

Defending the Citadel of Reasonableness: Search and Seizure in 2004

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Recent search and seizure history is largely one of defense, retrenchment and counterattack. The U.S. Supreme Court has spent much of its time reiterating its benchmark standard of reasonableness in general and, more specifically, totality of the circumstances regarding probable cause. The Court has fended off, in particular, the U.S. Court of Appeals for the Ninth Circuit's (Ninth Circuit) continuous attempts to categorize and pigeonhole the requirements for probable cause. Since its defeat in *United States v. Banks*¹ in 2003, the Ninth Circuit and its allies have mounted additional attacks. The Supreme Court has continued to repulse these attacks, and has even mounted its own counterattacks by affirming two cases which followed its previous law. This article looks at four cases in which the Court defends against assaults on its standards by reversing lower courts, as well as two in which it affirms lower courts which follow established law. In a seventh case a divided Court explained several interpretations of reasonableness and probable cause. This article also addresses five significant cases from the Court of Appeals for the Armed Forces (CAAF), as well as several from the Navy Marine Corps Court of Criminal Appeals (NMCCA) and the Air Force Court of Criminal Appeals (AFCCA).

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The U.S. Supreme Court defended a bold frontal assault on its precedent by the Ninth Circuit in *Devenpeck v. Alford*.² The Court found that probable cause existed for an arrest, even though the offense charged was not the same offense articulated by the arresting officer.³ In doing so, the Court reasserted two of its fundamental rules: (1) probable cause is based on reasonable conclusions drawn from the facts known to the officer at the scene;⁴ and (2) the officer's subjective intent for arrest is not a basis for invalidating the arrest.⁵ The Court rejected the Ninth Circuit's ruling that an arrest was improper when the probable cause for that arrest was not closely related to the offense articulated by the officer at the scene.

Mr. Alford apparently had a "wannabe cop" complex.⁶ He monitored police radio and had "wig wag" headlights on his car. In November 1997, he stopped on Route 16 in Pierce County, Washington, alongside a motorist who was having difficulty with his car. Meanwhile, driving in the opposite direction, police officer Joi Haner noticed the two vehicles, one with its headlights flashing alternately. When the officer returned to investigate, Mr. Alford drove away. The stranded motorist informed Officer Haner that he believed that Mr. Alford was a law enforcement officer. Officer Haner pursued and eventually stopped Mr. Alford. Sergeant Devenpeck joined Officer Haner on the scene.⁷

The two law enforcement officers were suspicious that Mr. Alford was impersonating a police officer, as they saw police scanners, handcuffs and the flashing lights on his car. Mr. Alford was vague and evasive when questioned. Sergeant Devenpeck noticed that Mr. Alford had been tape recording the roadside encounter.⁸ Officer Haner arrested Mr. Alford for violation of the Washington State Privacy Act.⁹ He was also charged with an infraction for the "wig wag" headlights.¹⁰ The

¹ 540 U.S. 31 (2003).

² 125 S. Ct. 588 (2004).

³ *Id.* at 595.

⁴ *See* *Maryland v. Pringle*, 540 U.S. 366 (2003).

⁵ *See* *Whren v. United States*, 517 U.S. 806 (1996).

⁶ *Devenpeck*, 125 S. Ct. at 591.

⁷ *Id.*

⁸ *Id.* at 591-92.

⁹ *Id.* at 592. The pertinent portion of the Act reads:

Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

WASH. REV. CODE § 9.73.030(1)(b) (1994).

¹⁰ *Devenpeck*, 125 S. Ct. at 592.

officers consulted a county prosecutor and considered charges of impersonating a police officer, obstructing law enforcement and making false representations, but declined to charge these offenses as part of a policy that discourages “piling on” of charges.¹¹

The state trial court dismissed both charges against Mr. Alford.¹² He then brought a cause of action in federal district court under 42 U.S.C. § 1983 and under state law, for unlawful arrest and imprisonment, claiming that the officers lacked probable cause to arrest him that evening.¹³ The district court instructed the jury that, in order to prevail, Mr. Alford would have to show that the officers arrested him without probable cause, and defined probable cause as: “if the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing or was about to commit a crime.”¹⁴ The unanimous jury found in favor of the police officers.¹⁵

The Ninth Circuit reversed the trial court’s findings, holding that there was “no evidence to support the jury’s verdict.”¹⁶ The court found that the officers could not have had probable cause to arrest Mr. Alford because recording the roadside stop was not a crime.¹⁷ The divided panel rejected the officers’ contention that they had probable cause to arrest for impersonating an officer and obstructing law enforcement, because those offenses were not “closely related” to the offenses for which Mr. Alford was actually arrested and charged.¹⁸ The Ninth Circuit found the probable cause inquiry irrelevant and declined to rule as to probable cause based on those offenses.¹⁹

Justice Scalia, writing for a unanimous Supreme Court,²⁰ rejects the “closely related” rule advanced by the Ninth Circuit in this case.²¹ First, he points out the basic principle that a warrantless arrest is considered reasonable under the Fourth Amendment if it is supported by probable cause.²² Next, the Court cites *Maryland v. Pringle*²³ for the proposition that the probable cause inquiry “depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest.”²⁴ Justice Scalia reminds the Ninth Circuit that “[o]ur cases make clear that an arresting officer’s state of mind (except for the facts he knows) is irrelevant to the existence of probable cause.”²⁵

The Court simply rejects the idea that the offense articulated by the officer at the time of arrest is the only offense for which the arrest can be valid. Recounting the “closely related” argument made nine years ago in *Whren*, the Court states: “[w]e rejected the argument there, and we reject it again here. Subjective intent of the arresting office, *however* it is determined . . . is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.”²⁶

¹¹ *Id.*

¹² *Id.* Washington State caselaw made it clear that tape recording a traffic stop was not a violation of the Privacy Act. *See id.* at 593.

¹³ *Id.* at 592.

¹⁴ *Id.* at 592-93 (quoting *Alford v. Washington State Police*, Case No. C99-5586RJB (W.D. Wash., Nov. 30, 2000)).

¹⁵ *Id.* at 592.

¹⁶ *Alford v. Haner*, 333 F.3d 972, 975 (9th Cir. 2003).

¹⁷ *Devenpeck*, 125 S. Ct. at 593 (citing *Alford*, 333 F.3d at 976). Washington caselaw was clear and uncontested on this point. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 595. The Chief Justice did not participate in the decision.

²¹ *Id.* at 594 n.2. The Court also rejected a variation on the rule presented by the Fifth Circuit Court of Appeals and the First Circuit Court of Appeals, which focuses on the offenses stated at booking, rather than at arrest. “Most of our discussion in this opinion, and our conclusion of invalidity, applies to this variation as well.” *Id.* Thus, the U.S. Supreme Court foiled a supporting attack by two apparent allies of the Ninth Circuit using a preemptive strike against their staging area. *See Gassner v. Garland*, 864 F.2d 394, 398 (5th Cir. 1989); *Sheehy v. Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999).

²² *Devenpeck*, 125 S. Ct. at 593.

²³ 540 U.S. 366 (2003).

²⁴ *Devenpeck*, 125 S. Ct. at 593.

²⁵ *Id.* (citing *Whren v. United States*, 517 U.S. 806, 812-13 (1996)).

²⁶ *Id.* at 594.

The Court went on to point out the perverse practical consequences. Rather than stopping sham arrests, which is the stated goal of supporters of the “closely related” rule, such logic would actually serve to the detriment of citizens arrested by the police. Officers would simply stop giving a reason for arrest, or, alternatively, offer every possible related reason for arrest.²⁷ Thus, sham arrests would not be foregone, and the citizen would actually lose the important benefit of being informed of the reason for arrest.

Devenpeck was a classic frontal assault on U.S. Supreme Court caselaw by the Ninth Circuit. The U.S. Supreme Court conducted a counterattack when it granted *certiorari* in *United States v. Flores-Montano*²⁸ in which the Court reasserted its rules regarding searches at international borders. The Court held that there is no suspicion requirement to search vehicles at a U.S. border checkpoint.²⁹

Mr. Flores-Montano tried to enter the United States by car at the Otay Mesa Port of Entry in southern California.³⁰ Customs officials inspected his vehicle, including the gas tank, as part of a routine entry inspection. A mechanic removed the gas tank and U.S. Customs officers found thirty-seven kilograms of marijuana inside. The entire process took around one hour.³¹

At trial, the defense brought a suppression motion claiming lack of reasonable suspicion to stop and inspect the vehicle.³² Rather than try to show that reasonable suspicion existed, the government argued to the district court that Ninth Circuit precedent, in the form of *United States v. Molina-Tarazon*,³³ was wrongly decided.³⁴ That case required reasonable suspicion to inspect a gas tank.³⁵ The district court duly granted the suppression motion, in accordance with the precedent.³⁶ The Ninth Circuit summarily affirmed.³⁷ The U.S. Supreme Court granted *certiorari*.³⁸

The U.S. Supreme Court reversed the Ninth Circuit, holding unanimously that “the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles.”³⁹ The Court found that the Ninth Circuit erroneously had “seized on language from our opinion in *United States v. Montoya de Hernandez* . . . and fashioned a new balancing test, and extended it to searches of vehicles.”⁴⁰ The Court specifically rejected that test, and stated in no uncertain terms that “[c]omplex balancing tests to determine what is a ‘routine’ search of a vehicle . . . have no place in border searches of vehicles.”⁴¹ The Court stated that the government’s interests are at their “zenith at the international border” and found that the property interest in one’s gas tank is far outweighed by “the government’s paramount interest in protecting the border.”⁴² The Court sums up the government’s strong interests: “It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.”⁴³

²⁷ *Id.* at 595.

²⁸ 124 S. Ct. 1582 (2004).

²⁹ *Id.* at 1585.

³⁰ *Id.* at 1584.

³¹ *Id.*

³² *Id.* at 1584-85.

³³ 279 F.3d 709 (9th Cir. 2002).

³⁴ *Flores-Montano*, 124 S. Ct. at 1584-85.

³⁵ *Id.* at 1584 (citing *Montoya de Hernandez*, 279 F. 3d at 717).

³⁶ *Id.* at 1585.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (internal citations omitted).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1586.

In *Groh v. Ramirez*,⁴⁴ the Ninth Circuit successfully assaulted the U.S. Supreme Court Citadel, forcing a truce in the form of a 5-4 Supreme Court decision that affirmed a Ninth Circuit ruling. The question was whether Alcohol, Tobacco and Firearms (ATF) Special Agent (SA) Groh executed an unconstitutional search when the warrant did not specify the items to be seized, even though the application for the warrant did so specify.⁴⁵ The answer was yes.⁴⁶

In 1997, SA Groh received information that Mr. Ramirez and his family were stockpiling weapons on their ranch in Butte-Silver Bowe County, Montana.⁴⁷ Special Agent Groh prepared a warrant application, accompanied by a detailed affidavit that specifically listed automatic weapons, grenade launchers and other weapons as the items to be searched for and seized. He also prepared the warrant form itself, which the magistrate signed. However, in the portion of the warrant calling for a description of the evidence to be seized, SA Groh had mistakenly placed a description of the home to be searched. Since the warrant did not incorporate the application or the affidavit by reference, it did not technically contain a description of the evidence sought, as required by the Fourth Amendment.⁴⁸ Special Agent Groh led the team that conducted the search, which uncovered no illegal weapons. Special Agent Groh left a copy of the search warrant with Mrs. Ramirez at the home, and later provided a copy of the affidavit at the request of the Ramirez's attorney.⁴⁹

The Ramirez family filed suit against SA Groh and the other officers under *Bivens v. Six Unknown Fed. Narcotics Agents*.⁵⁰ The district court entered summary judgment in favor of all defendants, finding no Fourth Amendment violation, and further finding that even if there was, the defendants were entitled to qualified immunity.⁵¹ The Ninth Circuit affirmed the trial court as to all of the agents except SA Groh, who led the investigation and the search.⁵² As to SA Groh, the Ninth Circuit ruled that he had violated the constitutional rights of the Ramirez family by executing a search based on a clearly defective warrant. The Ninth Circuit also found that SA Groh was not entitled to qualified immunity for his actions.⁵³

The Supreme Court affirmed the Ninth Circuit's ruling in a 5-4 decision, in an opinion written by Justice Stevens. "The warrant was plainly invalid"⁵⁴ because it did not state with particularity the evidence sought.⁵⁵ The Court went on to make clear that the application and affidavit were not sufficient to meet the particularity requirement, since they were not incorporated by reference.⁵⁶ It was clear from the collected documents—warrant, application and affidavit—that SA Groh had specific items in mind for which to search. He had merely committed an administrative error by putting the wrong information in the block on the warrant that calls for evidence sought. But this mattered not. Since the accompanying papers were not incorporated by reference, they were not technically part of the warrant, and thus the warrant itself was defective on its face.⁵⁷

The government argued that SA Groh conducted the search reasonably and within the limits of his application and that his search should therefore be considered the functional equivalent of a valid warrant search.⁵⁸ The Court disagreed. "[O]ur cases have firmly established the 'basic principle of Fourth Amendment law' that searches and seizures inside a home

⁴⁴ 540 U.S. 551 (2004).

⁴⁵ *Id.* at 554-55.

⁴⁶ *Id.* at 557.

⁴⁷ *Id.* at 554.

⁴⁸ *Id.* at 554-55.

⁴⁹ *Id.* at 555.

⁵⁰ *Id.* at 555 (citing *Bivens*, 403 U.S. 388 (1971)).

⁵¹ *Id.* at 555-56.

⁵² *Id.* at 556.

⁵³ *Id.*

⁵⁴ *Id.* at 557.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 557-58.

⁵⁸ *Id.* at 558.

without a warrant are presumptively unreasonable.”⁵⁹ Even more, the presumption of unconstitutionality applies equally to a warrant whose only defect is a lack of particularity.⁶⁰ Special Agent Groh’s search, though reasonable in effect, was still considered unconstitutional because it was considered warrantless.⁶¹

Justice Thomas authored a dissent, joined by Justice Scalia, in which he argues that the search should not be presumptively unreasonable because it is warrantless.⁶² Justice Thomas raises the argument that the Fourth Amendment can be interpreted such that not all searches must be authorized by a warrant, but if a warrant is issued, that it must meet certain requirements.⁶³ This view holds that the search must be reasonable, and can be without a warrant. This is not, however, the current state of the law, and thus remains a dissent.

The battle is not over; the Supreme Court is preparing its latest foray against the attacking Ninth Circuit. In another counter offensive, the Court has granted *certiorari* in *Muehler v. Mena*.⁶⁴ The granted issues are:

(1) Whether, in light of this Court’s repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional “seizure” if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

(2) Whether, in light of this Court’s ruling in *Michigan v. Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the Ninth Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.⁶⁵

The case was argued on 9 December 2004 and the Court has yet to determine if this counterattack will be successful, or whether the Ninth Circuit has gained another foothold.

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Apparently, the Ninth Circuit has an ally in its efforts to assault the U.S. Supreme Court’s reasonableness bastion. In a supporting attack, the Illinois Supreme Court held unconstitutional a search based on a drug dog’s alert to the trunk of a car during a routine traffic stop.⁶⁶ In *Illinois v. Caballes*,⁶⁷ the Illinois Supreme Court found that the introduction of a drug dog “unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation.”⁶⁸

Illinois State Trooper Daniel Gillette stopped Mr. Caballes for a speeding violation. Trooper Craig Graham heard the dispatch call and immediately responded to the scene with his drug detection dog. While Trooper Gillette wrote Mr. Caballes a warning for speeding, Trooper Craig walked his dog around the car. The dog alerted on the car’s trunk and the officers’ search resulted in the seizure of a significant amount of marijuana. The encounter lasted less than ten minutes from the time

⁵⁹ *Id.* at 559 (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)).

⁶⁰ *Id.* at 559.

⁶¹ *Id.* at 560.

⁶² *Id.* at 572 (Thomas, J., dissenting).

⁶³ *Id.* at 571-73 (Thomas, J., dissenting). Both this dissent and another authored by Justice Kennedy, and joined by the Chief Justice, dispute the majority’s finding that SA Groh was not entitled to qualified immunity. *Id.* at 566 (Kennedy, J., dissenting).

⁶⁴ 124 S. Ct. 2842 (2004) (mem.).

⁶⁵ United States Supreme Court, *Questions Presented*, 03-1423, at <http://www.supremecourtus.gov/qp/03-01423qp.pdf> (last visited Apr. 28, 2005). As this article is going to publication, the Court decided this case, reversing the Ninth Circuit as to both issues. See 125 S.Ct. 1465 (2005).

⁶⁶ *Illinois v. Caballes*, 802 N.E. 2d 202, 205 (Ill. 2003), *vacated*, 125 S. Ct. 834 (2005).

⁶⁷ *Id.*

⁶⁸ *Id.*

Trooper Gillette stopped Mr. Caballes to the time of the seizure.⁶⁹ Mr. Caballes was convicted of drug offenses and sentenced him to twelve years imprisonment and a quarter million dollar fine.⁷⁰ At trial, the judge denied a motion to suppress the marijuana.⁷¹ The intermediate appellate court affirmed the conviction but the Illinois Supreme Court reversed.⁷² The U.S. Supreme Court granted *certiorari* on the narrow issue of: “Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.”⁷³

The Court disagreed with the Illinois Supreme Court’s assertion that the fundamental nature of the encounter was changed with the introduction of the dog: “In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception . . . unless the dog sniff infringed respondent’s constitutionally protected interest in privacy. Our cases hold that it did not.”⁷⁴ The Court cited *United States v. Jacobsen*⁷⁵ for the proposition that a citizen may not claim a privacy interest in the possession of contraband. Thus, any government action which reveals the presence of such contraband, and only such contraband, cannot violate a privacy interest and thus cannot violate the Fourth Amendment, “This is because the expectation ‘that certain facts will not come to the attention of the authorities’ is not the same as an interest in ‘privacy that society is prepared to consider reasonable.’”⁷⁶ The Court’s precedents have held a dog sniff to be inobtrusive to the extent that it is not a search.⁷⁷ Since the dog’s alert exposes only the presence of drugs, it is not an invasion of any protected privacy interest, and thus not an impermissible search.

The Court confined its ruling to an otherwise lawful encounter. Had the officers detained Mr. Caballes longer than was necessary to carry out the traffic stop, a different outcome would likely have resulted.⁷⁸ Had Officer Gillette been required to keep Mr. Caballes on the roadside after issuing the warning citation in order for Officer Graham to arrive with the dog, the Court would probably have reached a different conclusion. Under those facts, the initially permissible stop would degenerate into an illegal detention, and then the subsequent dog sniff and search would be unlawful.

Justices Souter and Ginsburg each offered dissenting opinions. First, each questioned the “infallible” nature of the dog’s results being *sui generis*, claiming that the dog detected the presence of property other than just contraband.⁷⁹ More importantly, each dissenting justice, particularly Justice Ginsburg, found that the nature of the encounter was indeed fundamentally altered with the introduction of the drug dog: “Injecting an animal into a routine traffic stop changes the character of the encounter between the police and motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.”⁸⁰ Both dissenting justices invoke the *Terry v. Ohio*⁸¹ stop framework for their analysis. They find that the “reasonably related” prong is not satisfied under these circumstances.⁸² Apparently, the dissenting justices are concerned that, under the Court’s ruling, the government will routinely use dogs as part of traffic stops, engendering concerns of a police state, where cops “Cry havoc, and slip the dogs of war.”⁸³

⁶⁹ *Caballes*, 125 S. Ct. at 836.

⁷⁰ *Caballes*, 802 N.E. 2d at 203.

⁷¹ *Id.*

⁷² *Id.* at 204-05.

⁷³ *Caballes*, 125 S. Ct. at 837.

⁷⁴ *Id.*

⁷⁵ 466 U.S. 109 (1984).

⁷⁶ *Caballes*, 125 S. Ct. at 838 (citing *United States v. Jacobsen*, 466 U.S. 109, 122 (1984)).

⁷⁷ See *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696 (1983).

⁷⁸ *Caballes*, 125 S. Ct. at 838. The Court related the case *People v. Cox*, 782 N. E. 2d. 275 (2002), in which the Illinois Supreme Court found the use of a drug dog and consequent seizure unconstitutional because it followed an unreasonably prolonged traffic stop. “We may assume that a similar result would be warranted in this case of the dog sniff had been conducted while respondent was being unlawfully detained.”

⁷⁹ *Caballes*, 125 S. Ct. at 838 (Souter, J., dissenting), 843 (Ginsburg, J., dissenting).

⁸⁰ *Id.* at 845 (Ginsburg, J., dissenting).

⁸¹ 392 U.S. 1 (1968). An officer may stop and frisk a citizen based on observations of suspicious behavior, but “the officer’s actions [must be] ‘justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.’” *Caballes*, 125 S. Ct. at 843 (quoting *Terry*, 392 U.S. at 19-20 (Ginsburg, J., dissenting)).

⁸² *Caballes*, 125 S. Ct. at 841, 844 (Souter & Ginsburg, JJ., dissenting).

⁸³ WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 1.

The U.S. Supreme Court found its own ally in the Court of Appeals for the Fourth Circuit (Fourth Circuit) in *Thornton v. United States*.⁸⁴ Here, the venerable decision in *New York v. Belton*⁸⁵ was followed by both the trial court and the Fourth Circuit. The U.S. Supreme Court found itself in the pleasant—if unaccustomed—position of affirming a circuit court which had applied U.S. Supreme Court precedent. The Court was even able to extend that precedent somewhat, though the extension has caused a break in the line of defense. Several justices differed with the opinion of the Court, arguing that the precedent has been carried too far. The Court ruled that as part of a search incident to arrest, a police officer may search a vehicle recently occupied by the arrestee, even though the arrestee had exited the vehicle before he was “accosted” by the police officer.⁸⁶

Officer Nichols of the Norfolk Police Department, Norfolk, Virginia, while driving an unmarked police car, became suspicious of Mr. Thornton and followed him to a parking lot. Mr. Thornton got out of his vehicle and began to walk across the parking lot when Officer Nichols accosted him. Officer Nichols asked for and received consent to pat down Mr. Thornton and found several bags of marijuana and crack cocaine. Officer Nichols then made a proper arrest, handcuffed Mr. Thornton and placed him in the back seat of the police car. Officer Nichols then conducted a search of the car Mr. Thornton had been driving, and found a 9 mm handgun.⁸⁷ At trial, the defense sought to suppress, amongst other things, the gun. The trial judge denied the suppression motion, finding a valid search incident to arrest per *Belton*.⁸⁸ The Fourth Circuit affirmed.⁸⁹

The U.S. Supreme Court also affirmed.⁹⁰ The Court made clear that there is a real need for the bright-line rule enunciated in *Belton* which allows officers to ensure their safety by searching the passenger compartment of a vehicle incident to a valid arrest. In an opinion by Chief Justice Rehnquist, the Court stated: “So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.”⁹¹ The Court further stated: “There is simply no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he remained in the car.”⁹² The Court did not offer any further guidance regarding the recency of occupancy, or the proximity to the car, necessary for a valid search incident to arrest.

Justice Scalia, joined by Justice Ginsburg, concurred in the judgment but felt that this case stretched the *Belton* rule to a “breaking point.”⁹³ Justice Scalia opined that police officers have incorrectly come to view searching a suspect’s vehicle as an entitlement. He essentially rejects the entire *Belton* bright-line rule, and calls for a search of a vehicle in “cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁹⁴ This sounds very much like probable cause, as defined by MRE 315(f)(2).⁹⁵

Justice O’Connor also concurred, agreeing with Justice Scalia, but declining to adopt his proposed rule because it was not the issue granted and had not been fully briefed and argued.⁹⁶ Even the Chief Justice indicated that he might find merit in Justice Scalia’s reasoning, but agreed with Justice O’Connor that this case was not ripe for decision on this issue.⁹⁷ This may

⁸⁴ 124 S. Ct. 2127 (2004).

⁸⁵ 453 U.S. 454 (1981).

⁸⁶ *Thornton*, 124 S. Ct. at 2132.

⁸⁷ *Id.* at 2129.

⁸⁸ *Id.* at 2129-30.

⁸⁹ 325 F.3d 189 (2003).

⁹⁰ *Thornton*, 124 S. Ct. at 2133.

⁹¹ *Id.* at 2132.

⁹² *Id.* at 2131.

⁹³ *Id.* at 2133 (Scalia, J., concurring in judgment).

⁹⁴ *Id.* at 2137 (Scalia, J., concurring in judgment).

⁹⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(f)(2) (2002) [hereinafter MCM].

⁹⁶ *Thornton*, 124 S. Ct. at 2133 (O’Connor, J., concurring in part).

⁹⁷ *Id.* at 2132-33 n.4.

not be the last we hear of search incident to arrest and cars.

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There was action in a secondary theater of operations when the Supreme Court affirmed a ruling by the Nevada Supreme Court which upheld a conviction by a local court. The U.S. Supreme Court took this opportunity to extend its precedents. The Court addressed the constitutionality of Nevada's "stop and identify" statute in *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, et al.*⁹⁸ The Court determined that a suspect must identify himself when stopped by a police officer in accordance with *Terry v. Ohio*.⁹⁹

Police responded to a report of assault to find a woman in a truck on the side of Grass Valley Road in Humboldt County, Nevada. Also present was a man—who turned out to be Mr. Hiibel—standing in the road, evidently inebriated. Mr. Hiibel refused to identify himself, in violation of *Nevada Revised Statutes Section 171.123*,¹⁰⁰ the "stop and ID" statute. In fact, he taunted the officer by placing his hands behind his shirtless back and walking towards the officer.¹⁰¹

Mr. Hiibel was arrested and charged with obstructing justice.¹⁰² The government argued that Mr. Hiibel had obstructed the police officer in that he failed to comply with Section 171.123 when he refused to identify himself.¹⁰³ The trial court agreed, convicted Mr. Hiibel and fined him \$250.¹⁰⁴ Both the intermediate appellate court and the Nevada Supreme Court rejected Mr. Hiibel's contention that the statute violated his Fourth and Fifth Amendment rights.¹⁰⁵

The U.S. Supreme Court affirmed the conviction.¹⁰⁶ "The stop, the request [for identification], and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment."¹⁰⁷ The Court examined in detail its own line of cases in this area and found the Nevada statute in compliance with constitutional protections and the Court's own precedents.¹⁰⁸

In 1979, the Court invalidated a conviction based on a stop and identification (ID) statute in Texas.¹⁰⁹ In that case, there were insufficient facts to support reasonable suspicion by the officer that a crime was being committed. In 1983, the Court invalidated a stop and ID statute in California because it was vague.¹¹⁰ That statute required a person to produce "credible

⁹⁸ 124 S. Ct. 2451 (2004).

⁹⁹ *Id.* at 2456 (citing *Terry*, 392 U.S. 1 (1968)).

¹⁰⁰ *Id.* at 2455-56. Section 171.123 provides in relevant part:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

...

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

Id. at 2455-56 (quoting NEV. REV. STAT. § 171.123 (2003)).

¹⁰¹ *Id.* at 2455.

¹⁰² *Id.* He was charged with violating Section 199.280 of the Nevada Revised Statutes. Specifically, "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office." *Id.*

¹⁰³ *Id.* at 2456.

¹⁰⁴ *Id.*

¹⁰⁵ See *Hiibel v. Sixth Judicial Dist. Court*, 118 Nev. 868 (Nev. 2002).

¹⁰⁶ *Hiibel*, 124 S. Ct. at 2461.

¹⁰⁷ *Thornton*, 124 S. Ct. at 2460.

¹⁰⁸ *Id.* at 2457 ("The present case begins where our prior cases left off.").

¹⁰⁹ *Brown v. Texas*, 443 U.S. 47 (1979).

¹¹⁰ *Kolender v. Lawson*, 461 U.S. 352 (1983).

and reliable” identification.¹¹¹ The Court found this lacked a standard for determining how a citizen must comply and gave “virtually unrestrained power to arrest and charge persons with a violation.”¹¹² In the instant case, however, there were sufficient grounds to suspect Mr. Hiibel of a crime and the statute clearly states what is required of the citizen. Moreover, the question as to identity was reasonably related to the facts which justified the stop. The Court ultimately ruled: “A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with the Fourth Amendment prohibitions against unreasonable searches and seizures.”¹¹³

* * *

The CAAF had no such vigorous activity at its lines of defense as did the U.S. Supreme Court. Rather, the CAAF sat in review of the service courts at its leisure. In short, the CAAF was in a far less active theater of operations than was the U.S. Supreme Court in 2004.

In *United States v. Mason*,¹¹⁴ the CAAF undertook to determine whether probable cause existed to issue a search authorization for a blood sample.¹¹⁵ More importantly, it addressed whether omitted information invalidated the search authorization.¹¹⁶

A woman was raped in her base quarters early one weekday morning. Following a lengthy and complicated series of events, suspicion eventually fell upon Staff Sergeant (SSG) Mason and he was required to provide a blood sample. Staff Sergeant Mason’s DNA matched the DNA in the semen taken from the victim.¹¹⁷ Investigators from the Criminal Investigation Division (CID) obtained the authorization to seize the blood sample from the base magistrate, based on physical description, known proximity to the quarters, similar gloves and blood type evidence.¹¹⁸

The CID investigators did not provide certain information to the magistrate. They did not inform the magistrate that during a photo lineup, the victim identified another soldier, whom she knew, as closely resembling the rapist, but stated that he was not actually the rapist. The investigators did not inform the magistrate that there was a latent fingerprint lifted from inside the victim’s front door knob which did not match that of SSG Mason. The investigators did not tell the magistrate that SSG Mason had a prominent gold tooth and that the victim had not mentioned this in her description of her assailant.¹¹⁹

Staff Sergeant Mason was convicted of rape.¹²⁰ The ACCA reversed the conviction based on an erroneous ruling by the military judge (MJ) regarding a voir dire challenge.¹²¹ Staff Sergeant Mason was retried and again convicted of rape.¹²² The ACCA this time affirmed.¹²³

The CAAF unanimously affirmed.¹²⁴ “We agree with the military judge that, in noting the totality of these circumstances and applying her common sense, the magistrate had a substantial basis to conclude that probable cause

¹¹¹ *Thornton*, 124 S. Ct. at 2457.

¹¹² *Id.* (quoting *Kolender*, 461 U.S. at 360) (quoting *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring in the result)).

¹¹³ *Id.* at 2459.

¹¹⁴ 59 M.J. 416 (2004).

¹¹⁵ *Id.* at 420.

¹¹⁶ *Id.* at 421.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 418-19.

¹¹⁹ *Id.* at 422.

¹²⁰ *Id.* at 417.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 425.

existed.”¹²⁵ As to the omissions, the court drew from MRE 311(g)(2) and its caselaw to determine that “the defense must demonstrate that the omissions were *both* intentional or reckless, *and* that their hypothetical inclusion would have prevented a finding of probable cause.”¹²⁶ The CAAF went on to draw from U.S. Supreme Court caselaw: “[I]f [the defense shows intentional or reckless disregard], and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.”¹²⁷ The CAAF found that the omissions were neither reckless nor intentional, nor would they have prevented the proper finding of probable cause, had they been included.¹²⁸

In *United States v. Rodriguez*,¹²⁹ the CAAF next took up the distinction between an arrest and an investigatory stop. “The question . . . is whether or not Appellant’s roadside encounter with ATF was consensual, and if not, whether the encounter constituted an arrest supported by probable cause, or an investigatory stop supported by reasonable suspicion.”¹³⁰

Yeoman Third Class (YO3) Rodriguez was suspected of buying guns in Virginia and illegally transporting and selling them in his home state of New York. After gathering substantial evidence through surveillance, agents of the Bureau of ATF and the Naval Criminal Investigative Service (NCIS, then known as NIS) followed YO3 Rodriguez on a trip from Virginia to New York to ascertain the identity of his customers and contacts.¹³¹

As the federal agents followed YO3 Rodriguez in unmarked police cars, a Maryland State Trooper stopped one of the agents for speeding. After explaining the situation, they co-opted Maryland Trooper Pearce into the operation. Trooper Pearce eventually pulled over YO3 Rodriguez for following too closely. After issuing a warning, Trooper Pearce asked YO3 Rodriguez for consent to a routine search for contraband. Yeoman Third Class Rodriguez did consent, in writing, about ten minutes after Trooper Pearce’s initial stop. Ten ATF and NCIS agents then arrived and spent about ninety minutes thoroughly searching the car. Also, an NBC news crew, which was riding with the law enforcement agents in anticipation of the New York investigation and arrest, filmed the encounter, focusing on the officers’ search of YO3 Rodriguez’s car.¹³²

The officers found no contraband in the car. However, while other agents conducted the search, ATF Agent Grabman confronted YO3 Rodriguez with the evidence against him. After about ten minutes of discussion, YO3 Rodriguez confessed to the gunrunning operation.¹³³ An enlisted panel convicted YO3 Rodriguez at a general court-martial and the NMCCA affirmed the conviction.¹³⁴

The CAAF upheld the conviction.¹³⁵ Appellant made three distinct seizure arguments. First, that the police illegally seized him by surrounding him on the freeway; second, that Trooper Pearce’s stop became an unlawful detention after the warning was issued; and third, that the actual search by the ATF/NCIS agents transformed the original consensual encounter into an unlawful seizure.¹³⁶ In each case, the court found “[t]he critical question [was] ‘whether a reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter.’”¹³⁷

¹²⁵ *Id.* at 421.

¹²⁶ *Id.* at 422 (citing *United States v. Figueroa*, 35 M.J. 54, 56-57 (C.M.A. 1992)).

¹²⁷ *Id.* (alterations in original) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)).

¹²⁸ *Mason*, 59 M.J. at 423.

¹²⁹ 60 M.J. 239 (2004).

¹³⁰ *Id.* at 250.

¹³¹ *Id.* at 242-3.

¹³² *Id.* at 244.

¹³³ *Id.*

¹³⁴ *Id.* at 241. Note that there was a period of UA and considerable litigation, including a CAAF ordered a *Dubay* hearing [*United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967)], regarding the availability of video footage from the *NBC* cameras. *Id.* Thus, the seizure issue did not finally come before the CAAF until 2003, despite the offense occurring in 1991.

¹³⁵ *Id.* at 242.

¹³⁶ *Id.* at 241-42.

¹³⁷ *Id.* at 247 (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

As to the moving blockade, YO3 Rodriguez himself testified that he was unaware he was surrounded by police until after he was pulled over.¹³⁸ Thus, he could not have felt that he was not free to go. Next, the court found that “after the brief detention for the traffic stop concluded, the encounter between Appellant and Trooper Pearce was consensual in nature and not a seizure subject to Fourth Amendment scrutiny.”¹³⁹ Thus, the court quickly disposed of the defense’s first and second arguments.

In addressing the appellant’s third contention, the court gets to the heart of this case—“[w]hether the reasonable limits of an investigatory stop have been exceeded thus transforming a seizure into an arrest”¹⁴⁰ The court found that a reasonable person would not have felt free to leave once the ten officers began the search of his car.¹⁴¹ The consensual encounter was, then, changed to a seizure. But the court then found that the seizure was an investigatory detention, supported by reasonable suspicion, rather than an arrest, requiring probable cause. Key among the several factors considered in coming to this conclusion was that only twenty minutes elapsed from the initial stop to YO3 Rodriguez’s first admission, which then gave probable cause to continue the search.¹⁴² The court sums up with “we conclude as a matter of law that Appellant was the subject of a lawful investigatory stop supported by reasonable suspicion and that his subsequent statements were admissible.”¹⁴³

* * *

Even though it is more an evidentiary issue than one of search and seizure, the CAAF’s opinion in *United States v. Simmons*,¹⁴⁴ bears mentioning. In *Simmons*, the court decided whether admission of an unlawfully obtained handwritten letter and subsequent videotaped confession was harmless error.

First Lieutenant (1LT) Simmons was charged with multiple offenses, including conduct unbecoming an officer and assault, in violation of Articles 133 and 128, respectively, of the Uniform Code of Military Justice (UCMJ), concerning his homosexual relationship with a private first class in his company.¹⁴⁵ During a search incident to arrest for assault, civilian police found a handwritten letter by 1LT Simmons exposing the relationship.¹⁴⁶ First Lieutenant Simmons subsequently gave a video taped confession.¹⁴⁷

The military judge admitted both the letter and its derivative video tape, finding no ownership interest by 1LT Simmons in the letter,¹⁴⁸ which had been given to the private first class. A general court-martial convicted 1LT Simmons of conduct unbecoming an officer and of assault.¹⁴⁹ The ACCA concluded that the military judge erred in admitting the letter and tape but found that introduction of the letter, the tape and even 1LT Simmons’ in court testimony was harmless error, given the other evidence arrayed against him.¹⁵⁰

The CAAF reversed and set aside the ACCA’s decision as to the assault and the portion of the Article 133 violation regarding an intimate sexual relationship, but affirmed as to a close personal relationship.¹⁵¹ In accordance with the

¹³⁸ *Id.* at 247-48.

¹³⁹ *Id.* at 249.

¹⁴⁰ *Id.* at 250.

¹⁴¹ *Id.*

¹⁴² *Id.* at 251.

¹⁴³ *Id.*

¹⁴⁴ 59 M.J. 485 (2004).

¹⁴⁵ *Id.* at 486.

¹⁴⁶ *Id.* at 487.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 486.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 491.

controlling U.S. Supreme Court precedent, *Chapman v. California*,¹⁵² the CAAF inquired as to whether “it appears ‘beyond reasonable doubt that the error complained of did not contribute to the verdict[s] obtained.’”¹⁵³ The CAAF concluded the letter did contribute to the verdict. “We also cannot conclude, beyond reasonable doubt, that the admission of the letter and the derivative videotaped statement by Simmons concerning the sexual nature of his relationship with PFC W ‘did not contribute to’ that portion of the guilty finding regarding ‘an intimate relationship involving sexual contact.’”¹⁵⁴ The CAAF also found that the accused might not have testified if not for the letter and tape.¹⁵⁵ As to the assault, the government’s theory of the case was so reliant upon the “alleged unrequited homosexual ‘obsession’ with PFC W”¹⁵⁶ and the letter was so pervasive in trial counsel’s arguments that the improper evidence must have contributed to the verdict.¹⁵⁷

* * *

Though by and large all was quiet on the CAAF front, that court did have to quell a minor rebellion by reversing the NMCCA in *United States v. Daniels*.¹⁵⁸ In this case, the CAAF had to remind the lower court of its own precedent and of U.S. Supreme Court precedent, stating: “[T]he question of whether a private actor performed as a government agent does not hinge on motivation, but rather ‘on the degree of the Government’s participation in the private party’s activities.’”¹⁵⁹

Electronics Technician Seaman Apprentice (ETSA) Daniels brought a vial of powdery substance into his barracks room and told his roommates it was cocaine. One of the roommates reported this to Chief Petty Officer Wilt, who told the roommate to go get the drugs. Chief Wilt testified, however, that he thought ETSA Daniels was joking about the powder, and just trying to irritate his roommate. The powder was, indeed, cocaine.¹⁶⁰

At trial, the defense moved to suppress the drugs, as the result of an illegal search. The military judge denied the motion, basing his ruling on the roommate’s actions, and finding that Chief Wilt’s participation was a “red herring” and not relevant to the case.¹⁶¹ The NMCCA upheld the military judge’s ruling, but found Chief Wilt’s motives to be the key factor.¹⁶² The court’s theory was that because he did not honestly believe his order would result in retrieval of drugs, Chief Wilt did not initiate an official search.¹⁶³ Thus, the roommate was acting in his private capacity, and did not conduct a search prohibited by the Fourth Amendment. “Given Chief Wilt’s honest belief that ETSA Voitlein’s expressed concerns about Appellant actually having illegal drugs in their barracks room were unreasonable, we conclude that Chief Wilt’s directions did not make ETSA Voitlein a Government agent on a quest for incriminating evidence.”¹⁶⁴

The CAAF reversed, in a *per curiam* opinion.¹⁶⁵ The CAAF found Chief Wilt’s motivation irrelevant. “First, contrary to the CCA’s motivational approach, the Supreme Court defines a Fourth Amendment ‘search’ as a government intrusion into an individual’s reasonable expectation of privacy.”¹⁶⁶ Next, the CAAF addressed “the question of whether a private actor performed as a government agent,” and cited U.S. Supreme Court caselaw in finding that it “does not hinge on motivation,

¹⁵² 386 U.S. 18 (1967).

¹⁵³ *Simmons*, 59 M.J. at 489.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 489-90.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 490.

¹⁵⁸ 60 M.J. 69 (2004).

¹⁵⁹ *Id.* at 71.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 69-70.

¹⁶² *Id.* at 70.

¹⁶³ *Id.* at 70-71.

¹⁶⁴ 58 M.J. 599, 605 (N-M. Ct. Crim. App. 2003).

¹⁶⁵ *Daniels*, 60 M.J. at 69.

¹⁶⁶ *Id.* at 71 (citing *Soldal v. Cook County*, 506 U.S. 56, 69 (1992) (“suggesting a motivational approach is unworkable”)).

but rather ‘on the degree of the Government’s participation in the private party’s activities.’”¹⁶⁷ The CAAF drew from *Skinner* that “there must be ‘clear indices of the Government’s encouragement, endorsement, and participation’ in the challenged search.”¹⁶⁸ Since Chief Wilt’s “specific order . . . triggered SA Voitlein’s actual seizure of the vial”¹⁶⁹ it was clear that SA Voitlein acted as Chief Wilt’s agent.¹⁷⁰ The CAAF found that the search was an improper government intrusion, and thus reversed the NMCCA and set aside the findings.¹⁷¹

In *United States v. Garcia*,¹⁷² the CAAF reversed the lower court’s findings. However, the court did not address the search and seizure issue in that case, and thus, the NMCCA’s finding in this area remains good law. The important principle from this case is that the on premises refusal of consent to search by a co-tenant does not outweigh the off premises consent of a co-tenant.¹⁷³

Agents of the Naval Criminal Investigative Service (NCIS) suspected Staff Sergeant (SSgt) Garcia of possessing stolen cars and armed robbery and arrested him at this home in North Carolina. Staff Sergeant Garcia consented to allow the NCIS agents in his home to talk, but declined to consent to a search of his home. Meanwhile, civilian police arrested SSgt Garcia’s wife at her work site, and she consented to their searching the family home. Weapons and other evidence were obtained during the search.¹⁷⁴

At trial, the defense did not raise the issue, but on appeal, SSgt Garcia sought to suppress the weapons and stolen property, claiming that SSgt Garcia’s on premises declination outweighed his wife’s off premises consent.¹⁷⁵ The NMCCA reviewed for plain error, since the defense failed to raise the issue at trial.¹⁷⁶ The court pointed out that military law recognizes that third party consent to a search is valid.¹⁷⁷ As to SSgt Garcia’s claim that his refusal was weightier than his wife’s consent, the court found no military precedent. The court then created some by citing significant civilian caselaw¹⁷⁸ and holding that his refusal was insignificant, so long as the wife shared equal access to the premises, which she did.¹⁷⁹

The CAAF granted review of this issue, along with several others, but then reversed the NMCCA on ineffective assistance of counsel grounds.¹⁸⁰ Consequently, the NMCCA’s ruling regarding the consensual search remains good caselaw.

* * *

The NMCCA and AFCCA each made significant contributions to the body of search and seizure law. Unfortunately the Air Force court chose to designate its more important decisions as unpublished. Nonetheless, several cases bear examination.

¹⁶⁷ *Id.* (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 614-15 (1989)).

¹⁶⁸ *Id.* (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 615-16 (1989)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 72.

¹⁷² 59 M.J. 447 (2004).

¹⁷³ *United States v. Garcia*, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *rev’d on other grounds* 59 M.J. 447 (2004).

¹⁷⁴ *Garcia*, 59 M.J. at 449-50; *see also Garcia*, 57 M.J. 716, 718 (N-M. Ct. Crim. App. 2002).

¹⁷⁵ *Garcia*, 57 M.J. at 719.

¹⁷⁶ *Id.* at 720.

¹⁷⁷ *Garcia*, 57 M.J. at 719; *see also United States v. Clow*, 26 M.J. 176, 183 (1988); *United States v. Reister*, 40 M.J. 666, 669 (N.M.C.M.R. 1994), *aff’d* 44 M.J. 409, 416 (1996).

¹⁷⁸ *Garcia*, 57 M.J. at 720. The court cites the following cases: *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States v. Baldwin*, 644 F.2d 381, 383 (5th Cir. 1981); *Charles v. Odum*, 664 F. Supp. 747, 751-52 (S.D.N.Y. 1987); *Cranwell v. Mesec*, 890 P.2d 491, 501 n.16 (Wash. Ct. App. 1995); *People v. Sanders*, 904 P.2d 1311, 1313 (Colo. 1995); *State v. Ramold*, 511 N.W.2d 789, 792-93 (Neb. Ct. App. 1994); *Laramie v. Hysong*, 808 P.2d 199, 203-04 (Wyo. 1991); *State v. Douglas*, 498 A.2d 364, 370 (N.J. Super. Ct. App. Div. 1985); *People v. Haskett*, 640 P.2d 776, 786 (Cal. 1982); *In re Anthony F.*, 442 A.2d 975, 978-79 (Md. 1982); *State v. Frame*, 609 P.2d 830, 833 (Or. Ct. App. 1980); *People v. Cosme*, 397 N.E.2d 1319, 1322 (N.Y. 1979).

¹⁷⁹ *Garcia*, 57 M.J. at 720.

¹⁸⁰ 59 M.J. 447 (2004).

In *United States v. Toy*,¹⁸¹ the NMCCA found that violation of a Hawaii state statute prohibiting nonconsensual wire communications intercepts and recordings did not render the evidence inadmissible in federal court, so long as the recording was not made with a tortious or criminal purpose.

Petty Officer First Class (PO1) Toy met his wife in Rhode Island and committed sexual acts with her daughter, who was then ten years old. The family moved to Hawaii, where PO1 Toy committed more sexual acts with his stepdaughter, including sexual intercourse, over the course of several years. In an effort to abate these proceedings, Mrs. Toy insisted that, whenever he was in the house, PO1 Toy was to be handcuffed to the bed in their bedroom. Petty Officer First Class Toy agreed and this arrangement lasted for about a year. He eventually tired of his enforced confinement and the couple argued. Mrs. Toy secretly recorded one of their arguments, in which PO1 Toy made incriminating statements regarding his actions with his stepdaughter. Mrs. Toy also videotaped PO1 Toy while he was handcuffed to the bed.¹⁸²

These tapes were used as evidence in PO1 Toy's court-martial for several offenses, including rape and indecent acts, in violation of Articles 120 and 134, UCMJ, respectively.¹⁸³ The military judge denied a defense motion to suppress the tapes and PO1 Toy was convicted of forcible sodomy, sodomy and indecent acts, in violation of Articles 125 and 134, UCMJ, respectively.¹⁸⁴

The NMCCA affirmed the findings, though set aside two specifications on other grounds.¹⁸⁵ On appeal, the defense claimed that the military judge admitted the tapes in error, by disregarding MRE 317(a), which prohibits admission of such intercepts "if such evidence may be excluded under a statute applicable to members of the armed forces."¹⁸⁶ The pertinent statute, the defense claims, is 18 U.S.C. § 2511 (through 18 U.S.C. § 2515) which prohibits interception of oral communication, despite one party consent, if the purpose is tortious or criminal under the U.S. Constitution or the law of any state.¹⁸⁷ Hawaii Revised Statutes Section 803-42 prohibits "installation in any private place, without consent of the person or persons entitled to privacy therein, of any device for recording, amplifying, or broadcasting sounds or events in that place."¹⁸⁸ Thus, Mrs. Toy had violated the Hawaiian law by secretly recording her argument with PO1 Toy. The defense argued that because of that state law violation, the tapes should be excluded under § 2511(2)(d).¹⁸⁹

The court rejected this argument, citing extensive federal precedent.¹⁹⁰ "[E]vidence admissible under federal law cannot be excluded because it would be inadmissible under state law. This is because it is not unlawful under federal law for a person not acting under color of law to intercept a wire, oral or electronic communication where such person is party to the communication."¹⁹¹ Thus, the court explains, the defense would have had to "show that [the wife] acted with a criminal purpose, over and above having violated the Hawaii Revised Statutes Section 803-42 by installing a recording device in a private place without his consent."¹⁹²

¹⁸¹ 60 M.J. 598 (N-M. Ct. Crim. App. 2004).

¹⁸² *Id.* at 605-06.

¹⁸³ *Id.* at 600-01.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* The case has an interesting discussion on statutes of limitations, but that is outside the scope of this article.

¹⁸⁶ MCM, *supra* note 73, MIL. R. EVID. 317(a).

¹⁸⁷ 18 U.S.C. § 2511(2)(d) (2000). The statute reads, in pertinent part:

It shall not be unlawful under this chapter for a person not acting under color of law to Intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or law of the United States or any State.

Id.

¹⁸⁸ HAW. REV. STAT. §§ 803-04 (1998).

¹⁸⁹ *Toy*, 60 M.J. at 604.

¹⁹⁰ *Id.* at 604-05 (citing *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998); *United States v. Horton*, 601 F.2d 319, 323 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979); *United States v. Felton*, 592 F. Supp. 172, 193 (W.D. Pa. 1984), *rev'd on other grounds*, 753 F.2d 256 (3d Cir. 1985)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 605.

The Air Force court gets full credit for applying recent precedent. In *United States v. Torres*,¹⁹³ the court applied the recent U.S. Supreme Court decision in *Thornton v. United States*¹⁹⁴ to address an automobile search. Moreover, the court found that “the permissible scope of an automobile search is oftentimes . . . incremental and may change as the search progress[es] and circumstances change. What may start as a search incident to a lawful arrest may quickly develop into a search of the entire vehicle based upon probable cause.”¹⁹⁵

In April 2001, Wichita Falls Police Officers Sullivan and Bohn were investigating a vandalism call, looking for a fourteen-year old runaway and known miscreant. The girl’s mother told them they could find her sleeping in a car on the side of Gregg Road. The police found the girl and another young runaway asleep together in the back of a car, with Airman First Class (A1C) Torres in the driver’s seat. As the girls got out of the car, one of the officers approached A1C Torres and saw a Wichita Falls Police Department badge “protruding from under the console.”¹⁹⁶ The officers arrested A1C Torres for possessing a peace officer’s badge, in violation of Texas law.¹⁹⁷

They then conducted a search of the passenger compartment of the car and found another badge, a camera they believed had been stolen from a police car the week prior, some hand tools and a small metal box that contained marijuana and methamphetamine.¹⁹⁸ The officers searched the entire vehicle, including the trunk, and found various items that had been reported stolen the previous day.¹⁹⁹ Airman First Class Torres was arrested and held in a civilian confinement facility.²⁰⁰

The case eventually ended up at court-martial. The military judge denied a suppression motion, finding that “the initial search of the passenger compartment . . . was incident to the arrest . . . for possession of the sheriff’s badge, which was in plain view.”²⁰¹ The search of the entire car, including the trunk where the hand tools were found, was properly based on probable cause developed during the search incident to arrest. Airman First Class Torres was convicted.²⁰²

The AFCCA affirmed. The court found that because the arrest for possession of the badge was valid, the search incident to the arrest could include the passenger area of the car.²⁰³ The court cited *Thornton* for the proposition that the officers could search incident to a valid arrest, presumably because it is the most recent case on point. Note, however, that police first encountered A1C Torres when he was inside the vehicle, so that the rule under *Belton* would have sufficed. The court went on to say that the search of the entire vehicle was supported by probable cause based on the discovery of the badge alone, but also once the hand tools and drugs were found.²⁰⁴ Finally, the court dismissed the defense’s argument that a third officer joining the search and finding the objects in the trunk violated the temporal proximity requirement of a search incident to arrest.²⁰⁵

* * *

In the first of three unpublished cases, the AFCCA again gets credit for noting and applying recent precedent—here from

¹⁹³ 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

¹⁹⁴ *Thornton*, 124 S. Ct. 2127 (2004).

¹⁹⁵ *Torres*, 60 M.J. at 563.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 561-62.

¹⁹⁹ *Id.* at 562.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 560.

²⁰³ *Id.* at 563.

²⁰⁴ *Id.* at 564-65.

²⁰⁵ *Id.* at 564.

the CAAF—when it utilized the standard set in *United States v. Mason*²⁰⁶ in *United States v. Bethea*.²⁰⁷ In *Bethea*, the AFCCA delved into whether the absence of technical information regarding the potential results of a hair analysis invalidated a search authorization.

Master Sergeant (MSG) Bethea tested positive for cocaine during a random urinalysis, with a rather high nanogram level.²⁰⁸ Master Sergeant Bethea, however, told AFOSI investigators that he had never used drugs. The investigators sought authorization to seize a hair sample from MSG Bethea. They did not inform the magistrate that use of a small amount of the drug would not necessarily show up, and that the hair analysis was most useful to indicate chronic or binge usage. The sample was obtained and tested positive for cocaine use on divers occasions.²⁰⁹ Master Sergeant Bethea was convicted at general court-martial.²¹⁰

The AFCCA affirmed the conviction.²¹¹ The defense argued that because there was no evidence of binge or chronic use from the urinalysis test, there was no probable cause to seek a hair analysis.²¹² The court cited *Mason* in determining that neither was there intentional or reckless behavior, nor would the probable cause outcome have been affected by the omitted information.²¹³

In January 2005, the CAAF granted review in this case on the following issue:

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS HAIR TEST RESULTS WHEN THERE WAS NO PROBABLE CAUSE FOR THE SEARCH AUTHORIZATION USED TO SECURE APPELLANT'S HAIR.²¹⁴

In the second case, the AFCCA ventured into uncharted waters when it directly addressed the issue of reasonable expectation of privacy in a personal computer in a dormitory room.²¹⁵ In *United States v. Conklin*,²¹⁶ the court made three important rulings. First and foremost, there is a reasonable expectation of privacy in a personal computer in the person's government owned quarters.²¹⁷ Next, the court ruled that the government exceeded the scope of the health and comfort inspection in order to find the contraband.²¹⁸ Finally, the court found that Airman First Class (A1C) Conklin's consent – though uninformed – nevertheless validated the search.²¹⁹ The court ultimately found the evidence admissible.²²⁰ This is the first time a military court has directly addressed the issue of reasonable expectation of privacy in computers in this setting. Unfortunately, the decision is unpublished, so it is of limited utility.

Airman First Class Conklin was stationed at Keesler Air Force Base, Mississippi, undergoing training. His quarters were the government-owned, barracks-type setting with two men to a room. Airman First Class Conklin kept a personal desktop computer on the dresser/desk provided him in his room. During a routine inspection, SSgt Roy entered A1C Conklin's room

²⁰⁶ 59 M.J. 416 (2004).

²⁰⁷ No.35381, 2004 CCA LEXIS 175 (A.F. Ct. Crim. App. Jul. 20, 2004) (unpublished).

²⁰⁸ *Id.* at *2. Master Sergeant Bethea's urine sample revealed the presence of 238 nanograms of cocaine per milliliter, 138 nanograms higher than the Department of Defense cut-off of 100 nanograms per milliliter. *Id.* at *2, *5.

²⁰⁹ *Id.* at *2.

²¹⁰ *Id.* at *1

²¹¹ *Id.* at *7.

²¹² *Id.* at *4.

²¹³ *Id.* at *5.

²¹⁴ No. 05-0041, 2005 CAAF LEXIS 43 (Jan. 11, 2005) (unpublished).

²¹⁵ Though the Air Force refers to them as dormitory rooms, military quarters of this type are typically called barracks.

²¹⁶ No. 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished).

²¹⁷ *Id.* at *12.

²¹⁸ *Id.* at *15.

²¹⁹ *Id.* at *16.

²²⁰ *Id.* at *16-*17.

and, in the process of inspecting, opened and closed the desk drawer. This motion caused the monitor of the computer to power up, from a hibernate mode.²²¹ Staff Sergeant Roy saw on the screen a picture of the actress Tiffany Thiessen wearing a see-through black fishnet top that clearly revealed her breasts.²²² Such a display violated the base instruction which prohibits the “open display of pictures, statues, or posters which display the nude or partially nude human body.”²²³ Staff Sergeant Roy then enlisted the assistance of a more experienced noncommissioned officer, Technical Sergeant (TSgt) Schlegel, who examined the contents of the computer’s hard drive, eventually finding a folder labeled “porn” which contained photos of naked young girls.²²⁴

Technical Sergeant Schlegel reported his findings to his commander, who brought in the Office of Special Investigations agents. These investigators sought and obtained A1C Conklin’s consent to search his room and computer. They did not, however, inform him of the discoveries of the two sergeants. The agents then examined the contents of the computer and found a large number of pornographic pictures of children. Airman First Class Conklin eventually confessed to transferring hundreds of adult and child pornographic images onto his personal computer from compact disks borrowed from a friend.²²⁵

The AFCCA declared its threshold question to be “whether the appellant had a reasonable expectation of privacy in the desktop computer in his dormitory room.”²²⁶ It went on to set the left and right lateral limits of the firing zone. Previously, the CAAF has ruled that a servicemember has an expectation of privacy in a personal computer in his home.²²⁷ The CAAF also has held that a servicemember has a reduced expectation of privacy in his government computer in an unsecured office shared with co-workers.²²⁸ The *Conklin* case fell in between those established precedents, thus the court found that while A1C Conklin violated the regulation by displaying the semi-nude photo on his computer, he did have an expectation of privacy in the contents of his personal computer.²²⁹ The CAAF said, “We find, under these circumstances, that the appellant had a reasonable expectation of privacy in the files stored in his personal desktop computer.”²³⁰ This is a significant step forward in the jurisprudence of privacy law in the military regarding computers. Too bad it is an unpublished opinion.

The court next addressed the scope of the inspection. “The question before us is whether TSgt Schlegel exceeded the scope of the inspection when he examined the contents of the appellant’s computer. We conclude that he did.”²³¹ The court found that the purpose of the inspection was for orderliness, cleanliness, safety and security.²³² However, by accessing the file storage system in the computer, TSgt Schlegel exceeded that scope, particularly given the base instructions on room inspections.²³³ Technical Sergeant Schlegel offered testimony that he often thumbed through suspicious magazines to determine if they were permissible under the regulations, and that perusing the contents of the computer was essentially the same.²³⁴ The court disagreed:

[T]he fact that appellant had violated the “open display” prohibition did not logically form any basis to extend the inspection (or justify the search) into computer files that were not openly displayed. Under

²²¹ *Id.*

²²² *Id.* at *3.

²²³ *Id.* at *3 (citing KEESLER AIR FORCE BASE INST. 32-6003, DORMITORY SECURITY AND LIVING STANDARDS FOR NON-PRIOR SERVICE AIRMEN 4.2.3 (30 Aug. 2003)).

²²⁴ *Id.* at *4.

²²⁵ *Id.* at *4-*5.

²²⁶ *Id.* at *9.

²²⁷ *United States v. Maxwell*, 45 M.J. 406 (1996).

²²⁸ *United States v. Tanksley*, 54 M.J. 169 (2000), *overruled in part on other grounds by United States v. Inong*, 58 M.J. 460 (2003).

²²⁹ *Conklin*, 2004 CCA LEXIS 290, at *12.

²³⁰ *Id.* at *12.

²³¹ *Id.* at *13.

²³² *Id.*

²³³ *Id.* at *5-*6.

²³⁴ *Id.* at *8.

these circumstances, we conclude that TSgt Schlegel's perusal of the electronic files on the appellant's computer exceeded the authorized scope and purpose of the inspection.²³⁵

The court thus found that A1C Conklin had a reasonable expectation of privacy in his computer in his dormitory room, and that TSgt Schlegel had violated that expectation. Nonetheless, the court affirmed the lower court's decision to deny the suppression motion. The AFCCA found that A1C Conklin had given valid consent to the OSI agents and that their subsequent search was permissible and its results admissible.²³⁶ This despite the fact that the agents would never have addressed the request for consent to A1C Conklin if not for the impermissible findings of TSgt Schlegel. The court did not offer any rationale for this seeming inconsistency.

Finally, in the third unpublished AFCCA case, Senior Airman (SrA) Ashea Fuller offered a novel variation on the innocent ingestion defense. In *United States v. Fuller*,²³⁷ SrA Fuller claimed that the metabolite benzoylecgonine (BZE) her body produced, and which was later detected by a random urinalysis, was present because she had sex with her boyfriend the night before, and he was under the influence of a painkiller due to dental work.²³⁸ Thus, she claimed innocent ingestion through injection of contaminated semen into her body.²³⁹

When questioned by AFOSI, she denied the knowing use of cocaine. She posited that cocaine could have entered her system after she had sex with her boyfriend the night before the urinalysis. The boyfriend had been prescribed Lorset by a dentist, and that drug could have been in his semen, which passed to SrA Fuller's body. She offered to provide a hair sample, which eventually tested positive for the use of cocaine on many different occasions over a fifteen-month period. Senior Airman Fuller admitted that she had been seeing her boyfriend for fewer than fifteen months prior to the drug test.²⁴⁰

At trial, Dr. Matthew Selavka, a laboratory drug expert, testified that it was possible that the positive test result could have resulted from sexual intercourse as SrA Fuller claimed. However, she would have had to have had sex with at least seven different males who had recently used a recreational dose of cocaine, and the sexual activity would have to have occurred within a short time before the urinalysis.²⁴¹ Finally, Dr. Selavka testified that Lorset did not contain any cocaine.²⁴² The court-martial convicted SrA Fuller of illicit drug use on divers occasions.²⁴³

The AFCCA affirmed.²⁴⁴ Senior Airman Fuller challenged, on appeal, the military judge's use of the inference of wrongfulness found in Article 112a, UCMJ.²⁴⁵ The court found that the inference did not wrongfully shift the burden of proof to the defense.²⁴⁶

* * *

The U.S. Supreme Court has been relatively successful at defending its concept of flexible application of the Fourth Amendment restrictions on government action. Despite the determined assaults of the Ninth Circuit and its allies, the Court resists the temptation to create pigeon holes and checklists for government agents. Reasonableness and totality of the circumstances still hold the field. However, the Court remains at stand to, vigilant against the further attacks that are sure to come.

²³⁵ *Id.* at *15.

²³⁶ *Id.* at *16-*17.

²³⁷ No. 35058, 2004 CCA LEXIS 182 (A.F. Ct. Crim. App. June 23, 2004) (unpublished).

²³⁸ *Id.* at *2-*3.

²³⁹ *Id.* at *3.

²⁴⁰ *Id.* at *3-*6.

²⁴¹ *Id.* at *3-*4.

²⁴² *Id.* at *4.

²⁴³ *Id.* at *1.

²⁴⁴ *Id.* at *17.

²⁴⁵ *Id.* at *14.

²⁴⁶ *Id.* at *17.