ 2701-2711.

6. 54 M.J. 169 (2000).

7. *Id.* at 170.

8. U.S. CONST. amend. IV.

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314, 316 (2000) [hereinafter MCM]. In short, together both rules state that government property may be searched without a warrant or probable cause unless the property was provided for personal use.

Now Pending Against Me," still open on the computer screen.[13] He was apprehended when he arrived at the location he was summoned to, and placed into pretrial confinement.[14] Later, the duty officer (a judge advocate) went to the office to secure some of Captain Tanksley's belongings.[15] The duty officer printed the document and retrieved the floppy disk that was in the computer.[16]

At trial and on appeal, Captain Tanksley claimed that he had a reasonable expectation of privacy in his office and computer.[17] However, the CAAF agreed with the military judge and the NMCCA that Captain Tanksley's Fourth Amendment rights were not violated by seizure of the disk.[18] The CAAF found that he "had, at best, a *reduced* expectation of privacy" in his office and computer.[19] In addition, he "forfeited any expectation of privacy he might have enjoyed by leaving the document in plain view on a computer screen in an unsecured room."[20]

Although the CAAF's holding seems clear at first glance, there are at least two related problems with the decision for practitioners. First, the court does not provide any meaningful reasoning for its holding. Just two lines of text in the opinion address the search and seizure issue. Although there is no requirement for the court to provide more reasoning than it did, a little more analysis would be helpful to practitioners. In contrast, the service court did provide some meaningful analysis on the same issue.[21]

Second, the CAAF does not explain what it means by a "reduced" expectation of privacy. Again, in contrast, the NMCCA held that, as a general rule, service members do not have a reasonable expectation of privacy in government property.[22] The lower court also discussed the nature of the government property used by appellant. The office and computer were both made available to him for performance of his official duties.[23] Further, the NMCCA held that one does not acquire an expectation of privacy in government property merely because the property may be secured.[24] On the other hand, by not explaining the meaning of "reduced," the CAAF suggests that they might have found a reasonable expectation of privacy in this case had the facts been different (for example, if appellant had locked the door to the office).[25] Without more reasoning though, it is unclear what the CAAF meant by a "reduced" expectation.[26]

United States v. Allen

While *Tanksley* dealt with privacy interests in a government computer, *United States v. Allen*[27] concerned internet privacy in

10. *Tanksley*, 54 M.J. at 171.

11. *Id*.

12. *Id*.

13. *Id*. at 171-72.

14. *Id*. at 171.

15. *Id*.

16. *Id*. at 172.

17. *Id*. For the first time on appeal, he also claimed that the document on his computer was seized in violation of his Sixth Amendment right to counsel. *Id*. Since he prepared it for his attorney, he claimed that the content of the document contained privileged communications. *Id.* Both the NMCCA and the CAAF rejected this claim because the document was exculpatory and did not provide any information to the government that was not already known to them. *Id.*

18. *Id*. at 169.

19. *Id*. at 172 (emphasis added).

20. *Id*.

21. *See* United States v. Tanksley, 50 M.J. 609, 620-21 (N-M. Ct. Crim. App. 1999) (providing several paragraphs of discussion regarding seizure of the computer disk). Specifically, the lower court discussed why Captain Tanksley did not have an expectation of privacy in government property and why the disk seized was admissible because it was in plain view. *Id.*

22. *Id*. at 620 (citations omitted).

23. *Id*. As opposed to preparing his defense.

24. *Id*. Here, appellant closed the office door but did not lock it.

25. Another problem with the CAAF opinion is the court's summary of facts. The court said only that the duty officer went to "appellant's office to secure his personal belongings." *Tanksley*, 54 M.J. at 171. On the other hand, the lower court said that the duty officer and two Naval Criminal Investigative Service (NCIS) agents conducted a "search" of the office. *Tanksley*, 50 M.J. at 620. From a search and seizure standpoint, this difference is significant.

stored transactional records (along with several other related search and seizure issues). The Internet privacy question in *Allen*, however, is different from the privacy issues addressed in *United States v. Maxwell*,[28] where the court found a limited expectation of privacy in *e-mail transmissions* stored by Internet service or access providers.

The accused in *Allen* was convicted of various offenses including transporting and receiving child pornography in interstate commerce.[29] He was sentenced to confinement for seven years, total forfeitures, and a dismissal.[30] The CAAF granted review to consider whether the military judge committed prejudicial error by denying the defense motion to suppress evidence obtained by the government from "Super Zippo," the accused's Internet service provider (ISP).[31]

The accused became a suspect when a government network technician observed that files passing through the network to a government computer contained pornographic images.[32] The technician examined one of the image files which appeared to contain child pornography.[33] The subsequent investigation by the Air Force Office of Special Investigations (OSI) revealed that the images were being sent to a computer used by the accused and several others.[34] When questioned, the accused admitted that he used the computer during periods when the images were being received and that his ISP was "Super Zippo."[35] Eventually, OSI agents obtained a warrant to search the accused's home, located off of the installation.[36]

Before the warrant was issued, an OSI agent contacted the ISP and asked whether a warrant or a subpoena was required.[37] The manager of "Super Zippo" contacted corporate counsel who concluded that all they needed was a request from a "lawyer."[38] The agent asked for information relating to the accused's account and "any records of access to the online service that would indicate different areas that [appellant] traveled to."[39] The agent was provided with multiple listings of sites accessed by the accused through "Super Zippo" but not information containing "communications."[40]

The defense claimed that the information provided by "Super Zippo" should be excluded because it was acquired in violation of the Electronic Communications Privacy Act (ECPA)[41] and because Allen had a reasonable expectation of privacy in the information under the Fourth Amendment.[42] The CAAF ultimately found that, under the circumstances of this case, the seizure of information from "Super Zippo" did not amount to a constitutional violation that would warrant applica-

26. See Major Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, ARMY LAW., May 2000, at 17, for a good discussion of the NMCCA decision and the implications of the lower court's opinion for practitioners. One important practical aspect of the CAAF decision is that the court did not treat the government computer differently from any other type of government property. In addition, practitioners should note that the CAAF relied on *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987) for its holding. *Muniz* is an excellent case for practitioners to consider when confronted with questions related to expectations of privacy in government property.

27. 53 M.J. 402 (2000).

28. 45 M.J. 406 (1996).

29. *Allen*, 53 M.J. at 403.

30. *Id*. at 404.

31. *Id*. The defense also attempted to suppress evidence obtained from the accused's private residence pursuant to a warrant issued by a civilian judge in El Paso County, Colorado. In short, the defense claimed that the warrant was granted in violation of federal and Air Force regulations, that probable cause for the warrant was lacking, and that affidavits submitted for the warrant were false. *Id*. at 406-08.

32. *Id*. at 404.

33. *Id*.

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*.

38. *Id*.

39. *Id*. at 405.

40. *Id*.

41. 18 U.S.C. § 2703(c) (2000).

42. *Allen*, 53 M.J. at 408.

tion of the exclusionary rule.[43] However, the court's ultimate holding is not as important as how the court reached its decision. The framework the court used for analysis is significant because it provides practitioners with a very good means to analyze information obtained from a computer or internet network system.

First, the CAAF looked at what type of information was obtained from the ISP and what section of the ECPA was implicated by the government's seizure.[44] The government sought and obtained information in the form of "a log identifying the date, time, user, and detailed internet address of sites accessed by appellant over several months."[45] The court found that this information was covered under 18 U.S.C. § 2703(c) of the ECPA (Title II) which addresses government access to a "record or other information pertaining to a subscriber or customer of such service (not including the contents of communications . . . .)."[46] The court concluded from the language of the ECPA that release of transactional information did not require a warrant.[47] Even if a warrant was necessary, the CAAF also found that failure to secure a warrant would not entitle appellant to any relief in the form of exclusion of the information.[48] The court commented that "[i]f Congress had intended to have the exclusionary rule apply, it would have added a provision similar to the one found under Title III of the statute, concerning intercepted wire, oral, or electronic communications."[49]

Second, the court looked at whether appellant had a reasonable expectation of privacy in the information obtained that would implicate the Fourth Amendment. Since military appellate courts have only considered a handful of cases dealing with computer and internet privacy, the CAAF looked to the federal court system. In *United States v. Kennedy*[50] and *United States v. Hambrick*,[51] separate federal district courts found no expectation of privacy in information supplied by subscribers to their internet access providers (IAP). The information included the subscriber's name, address, credit card information, and other data identifying the subscriber.[52] The CAAF categorized this information on the low end of the types of information that might receive Fourth Amendment protection. Somewhat higher on the scale was the information obtained by government agents in *United States v. Maxwell*.[53] In *Maxwell*, the CAAF "found a limited expectation of privacy in e-mail messages sent or received through an IAP."[54] This information included "communications" in the text of e-mail transmissions.[55] The information in *Allen* was somewhere between the subscriber information obtained in *Kennedy* and *Hambrick* and the e-mail communications in *Maxwell*.[56]

Another important aspect of *Allen* is that the court did not address whether appellant had any privacy interest in using the government computer. Although this is probably because appellant never raised the issue, the absence of any discussion still adds support to the general conclusion that he, like other servicemembers, did not have an expectation of privacy while using a government computer.[57]

43. *Id*. at 410. The court never decided what type of privacy interest was involved and concluded that the transactional information obtained would have inevitably been discovered had a warrant been issued. *Id*. at 409.

44. *Id*.

45. *Id*.

46. *Id*. (citing 18 U.S.C. § 2703(c)(1)(A)).

47. *Id*. The court also found that this information could be "released upon a court order issued on the 'reasonable grounds to believe' standard under 18 U.S.C. § 2703(d)." *Id*. Unfortunately, it seems the court misread 18 U.S.C. § 2703(c)(1)(A). This section of the ECPA allows for release of transactional information to "any person *other than* a governmental entity." (emphasis added). The ISP did give the information to a government entity in this case so a warrant, court order, or consent from the subscriber was required. *Id.* § 2703(c)(1)(B)(i)-(iii). Regardless, the importance of this portion of the decision lies in how the court analyzed the privacy interest at issue.

48. *Id*.

49. *Id*. (referring to 18 U.S.C. §§ 2516, 2518(10)). In short, each code section provides for suppression of intercepted communications under certain circumstances. There is no such provision under Title II of the ECPA.

50. 81 F. Supp. 2d 1103 (D. Kan. 2000).

51. 55 F. Supp. 2d 504 (W.D. Va. 1999).

52. *Kennedy*, 81 F. Supp. 2d at 1107; *Hambrick*, 55 F. Supp. 2d at 508.

53. 45 M.J. 406 (1996).

54. United States v. Allen, 53 M.J. 402, 409 (2000).

55. *Id*.

56. *Id*. The CAAF did not go any further in discussing what type of privacy interest was at issue in the case because "a warrant would have inevitably been obtained for these very same records." *Id*.

Reasonable Expectation of Privacy: "Please Don't Squeeze the Charmin"[58]

Is a bus traveler's overhead luggage an "effect" protected under the Fourth Amendment? In *Bond v. United States*,[59] the Supreme Court said yes. The Court held that a Border Patrol Agent's squeezing of soft luggage on a Greyhound bus was an unreasonable search, rejecting the government's contention that the squeeze was just a visual inspection.[60]

Petitioner Bond was traveling from California to Little Rock, Arkansas.[61] The bus stopped at a mandatory border checkpoint in Texas and a Border Patrol Agent boarded the bus to check the immigration status of passengers.[62] After verifying that all passengers were lawfully in the United States, the agent squeezed passengers' bags stored in overhead compartments as he exited the bus.[63] The agent squeezed petitioner's green canvas bag located over his seat and felt a hard, brick-like object.[64] Bond admitted the bag was his and consented to a search of the bag when he was asked by the agent for permission to inspect its contents.[65] Inside the bag, the agent discovered a brick of methamphetamine wrapped in duct tape.[66]

At trial, petitioner's motion to suppress the methamphetamine was denied, he was convicted of conspiracy to possess and possession with the intent to distribute, and he was sentenced to fifty-seven months confinement.[67] The Court of Appeals for the Fifth Circuit affirmed the denial of the suppression motion, finding that the agent's manipulation of the bag was not a search under the Fourth Amendment.[68] However, in a seven to two opinion, the Supreme Court reversed the Court of Appeals.

The focus of the case was whether or not Bond gave up any privacy interest in his bag by placing it in the open overhead storage. First, the Court concluded that Bond's bag was clearly an "effect" protected by the Fourth Amendment.[69] Accordingly, he had a privacy interest in his bag.[70] Next, the Court considered whether Bond relinquished his privacy interest by leaving it in the overhead compartment where others could physically manipulate his bag.[71] The government relied on *Florida v. Riley*,[72] and *California v. Ciraolo*,[73] both of which dealt with aerial observation by police of suspects' homes and surrounding curtilage. The government's position was that Bond left his bag out for public observation and, like the defendants in *Riley* and *Ciraolo*, he gave up his privacy interest.[74] However, the Court distinguished those cases from *Bond*, stating that "they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection."[75]

---

57. *But cf*. United States v. Tanksley, 54 M.J. 169, 172 (2000) (finding a reduced expectation of privacy in a government office and computer).

58. Charmin Toilet Tissue Television Commercial, *reprinted* in JAMES B. SIMPSON, JAMES B. SIMPSON'S CONTEMPORARY QUOTATIONS (1988), LEXIS, Reference Library, Collected Quotations File.

59. 529 U.S. 334 (2000).

60. *Id*. at 338-39.

61. *Id*. at 335.

62. *Id*.

63. *Id*.

64. *Id*. at 336.

65. *Id*. The government did not claim the evidence seized was admissible based on petitioner's consent. *Id*. at 336 n.1.

66. *Id*.

67. *Id*.

68. *Id*.

69. *Id*.

70. *Id*. at 337.

71. *Id*.

72. 488 U.S. 445 (1989).

73. 476 U.S. 207 (1986).

74. *Bond*, 529 U.S. 337.

Finally, the Court looked at the nature of the intrusion by the agent. This intrusion was not as invasive as a body "frisk," like in *Terry v. Ohio*,[76] but the agent "did conduct a probing tactile examination of petitioner's carry-on luggage."[77] Although bus passengers should all foresee that their carry-on bags will be exposed to touching and handling by others on the bus, petitioner's belief was that the agent's manipulation went far beyond just incidental touching.[78] The Court agreed, finding that Bond had a subjective expectation of privacy in his bag since it was opaque. Further, this expectation was objectively reasonable in that a bus passenger "does not expect that other passengers or bus employees will, as a matter of course, feel [their] bag in an exploratory manner."[79] This is precisely what occurred in this case and the Court concluded that "the agent's physical manipulation of petitioner's bag violated the Fourth Amendment."[80]

The impact of *Bond* is significant in that the Court provides a new bright-line rule in an important area of search and seizure law. Justice Breyer and Justice Scalia, dissenting, believe that the decision might "deter law enforcement officers searching for drugs near borders from using even the most non-intrusive touch to help investigate publicly exposed bags."[81] Whether the case will do so remains to be seen. However, practitioners in the military need to be aware of the case because it potentially could affect the conduct of government investigators or police on an installation. Although there is a long recognized "gate inspection" exception[82] to the probable cause and warrant requirement, *Bond* appears to put some restrictions on the exception, at least in terms of searches conducted without any individualized suspicion.[83] Legal advisers and trial counsel need to be aware of *Bond* as it relates to current installation policies for conducting administrative inspections or searches generally.

Surprisingly absent from the majority's opinion in *Bond* is any discussion of important government interests at border checkpoints.[84] Although the checkpoint in *Bond* was not at a border crossing, it was just miles from Mexico. Aside from the potential problems posed by the flow of illegal immigrants near the border, the real concern is drug trafficking across the border. Installation commanders have similar concerns. More importantly, they have the obligation to maintain security on the installation.[85] In order to ensure commanders will continue to fulfill this obligation, a fresh look at inspection procedures should occur at all major installations. At the very least, personnel conducting administrative searches need to be apprised of *Bond* and its implications as to what they can search and how far they can go during a search in the absence of individualized suspicion.

Roadblocks

The Supreme Court decided another case dealing with government authority to conduct searches or seizures without individualized suspicion in *Indianapolis v. Edmond*.[86] The Court had established in earlier cases that "brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving and intercepting illegal immigrants were constitutional."[87] In *Edmond*, the Court considered the constitutionality of roadblocks "whose primary purpose is the discovery and interdiction of illegal narcotics."[88]

---

75. *Id*.

76. 392 U.S. 1 (1968).

77. *Bond*, 529 U.S. at 337.

78. *Id*. at 338.

79. *Id*. at 338-39.

80. *Id*.

81. *Id*. at 342-43 (Scalia, J., and Breyer J., dissenting).

82. *See* United States v. Alleyne, 13 M.J. 331, 334-35 (C.M.A. 1982) (discussing the importance of gate inspections in the military for installation commanders to maintain readiness and effectiveness) (citing United States v. Stanley, 545 F.2d 661 (9th Cir. 1976)). In addition, the Supreme Court has recognized the need on military installations for greater authority to restrict or control activity. Brown v. Glines, 444 U.S. 348, 356 (1980).

83. Generally, individualized suspicion means that police have some amount of suspicion based on specific and articulable facts observed by the police that would lead them to believe that criminal activity was afoot. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976).

84. In *City of Indianapolis v. Edmond*, 121 S. Ct. 447, 454 (2000), discussed in the next section, the Court considers the balance between individual privacy and roadblocks conducted without individualized suspicion for important government interests like policing of borders and ensuring roadway safety. The Court later explained why they did not discuss or inquire into the purpose for the "stop" in *Bond*, stating that "where the government articulates and pursues a legitimate interest for a suspicionless stop, courts should not look behind that interest to determine whether the government's 'primary purpose' is valid." *Id*. at 456 (citations omitted).

85. U.S. Dep't of Army, Reg. 190-16, Military Police: Physical Security, para. 2-2 (31 May 1991).

86. 12 S. Ct. 447 (2000).

Over the course of several months in 1998, the City of Indianapolis established a vehicle checkpoint program and conducted six roadblocks which resulted in a total of 104 arrests.[89] How the officers conducted the roadblocks was not in dispute. Vehicles were stopped by an officer, drivers were informed that the "stop" was a drug checkpoint, and drivers were asked for their vehicle registration and license.[90] During this process, the officer looked for signs of impairment and examined the inside of the vehicles while standing outside.[91] In addition, the police walked narcotics-detection dogs around each stopped vehicle.[92] Vehicles were stopped for an average of two to three minutes.[93]

Respondents were part of a group of individuals stopped at one of the roadblocks. They filed suit to stop the program claiming that the roadblocks violated the Fourth Amendment.[94] The district court denied the motion for a preliminary injunction and the Seventh Circuit Court of Appeals reversed.[95] Ultimately, the Supreme Court agreed with the Circuit Court and affirmed, holding that the roadblocks violated the Fourth Amendment because their "primary purpose [was] indistinguishable from the general interest in crime control."[96]

Why is *Edmond* important for military practitioners? The real significance of the case lies in what the Court did not say and what they briefly mentioned in a footnote.[97] The Court does provide an excellent synopsis of prior decisions where the purpose of the respective roadblocks was held to be proper. However, the Court did not discuss whether or not they would find that a roadblock with a proper primary purpose was still proper if a collateral or secondary purpose was, for example, drug interdiction. What this means for military practitioners is that commanders with authority to order roadblocks need to be advised that "drug interdiction" is not a proper primary purpose. Further, they need to be aware that any general crime prevention or interdiction purpose is likewise not proper.[98]

On the other hand, a "sobriety" checkpoint or roadblock will still be proper if, during the course of the "stop," police walk narcotics-detection dogs around the vehicle. In other words, *Edmond* does not prohibit the government from expanding the scope of a roadblock, within reason.[99] Actually, the Court seems to offer this avenue as a means of avoiding the problems presented by a program like the one used by the City of Indianapolis.[100]

---

87. *Id*. at 450 (citing Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

88. *Id.*

89. *Id*. The arrests represented a significantly high "hit rate" of about nine percent. *Id.*

90. *Id*.

91. *Id*.

92. *Id*. at 451.

93. *Id*. Obviously, some vehicles were stopped for considerably longer.

94. *Id*.

95. *Id*.

96. *Id*. at 458.

97. The court stated:

> [W]e need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics [or] whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car.

Id. at 457 n.2.

98. But the Court does state that a roadblock with a crime control purpose can still be proper in some exigent circumstances. The examples provided by the Court are roadblocks set up:

> to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route [and the] exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.

Id. at 455.

99. *Id*. at 457 n.2 (cautioning that the "search must be 'reasonably related in scope to the circumstance which justified the interference in the first place'") (citations omitted).

Probable Cause and Warrants

Illinois v. McArthur

In a more recent Supreme Court decision this year, *Illinois v. McArthur*,[101] the Court held that police acted reasonably when they kept a suspect from entering his home for two hours while waiting for a warrant to be issued. Police officers were "keeping the peace" while McArthur's wife retrieved her personal belongings in her trailer home.[102] McArthur was in the trailer when she arrived but the officers remained outside.[103] When she came out of the trailer, she informed the officers that her husband had marijuana hidden under a sofa.[104] McArthur denied the officers' request to enter the trailer to conduct a search.[105] While one officer and McArthur's wife went to get a search warrant, the other officer kept McArthur outside.[106] He was only allowed to enter the trailer where he could be observed by the officer standing outside.[107] When the warrant was obtained and executed, the officers found a small amount of marijuana and a marijuana pipe under the sofa.[108] McArthur moved to suppress the marijuana and the pipe as "fruit" of an illegal seizure based on the officers' refusal to let him enter his trailer.[109] His motion was granted, the Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied the State's petition.[110]

Reversing the Illinois courts, the majority focused on the reasonableness of the officers' conduct and the fact that they had probable cause to believe that illegal drugs were present in the trailer.[111] In terms of the necessity for the "seizure," the officers had legitimate concerns that McArthur might destroy or hide the drugs had he been allowed to enter the trailer unobserved, and they were reasonable in their efforts to avoid entering the trailer without a warrant or consent.[112] In addition, the officers only imposed the restraint just long enough to seek the warrant.[113] Their diligence in getting the warrant, the exigency that they faced, and their concern for McArthur's privacy interest in his home led the majority to conclude the officers' actions were reasonable under the circumstances. Hence, no violation of the Fourth Amendment occurred.

The majority's opinion provides practitioners with an excellent framework for analysis. From a practical standpoint, however, Justice Souter's concurring opinion provides the best advice regarding warrants. In short, when it is a house, or if in doubt whether or not to get a warrant, get one. In his own words, "the legitimacy of the decision to impound the dwelling follows from the law's strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later judicial review than a search without one."[114] He adds that "[t]he law can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one."[115]

Although the Illinois courts believed otherwise, the Supreme Court's nearly unanimous decision, eight to one, is a very good example for police to follow.[116] While protections against unreasonable police conduct are necessary, police officers also need to have the ability to do their jobs to protect soci-

100. *Id*. The Court did not expressly say that expanding the scope of a checkpoint program to include drug interdiction would be proper. However, by merely mentioning the possibility that a checkpoint program could be expanded in such a way, it seems the Court is offering a way for officials to succeed where the City of Indianapolis failed.

101. 121 S. Ct. 946 (2001).

102. *Id*. at 948.

103. *Id*.

104. *Id*. at 949.

105. *Id*.

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*.

111. *Id*. at 950. Justice Souter joined the majority but wrote a separate concurring opinion. Justice Stevens wrote a dissenting opinion. *Id*. at 954-55.

112. *Id*. at 950.

113. *Id*. at 951.

114. *Id*. at 953-54 (Souter, J., concurring).

115. *Id*. at 954.

ety without unnecessary and unwarranted restrictions. *McArthur* is a good example of how police officers can do their jobs while also protecting the privacy interests of citizens, particularly in their own homes.

United States v. Henley

In *United States v. Henley*,[117] the CAAF considered whether a warrant granted by a Texas magistrate to search appellant's home was supported by probable cause. The charges against appellant arose from his sexual abuse of his two children which occurred for many years.[118] He was convicted of various offenses stemming from the sexual abuse and was sentenced to six years confinement and a dismissal.[119]

At trial and on appeal, appellant challenged the warrant that was used to search his home. The magistrate was provided sworn statements from appellant's children, a statement from an investigative psychologist, and a summary of a treatise on pedophilia.[120] Appellant's children described how he would show them pornographic materials to arouse them before the sexual abuse.[121] The children also claimed that they saw the materials in appellant's possession since the period they were abused.[122] However, there was no evidence presented to the magistrate that the materials were seen in the five years preceding issuance of the warrant nor any evidence that the materials had been in appellant's present home.[123] Appellant's challenge of the warrant was based on the fact that the magistrate did not have this critical information.[124]

The Air Force Court of Criminal Appeals (AFCCA) and the CAAF both agreed with the military judge that the absence of information regarding the date the pornographic materials were last seen did not invalidate the warrant.[125] The magistrate had "substantial evidence" to support his finding of probable cause to issue the warrant.[126] Even assuming probable cause was absent, the CAAF found that "the evidence could be admitted under the 'good faith' exception to the warrant requirement."[127] From the record, the agents thought they were executing a valid warrant, they remained within the scope of the warrant, and the materials seized were described in the warrant.[128]

Judge Effron, concurring in part and in the result, disagreed with the majority's opinion that the warrant was supported by probable cause.[129] His disagreement was based on the fact that there was no evidence that the pornographic materials were used or even seen in the last five years and no indication that the material would be found at appellant's home.[130] He also believed that the statement from the psychologist, or any other information provided to the magistrate, did not save the warrant.[131]

So what does *Henley* mean for military practitioners? Not much, other than to reinforce the importance of providing timely information to the authority issuing a warrant or authorization to conduct a search. "Timeliness of the information

---

116. Justice Stevens, dissenting, believes the majority got the "balance" of interests all wrong. *Id*. at 954 (Stevens, J., dissenting). He characterizes the possession of small amounts of marijuana as not a particularly important public policy concern. *Id.* On balance, this minimal concern is more than outweighed by the very important need to protect the sanctity of the home, according to the Illinois courts and Justice Stevens. *Id*. at 955 n.3.

117. 53 M.J. 488 (2000).

118. *Id*. at 490.

119. *Id*. at 489.

120. *Id*. at 491; *see also* United States v. Henley, 48 M.J. 864, 867 (A.F. Ct. Crim. App. 1998).

121. *Henley*, 53 M.J. at 491.

122. *Id*.

123. *Id*.

124. Appellant also attempted to suppress incriminating statements he made to investigators following execution of the warrant and the seizure of pornographic materials in his home. *Id*. at 490-91.

125. *Id*. at 491.

126. *Id*.

127. *Id*. (citing United States v. Leon, 468 U.S. 897 (1984); United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)).

128. *Id*.

129. *Id*. at 493 (Effron, J., concurring). Judge Effron did agree with the court's reliance on the good faith exception. Accordingly, he concurred with the result of the case.

130. *Id*.

relied on is a vital part of the probable cause decision matrix."[132] Personnel seeking a warrant or authorization must not rely on the fact that the good faith exception is available as a safety net should there be a problem with probable cause. Obviously, it is much easier to be a Monday morning quarterback, but some important points can be drawn from the AFCCA's decision. The lower court provides practitioners with a good checklist to follow when making a probable cause determination. The factors that should be considered are: "the location to be searched; the type of crime being investigated; the nature of the article or articles to be seized; how long the criminal activity has been continuing; and, the relationship, if any, of all these items to each other."[133]

United States v. Khamsouk

In *United States v. Khamsouk*,[134] the NMCCA broke new ground in the area of arrest warrants, at least in military jurisprudence. Khamsouk was declared a deserter from the Navy and his commanding officer issued a DD Form 553 for his apprehension.[135] Special agents from the Naval Criminal Investigative Service (NCIS) were in possession of the form and information that appellant was staying at a particular residence off base.[136] The agents went to the residence and waited outside to apprehend Khamsouk when he left.[137] When two individuals walked out, the agents stopped them but found out Khamsouk was not one of them.[138] However, one of the individuals, Hospitalman Second Class (HM2) Guest, lived at the home. The agents told HM2 Guest that they had a warrant for Khamsouk's arrest and HM2 Guest said he would try to get Khamsouk to leave the residence.[139] The agents went to the residence with HM2 Guest and HM2 Guest went inside while the agents remained outside.[140] There were different versions as to what happened next but apparently one of the agents went inside the residence and eventually apprehended Khamsouk.[141] His knapsack and duffel bag were searched with his consent and various items were found that led to his conviction of larceny, forgery, fraudulent enlistment, and unauthorized use of another's credit card.[142] He was sentenced to five years confinement, a bad conduct discharge, a fine and forfeitures, and to be reduced to E1.[143]

Khamsouk moved at trial to suppress the evidence obtained following his allegedly illegal apprehension. His interpretation of Rule for Courts-Martial (RCM) 302(e)(2)[144] was that the requirement in the rule for an arrest warrant issued by competent *civilian* authority did not encompass DD Form 553.[145] The form was not issued by a civilian authority and, since the agent entered the residence, Khamsouk claimed the apprehension was improper. The NMCCA disagreed, holding that "when an

131. *Id*. Judge Effron commented that "[t]he statement provided by the investigative psychologist . . . does not 'bridge the gap' between the sighting [five years earlier] and the search to save the stale information." His concern is that previous cases where similar information provided by a psychologist were used to support probable cause involved gaps of less than two years and "represent the outer boundaries of the use of profile evidence to 'bridge the gap' and they do not warrant a finding of probable cause in the present case." *Id*.

132. United States v. Henley, 48 M.J. 864, 869 (A.F. Ct. Crim. App. 1998) (citing United States v. Lopez, 35 M.J. 35, 38 (C.M.A. 1992)).

133. *Id*. (citing *Lopez*, 35 M.J. at 38-39) (other citations omitted).

134. 54 M.J. 742 (N-M. Ct. Crim. App. 2001).

135. *Id*. at 743. U.S. Dep't of Defense, DD Form 553, Deserter/Absentee Wanted by the Armed Forces (Sept. 1989) The back of the form states:

> Any civil officer having authority to apprehend offenders under the laws of the United States, or of a State, territory, commonwealth, possession, or the District of Columbia may summarily apprehend deserters from the Armed Forces of the United States and deliver them into custody of military officials. Receipt of this form and a corresponding entry in the FBI's NCIC Wanted Person File, or oral notification from military officials or Federal law enforcement officials that the person has been declared a deserter and that his/her return to military control is desired, is authority for apprehension.

Id.

136. *Khamsouk*, 54 M.J. at 744.

137. *Id*.

138. *Id*.

139. *Id*.

140. *Id*.

141. *Id*. Hospitalman Second Class Guest's recollection of what occurred differed from that of the agent who made the apprehension. However, both stated that appellant was apprehended inside the house and HM2 Guest did not give the agent permission to enter the residence.

142. *Id*. at 743-44.

143. *Id*. at 743.

individual is being apprehended for desertion, a properly executed DD Form 553 stands in the place of an arrest warrant [issued by competent civilian authority]."[146]

The court noted that it routinely reviewed cases where service members had been apprehended in another person's home for desertion with DD Form 553 and convicted for either desertion or unauthorized absence.[147] What this decision means for the field is that there is now precedent for practitioners to advise that DD Form 553 may be used to apprehend deserters in a residence of another person.[148] In other words, officials apprehending a deserter do not have to obtain a separate civilian arrest warrant when a DD Form 553 has been issued. However, if and until the CAAF reviews and affirms this decision, it is only persuasive authority for the other services.

Wiretaps and Compliance with Regulations

In *United States v. Guzman*,[149] the CAAF considered whether the exclusionary rule should be applied to evidence obtained pursuant to a wiretap authorization issued without proper authority under Department of Defense (DOD) regulations. Appellant was under investigation by NCIS for making false military identification cards.[150] Naval Criminal Investigative Service agents applied for and received permission to conduct a consensual intercept of conversations between appellant and another party.[151] The other party consented to the interception and taping of the conversations.[152] Permission for the wiretap was granted by the Deputy General Counsel of the Navy.[153] *Department of Defense Directive 5200.24*[154] limited the listed authorities from delegating their power to approve wiretaps.[155] The service instruction that implemented the directive authorized the General Counsel of the Navy to approve or deny wiretap requests.[156] A later memorandum from the Secretary of the Navy delegated authority to approve wiretaps to the Deputy General Counsel.[157]

---

144. MCM, *supra* note 9, R.C.M. 302(e)(2). The rule states:

> No person may enter a private dwelling for the purpose of making an apprehension . . . unless:
> . . . .
> (ii) If the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority. A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization.

Id.

145. *Khamsouk*, 54 M.J. at 743 (emphasis added).

146. *Id*. at 747. The court also noted that the form is regularly called a "military warrant." *Id*. at 747 n.2.

147. *Id*. The court also acknowledged that "simply because this is common practice does not mean that the practice is legally correct." *Id*. At least until now (for Navy and Marine Corps cases).

148. The agents in this case believed that they could not enter HM2 Guest's residence to apprehend appellant without a civilian arrest warrant and a search warrant. *Id*. at 744.

149. 52 M.J. 318 (2000).

150. *Id*. at 319.

151. *Id*.

152. *Id*.

153. *Id*.

154. Interception of Wire and Oral Communications for Law Enforcement Purposes (Apr. 3, 1978).

155. *Id*. The directive specifically limited the delegation below the level of Assistant Secretary or Assistant to the Secretary of the Military Department.

156. *Guzman*, 52 M.J. at 320.

157. *Id*. Appellant claimed that the delegation to the Deputy General Counsel was not authorized by *DOD Directive 5200.24*. *Id*.

The government used evidence obtained from the wiretaps to convict appellant of charges related to his making of false military identification cards.[158] Appellant moved to suppress the evidence under MRE 317.[159] Appellant claimed that "the Secretary of the Navy was not authorized under *DoD Directive 5200.24* to delegate wiretap approval authority to the Deputy General Counsel."[160]

The CAAF held that, despite the apparent lack of authority for granting the wiretap in this case, appellant could not rely on the exclusionary rule to suppress the evidence.[161] The other party consented to the wiretap so appellant did not have a Fourth Amendment right to suppress evidence obtained from the wiretap.[162] In addition, there is no statutory authority prohibiting the interception of consensual conversations. Even if the wiretap was obtained without proper authority, this does not create a right to exclude the evidence based on the Fourth Amendment or any other statutory authority.[163]

Although a minor point, the practical implication of this case is that practitioners need to ensure that applicable regulations and statutes are reviewed before attempting to obtain search warrants or authorizations, particularly for wiretaps. Although the exclusionary rule was not applied in this case, the same result might not occur in cases where a statute or regulation specifically mentions that the remedy for violations is exclusion of evidence. At the very least, failure to follow applicable rules will lead to unnecessary litigation. Much worse, it may result in the trampling of individual privacy rights.

Urinalysis Testing

Ferguson v. City of Charleston

In the Supreme Court's most recent case this year, *Ferguson v. City of Charleston*,[164] some very important individual privacy concerns were addressed. The case has potentially far reaching implications for any drug testing program, including such programs and related procedures in the military. Unfortunately, only time will reveal what this opinion means for practitioners.

In response to a growing number of patients in prenatal care using cocaine, personnel at Charleston's public hospital, operated by the Medical University of South Carolina (MUSC), began a drug testing program in early 1989.[165] Initially, the program involved only screening of pregnant patients suspected of using cocaine and referrals of those that tested positive to drug counseling and treatment.[166] Later, when these efforts did not curb drug use by patients, the MUSC personnel contacted the Charleston Solicitor to offer their support in prosecuting mothers whose children tested positive when born.[167] A task force was formed by the Solicitor which included the MUSC personnel and police.[168] The task force established a policy for dealing with the drug abuse problem of patients under the MUSC care.[169] Included in the policy was the threat of involvement by law enforcement officials when a patient continued to use illegal drugs while on the program.[170] There were two different protocols for patients who tested positive before or after labor, but each included notification of police.[171]

158. *Id*. at 318-19.

159. MCM, *supra* note 9, MIL. R. EVID. 317.

160. *Guzman*, 52 M.J. at 320.

161. *Id*. at 321. The CAAF was presented with a similar issue in *United States v. Allen*, 53 M.J. 402 (2000). Citing to *Guzman* in *Allen*, the CAAF stated that "this Court refused to apply the exclusionary rule to a violation of a [DoD] or service directive where the record did not demonstrate that the limitations were 'directly tied to the protection of individual rights.'" *Allen*, 53 M.J. at 406.

162. *Guzman*, 52 M.J. at 321.

163. *Id*. The court also noted that *DOD Directive 5200.24* was canceled and replaced by U.S. DEP'T OF DEFENSE, DIR. 5505.9, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT (20 Apr. 1995), which deleted restrictions on the Secretary of the Navy as to delegation authority for the interception of consensual wiretaps. The court added that "[a]lthough subsequent legislative or regulatory history should be viewed with caution for purposes of interpretation, the fact that the [DoD] eliminated the regulatory provision at issue confirms the marginal importance of the provision in terms of whether a violation should require vindication through an exclusionary rule." *Guzman*, 52 M.J. at 321.

164. 121 S. Ct. 1281 (2001).

165. *Id*. at 1284.

166. *Id*. at 1285. The program's written policy identified nine criteria to be used by hospital personnel to determine if a patient should be tested. *See id*. at 1285 n.4. The Court noted that respondents also argued that the searches were not suspicionless. The Court disagreed with respondents noting that none of the criteria "[were] more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency." *Id*. at 1288 n.10.

167. *Id*. at 1284.

168. *Id*. at 1285.

169. *Id*.

170. *Id*. The policy also included procedures for maintaining a chain of custody for urine samples that were taken.

Petitioners were women who tested positive under the MUSC program and were later arrested.[172] They filed a suit against the city of Charleston challenging the validity of the MUSC program. They claimed that the policy requiring urinalysis testing for criminal investigatory purposes, without a warrant or consent, was unreasonable.[173] At trial, the jury was instructed to find for petitioners unless they believed that petitioners consented to the testing.[174] Petitioners appealed after the jury found for respondents but the Court of Appeals for the Fourth Circuit did not consider the question of consent.[175] The Fourth Circuit found that the searches were reasonable based on "special needs."[176] The Supreme Court disagreed, holding that "[a] state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure."[177] Accordingly, the Supreme Court reversed and remanded the case for further proceedings to consider the issue of consent.[178]

Writing for the majority, Justice Stevens distinguished this case from the line of "special needs" cases decided previously by the Court involving urinalysis testing.[179] In all of these other cases, the "special need" was "one divorced from the State's general law enforcement interest. Here, the policy's central and indispensable feature from its inception was the use of law enforcement to coerce patients into substance abuse treatment."[180] In contrast, the "special need" in previous cases "involved disqualification from eligibility for particular benefits, not the unauthorized dissemination of test results [for law enforcement purposes]."[181] In distinguishing these previous cases, the majority did not accept respondents' assertion that the program's ultimate purpose was to protect the health of mothers and their children.[182] The Court found that the "immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal."[183]

So what does *Ferguson* mean for practitioners? First, the case is one of several decided by the Court this year drawing the boundary for certain types of official conduct implicating privacy interests under the Fourth Amendment. Particularly in the medical community, *Ferguson* establishes that drug treatment programs may not have overriding law enforcement purposes or involvement. This does not mean that medical personnel are prohibited from involving police when evidence of a crime is found during medical treatment. Actually, the opposite has been and continues to be the law. Medical personnel are required to notify police under certain circumstances as recognized by the Court.[184] The clear message from the Court is that police participation in programs at medical treatment facilities involving drug abuse testing should not be so pervasive that the ultimate purpose of the program becomes law enforcement instead of rehabilitation. In short, legal advisors for medical treatment facilities with drug rehabilitation programs should at least review their current program policies to ensure that the rehabilitation purpose remains the primary focus.

Second, *Ferguson* has much more subtle implications. What if there is police involvement in a particular case or type of cases that does not rise to the level present in *Ferguson*? One recent example of this possible scenario occurred in *United States v. Stevenson*.[185]

---

171. *Id.* One protocol was later modified but still retained the notification and possible involvement of police.

172. *Id.* at 1282.

173. *Id.*

174. *Id.*

175. *Id.* at 1282-83.

176. *Id.* at 1283.

177. *Id.*

178. *Id.* at 1287.

179. Justice Stevens also distinguishes this case from other search and seizure cases where the Court applied a balancing test to determine the reasonableness of government roadblocks. *Id.* at 1291 n.21. However, the focus of the Court's analysis in this case was on "special needs" in the context of urinalysis testing.

180. *Id.* at 1283.

181. *Id.*

182. *Id.* The majority concludes that, because of the law enforcement purpose of the program and the "extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of 'special needs.'" *Id.*

183. *Id.*

184. The Court commented that "[t]here are some circumstances in which state hospital employees, like other citizens, may have a duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment." *Id.* at 1288 n.13.

In *Stevenson*, NCIS agents suspected the accused committed a rape while he was on active duty.[186] Stevenson became a suspect after he was assigned to the temporary disability retired list (TDRL) and was receiving treatment at the Veterans Administration (VA) hospital in Memphis, Tennessee.[187] The agents asked the VA hospital to provide them with a blood sample for DNA analysis when Stevenson came for treatment.[188] Hospital personnel complied but did not inform Stevenson that the blood they extracted would also be provided to NCIS.[189] He was informed only that the blood sample was for medical purposes.[190] At trial, Stevenson moved to suppress the results of the DNA testing derived from the blood sample and the military judge granted the motion.[191] The NMCCA affirmed the ruling but the CAAF reversed, holding that MRE 312(f)[192] applied to service members on the TDRL. The CAAF did not consider whether the results of the blood sample would be admissible, but the court did provide some guidance if the issue was raised.[193]

So how does *Ferguson* apply to the facts in *Stevenson*? Although NCIS involvement in *Stevenson* was not nearly as high as the police in *Ferguson*, without the NCIS request, the VA hospital would not have drawn the extra amount of blood. In addition, like the petitioners in *Ferguson*, Stevenson did not consent to providing his blood to law enforcement officials. Furthermore, the extra vial of blood was drawn for law enforcement purposes only, while the urine taken in *Ferguson* from the petitioners was used for medical treatment purposes (along with law enforcement purposes). More importantly, although the CAAF characterized the intrusion upon Stevenson as "*de minimis*," one could certainly argue that "extracting" blood from an individual is considerably more intrusive than "collecting" an individual's bodily waste. Regardless, the main point is that *Ferguson* may have implications that reach well beyond the Court's decision.

Another subtle implication of *Ferguson* relates to its potential impact on searches conducted for other administrative purposes. What effect does the case have in the military on gate inspections, unit urinalysis testing, and roadblocks? Again, only time will tell what impact *Ferguson* will have. The potentially broad scope of the case should at least put practitioners on notice that they need to review current drug testing programs and other programs or policies that are potentially impacted by *Ferguson*. The same review should also be done for any other government inspection or inventory policy that may implicate personal privacy interests protected under the Fourth Amendment. Specifically, legal advisers and staff judge advocates should review programs and policies, in light of *Ferguson.* The focus of this review should be on the primary purpose of each policy or program as well as the procedures used to implement them. The main reason for reviewing such programs and policies is that *Ferguson* potentially touches on a wide scope of search and seizure concerns. As Justice Scalia notes in his dissenting opinion, "the Court today opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate."[194] The potential impact of *Ferguson* may be considerable.

185. 53 M.J. 257 (2000), *cert. denied*, 121 S. Ct. 1355 (2001). The Supreme Court denied certiorari in *Stevenson* just two days before *Ferguson* was decided on March 21, 2001.

186. *Id*. at 258.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*. Two vials of blood were drawn from Stevenson. The first was used for medical treatment and the second was provided to NCIS. *Id*.

191. *Id*. at 257. Apparently, the military judge did not rule on whether or not the search was proper. The only issue addressed on appeal related to whether or not the Military Rules of Evidence applied to servicemembers on the TDRL.

192. MCM, *supra* note 9, MIL. R. EVID. 312(f). The rule is titled "Intrusions for valid medical purposes" and states:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

Id.

193. The court characterized the taking of the second vial of blood as a "*de minimis* intrusion" and gave the military judge guidance as to how to analyze the intrusion in light of *United States v. Fitten*, 42 M.J. 179 (1995). *Stevenson*, 53 M.J. at 260.

194. Ferguson v. City of Charleston, 121 S. Ct. 1281, 1297-98 (2001) (Scalia, J., dissenting). Justice Scalia further comments that the Court's decision "leaves law enforcement officials entirely in the dark as to when they can use incriminating evidence obtained from 'trusted' sources." *Id*. at 1298. Chief Justice Rehnquist and Justice Thomas joined in the dissenting opinion.

United States v. Williams

The AFCCA in *United States v. Williams*[195] set aside appellant's conviction for wrongfully using cocaine. The modified findings were affirmed and the sentence was reassessed.[196] The court held that there was no proper basis for placing appellant in pretrial confinement and, accordingly, the positive urinalysis resulting from appellant's pretrial confinement in-processing should have been suppressed.[197]

The charges against appellant arose when he was arrested at a crack house by local police in Louisiana.[198] The arrest occurred outside the crack house after appellant dropped some cocaine on the ground.[199] After his arrest, appellant was placed in the local jail and OSI agents later notified his command of the incarceration.[200] Appellant's commander decided to place appellant in pretrial confinement despite the duty judge advocate's advice not to do so.[201] The commander's basis for pretrial confinement was that she feared for appellant's safety and because she did not know him well.[202] During in-processing at the military confinement facility, appellant was required to submit to urinalysis testing.[203] The following day, the commander released appellant after she was convinced to do so by the base staff judge advocate.[204]

At trial, appellant requested credit for illegal pretrial confinement and moved to suppress results of the positive urinalysis as the "fruit" of illegal pretrial confinement.[205] The military judge awarded appellant twenty-seven days sentence credit for three days of illegal pretrial confinement and denied the motion to suppress, but called it a "close call."[206]

Chief Judge Young, writing the court's opinion, went to great lengths to distinguish the case from *United States v. Sharrock*,[207] an Air Force case decided by the Court of Military Appeals[208] with facts similar to *Williams*. The military judge at trial applied *Sharrock* as authority to deny appellant's motion to suppress.[209] The Court of Military Appeals in *Sharrock* reversed the Air Force Court of Military Review, finding the lower court "erred in reversing the military judge's denial of the defense motion to suppress evidence obtained in a search of the accused after he was allegedly unlawfully confined."[210] Although Chief Judge Young in *Williams* noted that the three judges for the Court of Military Appeals in *Sharrock* wrote separate decisions, the reality is that *Sharrock* was a unanimous decision as to the suppression issue.[211]

All of the judges on the higher court were very clear in their separate decisions that the contraband found during Sharrock's in-processing for pretrial confinement was admissible, regardless of whether or not his pretrial confinement was unlawful. Specifically, Chief Judge Sullivan found that the pretrial confinement decision was proper and, even assuming that it was improper, exclusion of the evidence was not an available rem-

195. 54 M.J. 626 (A.F. Ct. Crim. App. 2001).

196. *Id*. at 628.

197. *Id*. at 633.

198. *Id*. at 628.

199. *Id*. at 633. At trial, two witnesses testified that they smoked crack cocaine with appellant for several hours. *Id*.

200. *Id*. at 628.

201. *Id*.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*.

206. *Id*.

207. 32 M.J 326 (C.M.A. 1991).

208. The court was renamed the "Court of Appeals for the Armed Forces" on 5 October 1994 by the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994). The Act also changed the name of the courts of military review to the courts of criminal appeals for each respective service (the Air Force Court of Criminal Appeals was formerly named the Air Force Court of Military Review).

209. *Williams*, 54 M.J. at 629.

210. *Sharrock*, 32 M.J. at 327.

211. *Williams*, 54 M.J. at 629.

edy.[212] Senior Judge Everett, concurring in part and dissenting in part, believed Sharrock should not have been placed in pretrial confinement, agreeing with the lower service court.[213] However, he also concluded that the lower court erred in finding that the evidence seized during Sharrock's in-processing should be suppressed.[214] He found that "the exclusionary rule *may not* be invoked merely because a commanding officer has erred in determining that '[c]onfinement is required by the circumstances.'"[215] Finally, Judge Cox, concurring in part and concurring in the result, agreed with the chief judge that the pretrial confinement was lawful, but also agreed with the senior judge that the lower service court had the authority to determine that it was not lawful.[216] More importantly, Judge Cox found that the conclusion by the lower service court that Sharrock's pretrial confinement was unlawful "did not create an exclusionary rule for suppression of evidence seized during in-processing."[217]

Disregarding the ultimate holding on the issue of suppression in *Sharrock*, Chief Judge Young concluded that, because the pretrial confinement of Williams was unlawful, evidence seized during his in-processing should have been suppressed.[218] His very thorough analysis provides practitioners with a superb search and seizure guide, particularly with regard to exceptions to the Fourth Amendment and the exclusionary rule.[219] However, his analysis is flawed in one important area.

Discussing exceptions to the exclusionary rule, Chief Judge Young found that "the good faith exception to the exclusionary rule does not apply in this case. Lt Col Eaves [the commander] had no substantial basis for concluding that pretrial confinement was appropriate or that it was required by the circumstances."[220] This finding is flawed because probable cause to believe that Williams committed an offense was clearly established before pretrial confinement. Chief Judge Young found the pretrial confinement unlawful because it was not "required by the circumstances."[221] The proper analysis established by the Court of Military Appeals in *Sharrock*, however, does not hinge on whether or not pretrial confinement is required by the circumstances. As noted already, Senior Judge Everett stated that "the exclusionary rule may not be invoked merely because a commanding officer has erred in determining that 'confinement is required by the circumstances.'"[222] In addition, Senior Judge Everett found that evidence discovered during a routine inventory while in-processing for pretrial confinement is admissible unless "no probable cause exists to believe that the person being confined has committed a crime."[223] Clearly, there was probable cause that Williams committed an offense that could be tried by a court-martial.[224] The existence of probable cause was not disputed in *Williams*. Regardless, the AFCCA did not follow the controlling precedent established by the Court of Military Appeals in *Sharrock.*

Conclusion

Aside from a handful of bright-line rules from the Supreme Court, the body of search and seizure law remained relatively stable during 2000 and early 2001. Although stable, it was not stale. The Supreme Court drew some definite lines demarcating the boundaries for roadblocks[225] and government seizures made without suspicion.[226] In addition, many cases discussed in this article provide military practitioners with valuable lessons learned while other cases have very useful discussions and

212. *Sharrock*, 32 M.J. at 332 n.4 (agreeing with Senior Judge Everett that the good faith exception to the exclusionary rule would apply).

213. *Id*. at 332 (Everett, J., concurring in part and dissenting in part).

214. *Id*. at 333.

215. *Id*. (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (1984)) (emphasis added). More importantly he concludes that "evidence seized in an inventory incident to confinement *should not* be suppressed solely because a court later determines that confinement was not required by the circumstances." *Id*.

216. *Id*. at 333-34.

217. *Id*. at 334. He added that "the lawfulness of this inventory stood on the same footing as a search incident to apprehension." *Id*.

218. *Williams*, 54 M.J. at 633.

219. Considering the strong similarity between this case and *Sharrock*, it is very possible that the CAAF will reverse this decision (that is, if the case is reviewed by the CAAF). Regardless, Chief Judge Young's reasoning in the decision is worth reading for those practicing military criminal law.

220. *Id*. at 632.

221. *Id*.

222. 32 M.J. at 333 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (1984)). Although Senior Judge Everett concurred in part and dissented in part, both of the other judges agreed with him on this issue.

223. *Id*.

224. Chief Judge Young agreed "with the military judge's decision that Lt Col Eaves had reasonable grounds to believe that the appellant had committed an offense triable by court-martial." *Williams*, 54 M.J. at 631.

guidance on the current state of the law in search and seizure. Finally, there were no major statutory or regulatory changes affecting search and seizure in the military over the last year. Overall, Fourth Amendment jurisprudence remained a dynamic and healthy area of the law during the year.

225. *See* City of Indianapolis v. Edmond, 121 S. Ct. 447 (2000).

226. *See* Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001); Illinois v. McArthur, 121 S. Ct. 946 (2001).