Search and Seizure in 2003-04

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The last revolutionary case in search and seizure was *Katz v. United States*,[1] a 1967 case in which the U.S. Supreme Court redefined the concept of reasonable expectation of privacy. The most recent Supreme Court case to fundamentally alter the search and seizure landscape was *Illinois v. Gates*,[2] wherein the Court adopted the "totality-of-the circumstances" as the standard for probable cause.[3] In the decades since the Court decided these cases, courts at all levels have refined these constitutional concepts.[4] In the past year, the Court decided four such refining cases. These four cases are important to note and to understand, but none is revolutionary nor even fundamental; instead, they are restatements of existing law, which should make future application of the rules clearer. This article addresses each of these cases as well as several cases from the Court of Appeals for the Armed Forces (CAAF), and from the various service courts.

Warrant and Probable Cause Requirement—Not Usefully Reducible, or "There is one way to find out if a man is honest—ask him. If he says yes, you know he's crooked."[5]

The Fourth Amendment is a succinct and clear statement,[6] and the Court's interpretation and precedents have created a distinct body of law. That body rests on the term *reasonable*, which is subject to varying interpretations. Therefore, the Court has provided flexible guidance which contemplates the various facts and circumstances as experienced by the reasonable officer on the scene. The Court's decisions also address reasonableness and constitutional violations. However, the remedy for a Fourth Amendment violation, the exclusion of evidence at trial, is designed to deter government agent misconduct, not to place unreasonable, restrictive, and unduly taxing requirements on the intellect, education, training, and instincts of police officers. Reasonableness is the key. Consequently, *Gates*' totality of the circumstances test, as experienced by a reasonable officer on the scene, remains the standard by which probable cause determinations are made.

The Court's case law is replete with precedents which assist in these determinations. "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion."[7] "[P]robable cause is a fluid concept–turning on the assessment of probabilities in particular factual contexts–not readily, or even usefully, reduced to a neat set of legal rules."[8] The probable cause determination deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

1. 389 U.S. 347 (1967).

2. 462 U.S. 213 (1983).

3. *Id.* at 238. In *Gates*, the Court returned to the earlier, simplified version of probable cause determination.

> [W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . [concluding]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires . . . .

Id. at 238-89 (citations omitted).

4. U.S. CONST. amend. IV.

5. Creative Quotations, *Groucho Marx, available at* http://www.creativequotations.com/cgi-bin/sql_search3.cgi?keyword=Groucho+Marx+&boolean=and&frank=all&field=all&database=all (last visited May 7, 2004).

6. U.S. CONST. amend. IV.

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

Id.

7. Locke v. United States, 11 U.S. 339, 348 (1813). *Locke* was a civil case, but the opinion written by Chief Justice John Marshall is one of the earliest helpful definitions of the term in American jurisprudence.

technicians, act."[9] "'The substance of all the definitions' [of probable cause] . . . is a reasonable ground for belief of guilt."[10]

In *Maryland v. Pringle*,[11] a unanimous Court refined probable cause with respect to individualized suspicion. In this case, the Court went a long way towards answering the question: *How many people can a cop arrest based on one bag of dope?* The holding is neatly summed up:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[12]

"The facts of the case are these."[13] A Baltimore police officer stopped a Nissan Maxima for speeding at 3:16 a.m. on 7 August 1999. Donte Partlow was driving the car, Otis Smith was in the back seat and Joseph Pringle was in the front passenger seat. When Mr. Partlow retrieved his registration from the glove compartment—at the officer's request—the officer noticed a large roll of bills. Again at the request of the officer, Mr. Partlow consented to a search of his vehicle. The officer found cocaine packaged for distribution behind the armrest of the back seat. The officer then questioned all three men about the drugs and told them that if no one explained the presence of the drugs, he would arrest all three. None of the three offered any information regarding the drugs and the officer arrested all three. Later, Mr. Pringle waived his rights and admitted ownership of the cocaine, explaining they were headed to a party and he intended to sell the cocaine, or trade it for sex. He stated that the others did not know of the drugs.[14]

At trial, Mr. Pringle's counsel moved to suppress the admission as the fruit of an illegal arrest, claiming the officer did not have probable cause to arrest Mr. Pringle. The defense claimed that the officer had no evidence of Mr. Pringle's ownership, and thus lacked sufficient individualized suspicion to establish probable cause *vis-à-vis* Mr. Pringle. The trial judge denied the motion, the jury convicted Mr. Pringle, and the Court of Special Appeals of Maryland affirmed. However, the state's highest court, the Court of Appeals of Maryland, overturned, ruling that the mere presence of cocaine in the back seat of a car driven by Mr. Partlow was not enough to establish probable cause.[15] The State of Maryland appealed and a unanimous Court reversed the Court of Appeals of Maryland, and upheld the conviction.[16]

The dispositive issue was whether the arresting officer "had probable cause to believe that Pringle committed the crime."[17] The Court stressed the fluid nature of the probable cause determination, emphasizing its precedents, and concluded that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause."[18] The Court then found that it was "reasonable for the officer to infer a common enterprise among the three men."[19] Consequently, the probable cause standard was met, and the arrest of all three men, including Mr. Pringle, did not violate the Fourth Amendment.[20]

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8. *Gates*, 462 U.S. at 232.

9. Brinegar v. U.S., 338 U.S. 160, 175 (1949).

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Id.

10. *Id*. (quoting McCarthy v. De Armitt, 99 Pa. 63, 69 (1881)).

11. 124 S. Ct. 795 (2003).

12. *Id*. at 800-01.

13. A FEW GOOD MEN (Columbia Pictures 1991). The prosecutor in the referenced movie, portrayed by actor Kevin Bacon, began his opening statement with this line.

14. *Pringle*, 124 S. Ct. at 798.

15. Pringle v. State, 370 Md. 525 (2002).

16. *Pringle*, 124 S. Ct. at 797.

17. *Id*. at 799.

18. *Id*. at 800 (citations omitted).

19. *Id*. at 801.

The Court distinguished this situation from that in *Ybarra v. Illinois*,[21] which was cited by the defense. In *Ybarra*, police executing a search warrant at a tavern patted down every patron of the tavern for weapons. The Court found that improper, stating:

> a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.[22]

Here, the officer had a reasonable belief that Mr. Pringle was the owner, or co-owner, of the cocaine. Under these facts, that was sufficient particularization. This case does not answer the earlier "how many people" question with *three*. Rather, given these facts and under the totality of the circumstances, it was reasonable for the officer to believe that all three occupants of the vehicle were guilty. This is, of course, instructive in similar future situations.

The Court offered an important practice tip in its concluding footnote. The Court of Appeals of Maryland had earlier "dismissed" the large roll of bills "from the glove compartment as a factor in the probable cause determination, stating that '[m]oney, without more, is innocuous.'"[23] In response, the Court pointed out that the lower "court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents."[24]

In another case, the Court examined the issue of exigent circumstances, one of several probable cause exceptions. In *United States v. Banks*,[25] the Court addressed the appropriate amount of time police should wait between announcing their presence and forcible entry when executing a search warrant. The unanimous Court ruled that "this case turn[ed] on the significance of exigency revealed by circumstances known to the officers . . . ."[26] In short, the circumstances of a warrant search can ripen into an exigency justifying immediate entry. The amount of time to wait between announcing and entry depends on the time of that ripening process. In *Banks*, the Court held that a fifteen to twenty second wait was appropriate, but that could easily vary depending on the circumstances.[27]

"The facts of the case are these."[28] Officers of the North Las Vegas Police Department, along with federal agents, were executing a validly obtained search warrant at the apartment of LaShawn Banks at 1400 on a Wednesday. They were seeking evidence of crack cocaine distribution. After knocking and announcing their presence, the police waited approximately fifteen to twenty seconds and then broke down the front door to the apartment with a battering ram. They found Mr. Banks emerging from the shower, literally dripping wet and toweling off. The subsequent search revealed weapons and crack cocaine.

At trial, the defense sought to suppress the guns and drugs, on the ground that the officers violated the Fourth Amendment when they failed to wait a reasonable amount of time before breaking down the door. The judge denied the motion, and the defense entered a conditional plea. A divided panel of the Ninth Circuit Court of Appeals reversed and ordered suppression of the contested evidence.[29] The court offered a long list of factors that an officer "reasonably should consider" when executing a warrant.[30] Moreover, to assist "in the resolution of the essential question of whether the entry made herein was reasonable under the circumstances," the Ninth Circuit defined four categories of intrusion.[31] Finally, the court decided that the intrusion was neither justified by exigent circumstances nor permissible.[32]

The Court disagreed with the Court of Appeals:

> Here . . . the Court of Appeals overlay of a categorical scheme on the general reasonableness analysis threatens to distort the

20. *Id*. at 802.

21. 444 U.S. 85 (1979).

22. *Id*. at 91 (citation omitted).

23. *Pringle*, 124 S. Ct. at 800 (citing Pringle v. State, 370 Md. 525, 546 (2002)). "There was $763 of rolled-up cash in the glove compartment directly in front of Pringle." *Id.*

24. *Id*.

25. 124 S. Ct. 521 (2003).

26. *Id*. at 526.

27. *Id*.

28. *See supra* note 13.

29. United States v. Banks, 282 F.3d 699 (9th Cir. 2002).

> "totality of the circumstances" principle, by replacing a stress on revealing facts with resort to pigeonholes. . . . Attention to crack cocaine rocks and pianos tells a lot more about the chances of their respective disposal and its bearing on reasonable time.[33]

The Court's comparison of crack cocaine with pianos is the key to the holding. The Court determined that the Ninth Circuit misplaced its focus in this case. The Ninth Circuit addressed the time it would take Banks to hear the police, stop what he is doing, travel through the dwelling, and answer the door. Instead, the Court focused on the amount of time it would take Mr. Banks to recognize his peril and begin disposing of the very evidence sought—the crack cocaine. "[T]he crucial fact in examining their actions is not the time to reach the door but the particular exigency claimed."[34] Since the "prudent [drug] dealer" keeps his stash by a sink or toilet, fifteen to twenty seconds would suffice to begin flushing the dope.[35] That is the relevant inquiry. If the police were seeking stolen pianos, as Justice Souter writing for the Court notes, then the police reasonably would have to delay longer than fifteen to twenty seconds, since the piano thief could not easily dispose of a piano.[36]

Banks does not announce that fifteen seconds is now the waiting period for a knock and announce warrant. Rather, it affirms that the probable cause test remains the *totality of the circumstances*, as perceived by the reasonable officer on the scene. In this case, the circumstances ripened into an exigency in about fifteen seconds, but that will not always be the case. In any case, the totality of the circumstances remains the standard, and cannot be replaced or restricted by pigeonholes or bright-line rules.

Related to probable cause is the concept of reasonable suspicion. In *United States v. Robinson*,[37] the CAAF addressed this concept, with several of the judges offering differing views. The resulting opinion is instructive.

"The facts of the case are these."[38] At approximately 0130 hours, while patrolling a high crime area in Florida, a civilian police officer observed a vehicle on three occasions, once parked outside of and twice traveling near a known drug house. The driver, Air Force (AF) Technical Sergeant (TSgt) Robinson made a sudden left turn into an alley without signaling, prompting the officer to stop him. The officer observed a disheveled passenger in the car, and detected alcohol on TSgt Robinson. While awaiting the results of a warrants check, the officer called for a canine unit. About eighteen minutes after the initial stop (ten minutes of which included TSgt Robinson searching for his license and registration), the drug dogs alerted on TSgt Robinson's car. During the ensuing search, the police found drugs. Technical Sergeant Robinson was charged with driving under the influence and possession of a controlled substance.[39]

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30. *Id.* at 704. A non-exclusive list of factors include:

> (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

Id.

31. *Id.*

> Entries may be classified into four basic categories, consistent with the interests served by 18 U.S.C. Section 3109: (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time. The action at bar falls into the final category because no exigent circumstances existed and the entry required destruction of property--i.e., the door to Banks' apartment.

Id. (citation omitted).

32. *Id*.

33. United States v. Banks, 124 S. Ct. 521, 528 (2003).

34. *Id*. at 527.

35. *Id*.

36. *Id*.

37. 58 M.J. 429 (2003).

38. *See supra* note 13.

The military judge upheld the search, finding probable cause to search based on the appearance of the passenger, the odor of alcohol and glazed-eyed appearance of TSgt Robinson, and the alert of the drug dogs. However, on appeal the Air Force Court of Criminal Appeals (AFCCA) discovered that it is not a legal requirement to signal before making a turn in Florida, if no other vehicles are affected by the turn.[40] Consequently, the officer did not validly stop TSgt Robinson on the basis of the illegal left turn. Moreover, absent the improper stop, the officer would not have been in a position to evaluate the appearance of the car's occupants or to utilize the drug dogs to develop the probable cause. Thus, the probable cause search was invalid, and the evidence inadmissible.

Despite this analysis, the AFCCA found that the facts related by the officer at trial amounted to reasonable suspicion, and upheld the military judge's ruling[41] though on a different basis. The AFCCA conceded that the traffic stop for failure to signal, which was the basis for the stop to which the officer testified at court-martial, was faulty, and could not support the later probable cause determination.[42] Nonetheless, the AFCCA determined that there were sufficient facts for the officer to determine that he had reasonable suspicion to stop TSgt Robinson.[43] The AFCCA cited the Supreme Court to support this brief investigative stop for vehicles. "These brief investigative stops may be used for persons in a moving vehicle."[44] That stop would have been valid, and thus the facts discovered during the ensuing investigation would be valid to support the probable cause determination. The AFCCA found it was irrelevant that the officer testified he executed the traffic stop based on the lack of a turn signal and not on reasonable suspicion of some illicit activity. Consequently, the court "conclude[d] that Officer Jennewein's stop of the appellant's vehicle was reasonable under the circumstances. The evidence derived from the subsequent searches of the appellant and his vehicle was properly seized and admitted into evidence."[45]

On appeal, the CAAF was fractured. Writing for the majority, Judge Gierke provided a detailed analysis of the law and the facts of the case then agreed that the facts amounted to reasonable suspicion.[46] Finding reasonable suspicion to make the stop, the CAAF had no trouble finding that probable cause developed thereafter. But not all of the judges agreed.

The dissents are equally compelling and informative regarding the reasonable suspicion determination. In his dissent, Judge Baker found that the facts did not raise reasonable suspicion.[47] Judge Erdmann also dissented, not only finding no reasonable suspicion, but also expressing concern that the appellate courts felt free to uphold the search on a basis that was never articulated by the officer.[48] "There is something troubling about a concept where the initial police action violates the Fourth Amendment but an appellate court later develops a theory which allows the admission of the evidence."[49]

Robinson is a useful case. The judges' varied application and analysis of law and facts are enlightening. The facts are fully developed in both the CAAF and the AFCCA opinions, and the individual judge's determinations of whether these facts amount to reasonable suspicion may be helpful in future determinations.

Reasonable Expectation of Privacy—Then Don't Show Everyone!

In two recent cases, the CAAF took the opportunity to address the reasonableness of privacy expectations. First, in *United States v. Springer*,[50] the CAAF affirmed the concept that there is no reasonable expectation of privacy in the information a person writes on the outside of an envelope and then mails. The CAAF also held that there is no reasonable expectation of

39. *Robinson*, 58 M.J. at 430-31.

40. United States v. Robinson, 56 M.J. 541 (A.F. Ct. Crim. App. 2001).

41. *Id*. at 548.

42. *Id*. at 544.

43. *Id*. at 547-48.

44. *Id*. at 546 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)) (stating "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion").

45. *Id*. at 548.

46. United States v. Robinson, 58 M.J 429, 433-34 (2003).

47. *Id*. at 437 (Baker, J., dissenting).

48. *Id*. at 439 (Erdmann, J., dissenting).

49. *Id*. at 442.

50. 58 M.J. 164 (2003).

privacy in the enclosed information, if it is clearly visible through the envelope.[51]

"The facts of the case are these."[52] Staff Sergeant (SSG) Springer was a member of a training cadre at a remote site. He mailed a letter to a former trainee, with his address as the return address, by dropping it at the front desk, along with trainee mail. Staff Sergeant Payne, another cadre member, checked to ensure all letters had postage and return addresses before mailing them. He recognized SSG Springer's letter by the return address. He also saw a heart picture drawn on the letter inside the envelope. Staff Sergeant Payne suspected an inappropriate relationship and reported the incident.[53] During an ensuing investigation, SSG Springer admitted writing an inappropriate letter to a former trainee. The command charged him with and he was convicted of violations of lawful orders[54] and maltreatment of several trainees.[55] At trial, the defense moved to suppress the contents of the letter and other statements derived from SSG Payne's initial examination of the letter.[56]

Writing for a unanimous court, Judge Baker first found that the address and return address were placed in open view and thus SSG Springer could not have had even a subjective expectation of privacy.[57] Next, the CAAF addressed the contents of the envelope. The court held that SSG Springer may have had a subjective expectation of privacy in the content of his letter despite the fact some of it could be seen through the envelope, but that was not objectively reasonable. "Appellant's expectation of privacy in the parts of his letter that were readily visible to the naked eye though the envelope was not one that society would recognize as reasonable."[58]

In the second case, the CAAF recently granted review of *United States v. Geter*,[59] an unpublished Navy-Marine Corps Court of Criminal Appeals (NMCCA) case involving privacy and government computers.[60] In this case, the NMCCA declared that Lance Corporal Geter did not have a reasonable expectation of privacy in the emails he sent over a government computer network system, with his government issued computer. The NMCCA declared that "when dealing solely with a U.S. Government owned and operated system, in which individual e-mail accounts are provided for official use only, there is no reasonable expectation of privacy."[61] Those e-mails eventually led to drug distribution charges [62] and the appellant's conviction.[63] The NMCCA found no evidence of a subjective expectation of privacy, nor was it prepared to recognize the reasonableness of an objective expectation in such a case.

> Appellant has failed to point to any evidence in the record introduced on his motion to suppress indicating he had a subjective expectation of privacy in his assigned e-mail account. He failed to put before the military judge evidence or testimony which would satisfy the necessary, subjective prong of Fourth Amendment analysis, thus, causing the military judge to find a failure by Appellant to satisfy his burden of persuasion. Even if he had made a showing of a subjective expectation of privacy, Appellant clearly failed to show that such an expectation was objectively reasonable.[64]

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51. *Id*.

52. *See supra* note 13.

53. *Springer*, 58 M.J. at 167.

54. UCMJ art. 92 (2002).

55. *Id.* art. 93.

56. *Springer*, 58 M.J. at 167.

57. *Id*. at 168 (citing Katz, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan first articulated the two-prong test for the reasonable expectation of privacy in his concurrence in *Katz*. First, one must exhibit a subjective expectation of privacy, and then, second, that expectation must be one that society is willing to recognize as objectively reasonable. *Id*.

58. *Id.* at 169.

59. 59 M.J. 268 (2004).

60. No. 9901433, 2003 CCA LEXIS 134 (N-M. Ct. Crim. App. May 30, 2003) (unpublished), *pet. granted*, 59 M.J. 268 (2004).

61. *Id.* at *9 (citing United States v. Monroe, 50 M.J. 550, 558 (A.F. Ct. Crim. App. 1999), *aff'd*, 52 M.J. 326 (2000)).

62. UCMJ art. 112a (2002).

63. *Geter*, 2003 CCA LEXIS 134 at *1.

64. *Id.* at *11 (citations omitted).

The court's decision is still pending in a case in which the CAAF may finally address directly the expectation of privacy in government computer systems.

Scope of Search—How Far Can You Go?

In *United States v. Billings*,[65] the Army Court of Criminal Appeals (ACCA) incorporated extensive federal case law to determine that police could conduct a protective sweep of a structure, even if the suspect was arrested outside of it.[66] Here, the ACCA held that "the authority of police to conduct a protective sweep does not turn on whether the person apprehended may harm police, but instead on whether others may be present and pose a danger to the police."[67]

"The facts of the case are these."[68] Specialist (SPC) Billings was the leader of the Fort Hood and Killeen, Texas, chapter of the Chicago-based criminal organization known as the Gangster Disciples. Civilian police executed an arrest warrant for SPC Billings at her apartment, actually performing the arrest on the small front porch outside the apartment. Having reason to believe that a gangster cohort may have been in the apartment, the police executed a protective sweep search of the living room of the apartment. In doing so, they saw an application to join the Gangster Disciples laying face up on a table. They seized the form and used this and other information to obtain a search warrant for the entire apartment.[69]

Specialist Billings challenged the protective sweep as unnecessary, given she was arrested outside.[70] The military judge denied the defense motion to suppress, ruling the sweep was within the limits set by the Court in *Maryland v. Buie*.[71] The ACCA agreed with the military judge. The opinion discussed several Courts of Appeals opinions which recognize the need to allow officers who have articulable suspicion that a danger remains to search inside a dwelling, even if the arrest takes place outside.[72] Here, the police had information that other gangster disciples might be in the apartment. "Arresting officers need not wait for a warrant before ensuring their safety and minimizing the risk of an attack if articulable facts support their belief that danger lurks in the home."[73]

In another case meriting attention, the CAAF granted review of an unpublished ACCA decision in *United States v. Simmons*.[74] In *Simmons*, the ACCA found the trial court erred in admitting a letter and a videotaped confession. However, the ACCA found that admission of the letter, the videotape, and the potentially derivative court-martial testimony was harmless.[75]

"The facts of the case are these."[76] First Lieutenant (1LT) Simmons was convicted of multiple offenses, including conduct unbecoming an officer[77] and assault,[78] which related to his homosexual relationship with Private First Class (PFC) W, a member of the accused's company. After responding to a report of a fight in 1LT Simmons' apartment, a civilian police officer discovered PFC W "unconscious on the floor, lying in a pool of blood."[79] At the time of the assault, the victim was at the accused's apartment to "remove his personal belongings."[80]

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65. 58 M.J. 861 (Army Ct. Crim. App. 2003).

66. *Id*. at 865.

67. *Id*. at 863 (citing Maryland v. Buie, 494 U.S. 325, 334 (1990)).

68. *See supra* note 13.

69. *Billings*, 58 M.J. at 862-63.

70. *Id*. at 863.

71. *Id*. (citing *Buie*, 494 U.S. at 334).

72. *Id*. at 864 (citing United States v. Colbert, 76 F.3d 773, 776-77 (6th Cir. 1996); United States v. Biggs, 70 F.3d 913, 916 (6th Cir. 1995); United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995); United States v. Kimmons, 965 F.2d 1001, 1004, 1009-10 (11th Cir. 1992); United States v. Oguns, 921 F.2d 442, 446-47 (2d Cir. 1990); United States v. Tisdale, 921 F.2d 1095, 1097 (10th Cir. 1990)).

73. *Id*.

74. No. 20000153 (Army Ct. Crim. App. Mar. 31, 2003) (unpublished), *pet. granted*, 59 M.J. 136 (2003).

75. *Id*. at 9.

76. *See supra* note 13.

77. UCMJ art. 133 (2002).

78. *Id.* art. 128.

79. *Simmons*, No. 20000153 at 2.

Private First Class W "frequently stay[ed] at the apartment and kept personal belongings" in 1LT Simmons' guest bedroom.[81] During a search incident to 1LT Simmons' arrest for assault, civilian police found a handwritten letter that 1LT Simmons had given to PFC W several weeks earlier. The police seized the letter as evidence of 1LT Simmons' motive for the assault. First Lieutenant Simmons subsequently made a videotaped statement in which he confessed to the homosexual relationship with PFC W.[82] At the court-martial, the military judge denied the defense suppression motion and found that 1LT Simmons had no ownership interest in the letter, which had been given to the PFC. The military judge admitted both the letter and the derivative videotape.[83]

The ACCA concluded that the military judge erred in admitting the letter and tape.[84] The court ruled that the letter was illegally obtained by police, since the search exceeded a search incident to arrest. However, the ACCA determined that introduction of the letter, the tape, and even 1LT Simmons' in-court testimony was harmless error, given the other evidence arrayed against him.[85] While the CAAF will review the harmlessness of the error, the most important issue facing the CAAF will be whether the in-court testimony was derivative of the admissible evidence.

Consent? Sure, Search My _____ (fill in your choice of container), 'Cause I Don't Think You'll Find the _____ (fill in your choice of illegal material) I Have So Cleverly Hidden in the _____ (fill in your choice of stupid hiding places).

In *United States v. McMahon*,[86] the investigators executed a textbook search, which began with a consensual, administrative inspection and then evolved into a criminal search involving two separate search authorizations and several levels of scope. The appellant's initial consent gave the investigators the authority they needed to be in position to discover the contraband.

"The facts of the case are these."[87] Staff Sergeant McMahon occupied base quarters along with his wife, two children, and Aunt Billie. Aunt Billie, who was in ill health, died in her sleep early one morning. Though no foul play was suspected, the Criminal Investigation Command (CID) was called to investigate because the death occurred in government quarters. The CID agents asked for and received SSG McMahon's permission to perform their administrative investigation, including taking pictures and measurements, as well as looking for medications.[88] In performing this investigation, the agents came across many items that appeared to be government property, including field gear, computers, compact discs, an inflatable boat, and several ammunition cans. Concerned for everyone's safety, the lead investigator opened one of the ammunition cans and found TNT and other explosives.[89]

Based on this evidence, the investigators obtained search authorization from a military magistrate to look for explosives and associated hardware, as well as other items of government property. While searching for government property, an investigator observed some award certificates on SSG McMahon's computer printer. Also on the desk was a letter which indicated that SSG McMahon had not been awarded a Bronze Star.[90] The investigator then looked inside a three ring binder and found a certificate awarding a Bronze Star to SSG McMahon. Suspecting yet another crime, the investigators obtained a second search authorization from the military magistrate to look for items associated with awards and ribbons, including authority to search the computer itself.[91]

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80. *Id*.

81. *Id*. at 3.

82. *Id*.

83. *Id*.

84. *Id*. at 7. The military judge found the letter admissible on three bases. First, the accused had no reasonable expectation of privacy in it because he had given it to the PFC. *Id*. at 5. Second, it was found as part of a search incident to arrest. *Id*. at 5-6. Third it was in plain view, inside a closed medicine cabinet in the back bathroom. *Id*. 6-7. The military judge was clearly in error on all three bases he gave for admission of the evidence. *Id*. at 7.

85. *Id*. at 7. Nonetheless, because there was a potential constitutional violation, the law required the court to determine whether the error was harmlessness beyond reasonable doubt. *Id*. (citing Chapman v. California, 386 U.S. 18 (1967)).

86. 58 M.J. 362 (2003).

87. *See supra* note 13.

88. *McMahon*, 58 M.J. at 363-64.

89. *Id*. at 364, 365.

90. *Id*. at 365. Later that day, investigators advised SSG McMahon of his rights, which he waived and then admitted to falsifying his records to reflect the award of the Bronze Star. *Id*.

At trial, the defense moved to suppress the evidence. This motion was based on lack of consent for the initial search and the assertion that searching the computer exceeded the scope of both the initial consent and the subsequent search authorizations.[92] The military judge denied the motion. The ACCA affirmed.[93] Chief Judge Crawford delivered the opinion for the unanimous CAAF. The court determined that the initial consent was not mere acquiescence and was freely and voluntarily given, based on the testimony of the CID agents regarding SSG McMahon's words and demeanor, as well as his age, maturity, and experience.[94] Once the investigators uncovered evidence of criminal wrongdoing which exceeded the scope of the consent, they obtained two separate search authorizations from the military magistrate. Moreover, the CAAF held that the search authorization for government property authorized looking through the binder, since compact discs were among the alleged stolen property, and the binder could contain those items. Thus, the Bronze Star certificate was in plain view to the investigator who had the authority to look in the binder.[95]

In the first of two NMCCA cases, *United States v. Garcia*,[96] the NMCCA found that one cotenant's consent to search a home suffices. More pointedly, the court held that "an accused's presence and explicit refusal to consent is 'constitutionally insignificant,' so long as the consenting cotenant has equal access or control over the premises to be searched."[97]

"The facts of the case are these."[98] Staff Sergeant Garcia was suspected of possessing stolen cars and armed robbery, and was apprehended at his home. He consented to allow Naval Criminal Investigative Service agents in his home to talk, but declined to consent to a search of his home.[99] Meanwhile, civilian police arrested SSG Garcia's wife at her work site, and she consented to their search of the family home. Weapons and other evidence were discovered during the search.[100] Although not raised by the defense at trial, on appeal, SSG Garcia sought to suppress the weapons and stolen property. He claimed that his on-premises declination outweighed his wife's off-premises consent.[101]

The NMCCA reviewed for plain error, since the defense failed to raise the issue at trial.[102] The court noted military law recognizes that third party consent to a search is valid.[103] Regarding SSG Garcia's claim that his refusal was weightier than his wife's consent, the court found no military precedent, but then created some by citing considerable civilian case law[104] and holding that the accused's refusal was insignificant, so long as his wife shared equal access to the premises.[105] The CAAF granted review on several issues in *Garcia*, including this one.

In the second consent case, the NMCCA dealt with the voluntariness of consensual urinalysis searches in *United States v. Camacho*.[106] "The facts of the case are these."[107] Petty Officer First Class (PO1) Camacho tested positive on six separate urinalysis tests, and contested the voluntariness of the first four.[108]

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91. *Id*. at 365-67.

92. *Id*. at 366.

93. *Id*. at 363.

94. *Id*. at 366-67.

95. *Id*. at 367.

96. 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *pet. granted*, 59 M.J. 49 (2003).

97. *Id*. at 719-20.

98. *See supra* note 13.

99. *Garcia*, 57 M.J. at 718.

100. *Id.* at 718-19.

101. *Id.* at 719.

102. *Id.*

103. *Id.*

104. *Id*. at 720 (citing Charles v. Odum, 664 F. Supp. 747, 751-52 (S.D.N.Y. 1987); *accord* 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. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977); People v. Haskett, 640 P.2d 776, 786 (Cal. 1982); People v. Sanders, 904 P.2d 1311, 1313 (Colo. 1995); *In re* Anthony F., 442 A.2d 975, 978-79 (Md. 1982); State v. Ramold, 511 N.W.2d 789, 792-93 (Neb. Ct. App. 1994); State v. Douglas, 498 A.2d 364, 370 (N.J. Super. Ct. App. Div. 1985); People v. Cosme, 397 N.E.2d 1319, 1322 (N.Y. 1979); State v. Frame, 609 P.2d 830, 833 (Or. Ct. App. 1980); Cranwell v. Mesec, 890 P.2d 491, 501 n.16 (Wash. Ct. App. 1995); Laramie v. Hysong, 808 P.2d 199, 203-04 (Wyo. 1991)).

105. *Id.*

The first sample was given on 24 February, following a traffic stop by a civilian police officer where she was suspected of being under the influence of methamphetamine. After signing a consent statement, PO1 Camacho provided a sample, which was discarded by Chief Petty Officer Crawford.[109] Petty Officer First Class Camacho subsequently gave a second sample. She claimed at trial that she was not allowed to leave the security office until she gave the second sample, and thus it was no longer consensual.[110] Petty Office First Class Camacho was asked to provide three more samples on 11 March, 13 and 21 April, each following brief periods of unauthorized absence. According to Chief Crawford, he asked her to provide a sample each time, to which she replied, "[S]ure, I have no problem with that."[111] No written consent form was executed. In each case, PO1 Camacho claimed she was prevented from taking care of some personal business until she provided a sample. On 7 May she was placed in pretrial confinement at Naval Air Station Miramar, and released on 14 May, though restricted to Naval Air Station North Island. She tested positive again on 24 June (she did not contest this urinalysis) and was ordered back in pretrial confinement. She again tested positive for methamphetamine on 26 June during brig in-processing. At trial, defense contested the consent for each of the first four urinalysis tests. The military judge denied each of the motions.[112]

The NMCCA affirmed, based in part upon the military judge's factual findings. The trial judge "made extensive findings of fact. Explicitly referencing the 'clear and convincing' standard and the 'totality of the circumstances' test, [the trial judge] found that the appellant" had knowledge of her right to refuse, was not coerced, and voluntarily provided samples on each occasion.[113] The military judge also found that PO1 Camacho remembered the contents of the consent form on each of the subsequent occasions, and factored this into the voluntariness decision.[114] The defense contested this on appeal, but the NMCCA found that, while each search must be individually examined, relevant information to all of the searches can certainly be considered taken as a whole. "While we certainly agree that each urinalysis must be evaluated independent of the others, we know of no rule that precludes the military judge or this court from considering evidence relevant to each of the urinalyses."[115] The most unique aspect of *Camacho* is this imputed knowledge of her rights, which the court relied upon to determine the voluntariness of PO1 Camacho's consent.

Official Search—The "Joking" Exception, or, Is It Even a Search at All?

In another case that is pending review by the CAAF, the NMCCA created what might be called the "joking exception" to the probable cause requirement. *United States v. Daniels*[116] presents the issue of whether a search is not official if the initiator does not honestly believe he is in an evidence-gathering mode.

"The facts of the case are these."[117] 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 (CPO) Wilt, who told the roommate to "go get" the drugs.[118] Chief Petty Officer Wilt testified, however, that he thought Daniels was joking about the powder, and just trying to irritate his roommate.[119] At trial, 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,

106. 58 M.J. 624 (N-M. Ct. Crim. App. 2003).

107. *See supra*, note 13.

108. *Camacho*, 58 M.J. at 626.

109. *Id*. at 627. Petty Officer First Class Camacho provided her specimen for someone other than Chief Machinist's Mate (MMC) Crawford, the command urinalysis coordinator. When MMC Crawford arrived, he decided that sample was unusable and said another sample was necessary. *Id*.

110. *Id*.

111. *Id*.

112. *Id*. at 628.

113. *Id*. The NMCCA also based its conclusion on the credible testimony of the government witnesses, including Chief Crawford. *Id*.

114. *Id*.

115. *Id*.

116. 58 M.J. 599 (N-M. Ct. Crim. App. 2003).

117. *See supra* note 13.

118. *Id*. at 601.

119. *Id*. at 605. ("Chief Wilt's testimony clearly establishes his belief that Appellant had merely been playing a 'joke' on his roommates.").

and finding that CPO Wilt's participation was a "red herring" and not relevant to the case.[120]

On appeal, all parties agreed that ETSA Daniels had a reasonable expectation of privacy in the nightstand where he stored the cocaine. Moreover, the issue of CPO Wilt's authority to authorize a search was not raised. Instead, the NMCCA focused on the government action aspect of the case. The court upheld the results of the military judge's ruling, but found CPO Wilt's motives to be the key factor. "Indeed, the determining factor in whether or not the cocaine seizure was constitutional is what motivated Chief Wilt's directions to ETSA Voitlein."[121]

According to the court, because he did not honestly believe his order would result in retrieval of drugs, CPO Wilt did not initiate an official search.[122] "Given Chief Wilt's honest belief that ETSA Voitlein's expressed concerns about Appellant actually having illegal drugs in their room were unreasonable, we conclude that Chief Wilt's directions did not make ETSA Voitlein a Government agent on a quest for incriminating evidence."[123] The CAAF granted review on this issue.[124]

Roadblocks—Inspections, Searches, a Little of Both?

The Court used a roadblock case from Illinois to minimize the impact of its constitutionally significant decision in *Indianapolis v. Edmond*.[125] In that case, the Supreme Court found unconstitutional a general crime control roadblock conducted by the City of Indianapolis. In *Illinois v. Lidster*,[126] the Court distinguished the factual situation and the purpose of the roadblock, effectively saying that *Edmond* should not be read too broadly.

"The facts of the case are these."[127] On 23 August 1997, around midnight, a seventy-year-old bicyclist was struck and killed by a vehicle traveling along an eastbound local highway. One week later, in an effort to identify the hit and run perpetrator, the local police set up a traffic control point at about the same time of night along the same road, which coincided with a shift change at a local factory. Police stopped every eastbound car, handed out a flyer seeking assistance and briefly asked the occupants if they had any information regarding the previous week's incident. As Mr. Robert Lidster approached the roadblock, he swerved out of his lane and almost struck one of the officers. He was eventually arrested for drunk driving.[128]

At his trial, Mr. Lidster challenged the arrest, claiming the roadblock was unconstitutional. The trial judge rejected the challenge and Mr. Lidster was convicted.[129] On appeal, however, the state appellate court and the Illinois Supreme Court agreed with Mr. Lidster. The Illinois Supreme Court found that the Supreme Court's ruling in *Edmond* required it to find the stop unconstitutional, and thus overturn the conviction.[130] Other courts had found roadblocks similar to the one in Illinois constitutional,[131] so the Supreme Court granted *certiorari* to clarify the situation.[132]

In *Lidster*, the Court made two distinct findings. First, *Edmond* did not control this case. "The Illinois Supreme Court

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120. *Id*. at 604.

121. *Id*.

122. *Id*.

123. *Id*. at 605.

124. *Id*. at 600.

125. 531 U.S. 32 (2000).

126. 124 S. Ct. 885 (2004).

127. *See supra* note 13.

128. *Lidster*, 124 S. Ct. at 888.

129. People v. Lidster, 779 N.E. 2d 855, 856-57 (Ill. 2002).

130. *Id*. at 858-59.

131. *See, e.g.*, Burns v. Commonwealth, 541 S.E.2d 872 (2001), *cert. denied*, 534 U.S. 1043 (2001). In *Burns*, the Virginia Supreme Court found:

> The Virginia case involved a capital conviction for rape and murder, during the investigation of which a roadblock was erected. "According to Sheriff Green, the purpose of the roadblock was to 'canvas drivers who were passing through the area, to see whether they had seen anything or heard anything' during the time period when the crime had probably been committed the previous day."

Id. at 883.

132. *Lidster*, 124 S. Ct. at 888.

basically held that our decision in *Edmond* governs the outcome of this case. We do not agree."[133] Second, the roadblock in question did not violate the Fourth Amendment. Rather, the Court ruled that "brief, information seeking highway stops" do not do not require "an *Edmond*-type rule of automatic unconstitutionality."[134]

The key difference, of course, is that in *Edmond*, the Indianapolis police were seeking evidence of criminal misconduct from each and every driver they stopped. There was no probable cause and no individualized suspicion. Law enforcement had cast their net too broadly. In *Lidster*, the Illinois police were seeking information about a previously committed crime, not evidence of criminal misconduct by the drivers who were stopped. Mr. Lidster was simply caught in a net which was lawfully cast to catch someone else.

In *Edmond*, the Court found that "general interest in crime control" did not fit within the narrow definition it had created for the special needs exception to the Fourth Amendment requirements.[135] In *Lidster*, the Court did not even address that consideration, finding that the roadblock did not violate the Fourth Amendment in the first place.[136] There is a notable dissent, which agrees that *Edmond* is not controlling, but differs regarding the validity of the roadblock, and recommends remanding to Illinois "to address that issue in the first instance."[137]

Lidster illustrates that such determinations boil down to an analysis of the reasonableness of the official conduct, given the circumstances. "These considerations, taken together, convince us that an *Edmond*-type presumptive rule of unconstitutionality does not apply here. That does not mean the stop is automatically, or even presumptively constitutional. It simply means that we must judge its reasonableness, hence its constitutionality, on the basis of individual circumstances."[138]

The AFCCA heard a roadblock case in which the official conduct evaded the strictures of *Edmond* by utilizing the pretextual stop principle derived from *Whren v. United States*.[139] In *United States v. Johnson*,[140] Texas law enforcement agents were extremely clever in their incorporation of the Court case law into their drug interdiction roadblock operation.

"The facts of the case are these."[141] On 25 June 1999, law enforcement officers in Canton Texas, near Dallas, set up a sign that read "CAUTION BE PREPARED TO STOP, DRUG CHECKPOINT AHEAD" along the eastbound side of a major highway. The sign was positioned two miles past a major travelers' services exit, and one mile before a "farm-to-market" road, which had access to nothing other than farm fields.[142] There was not an actual drug control checkpoint—the sign was a ruse. The plan was to lure drug traffickers onto the seldom-used exit, which they would not use but for the sign.[143] It appears, however, that the Texas police were aware that they could not then simply stop the suspected smugglers,[144] since in cases like *United States v. Yousif*,[145] the courts had declared this was not sufficient particularized suspicion.[146]

Exhibiting a clear understanding of the pretextual stop, the Canton police chose the exit carefully as a place where a motorist would likely commit a traffic infraction. The speed limit

133. *Id.*

134. *Id.* at 889.

135. *Id.*

136. *Id.* "The Fourth Amendment does not treat a motorist's car as his castle." *Id.* (citations omitted).

137. *Id.* at 891 (Stevens, J., dissenting).

138. *Id.* at 890.

139. 517 U.S. 806 (1996). In *Whren*, "the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, [consequently,] the evidence thereby discovered [was] admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id.* at 819.

140. 59 M.J. 666 (2003).

141. *See supra* note 13.

142. *Johnson*, 59 M.J. at 668.

143. *Id.*

144. The Court's decision in *Edmond* limited the use of checkpoints and resulting suspicionless stops for the primary purpose of general crime control. *Id.* at 671 (citing Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

145. United States v. Yousif, 308 F.3d 820 (8th Cir. 2003).

146. *Id.*

dropped quickly from sixty-five miles per hour to twenty-five miles per hour, and the yellow line dividing the actual road extended far into the intersection.[147] Once a vehicle exceeded the speed limit or crossed the yellow divider line, probable cause to conduct a stop existed.

Staff Sergeant Johnson saw the sign, exited, crossed over the yellow line, and was stopped by police.[148] In response to a police request, he consented to a search of his vehicle. The officer found a heavily taped square box from which he detected—according to his later testimony—the strong odor of marijuana. He then opened the box and found three bricks of compressed marijuana, wrapped in cellophane, and then surrounded by coffee beans.[149] The police officer then searched the rest of the car, found small baggies and an electronic scale, and arrested SSG Johnson. Eventually, SSG Johnson was tried and convicted for drug offenses[150] at court-martial.[151]

On appeal, the AFCCA agreed with the military judge, and found the Texas police's scheme constitutionally permissible.

> The military judge ruled the initial stop of the appellant was based upon probable cause and the use of a ruse or deceptive drug checkpoint did not violate the Fourth Amendment protection against unreasonable searches and seizures. In reaching this conclusion, he correctly noted the critical consideration was "largely one of fact," specifically, whether the appellant committed a traffic violation upon exiting I-20 at Exit 530.[152]

Under *Whren*, if the traffic violation was legitimate, then the officers could permissibly stop SSG Johnson regardless of their true, drug seeking intentions.[153] Once they made contact with the driver, the officers were required to further develop the situation in order to eventually search the car. Here, SSG Johnson gave consent. Had he declined, the officers may not have been able to continue, since the only indicators they had were that SSG Johnson looked more nervous than the usual driver.[154] This case is distinguishable from both *Edmond* and *Yousif*. The car was stopped on the basis of a traffic violation, rather than just traveling through the designated area as in *Edmond*, or even exiting in a suspicious area following a dummy sign as in *Yousif*.

Principles from *Edmond* rear their head once again in *People v. Caballes*, an Illinois Supreme Court case on which the U.S. Supreme Court has granted *certiorari*.[155] In *Caballes*, the Supreme Court will address the propriety of using drug dogs at a routine traffic stop. The Illinois Supreme Court found that, following a traffic stop for speeding, "a canine sniff was performed without 'specific and articulable facts' to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation."[156] The Illinois Supreme Court applied a *Terry* analysis[157] to the traffic stop, and found that the officer did not have sufficient reason to conduct the dog sniff of the car, essentially the equivalent of a pat down.[158] Consequently, the officer expanded the scope of the traffic stop to a drug investigation, without proper reason to do so.[159]

However, in a strongly worded dissent, Justice Thomas of the Illinois Supreme Court, identified two grave errors in the opinion. First, the *Terry* analysis only applies to a search for weapons, not for other contraband.[160] More importantly, he

147. *Johnson*, 59 M.J. at 668.

148. *Id*. at 669.

149. *Id*. "According to testimony at trial, coffee beans are used to mask the smell of marijuana, which is sometimes compressed to facilitate its transportation and concealment in transit." *Id*. The super-olfactory police officer was able to detect the scent of marijuana despite the efforts taken to conceal the drugs.

150. UCMJ art. 112a (2002).

151. *Johnson*, 59 M.J. at 667.

152. *Id.* at 670.

153. *Id*. at 673 (citing Whren v. United States, 517 U.S. 806 (1996)).

154. *Id*.

155. 207 Ill. 2d 504 (Ill. 2004), *cert. granted*, 124 S. Ct. 1875 (2004).

156. *Id.* at 510.

157. Terry v. Ohio, 392 U.S. 1 (1968).

158. *Caballes*, 207 Ill. 2d at 508-09.

159. *Id*. at 510.

160. *Id*. at 512, 13 (Thomas, J., dissenting).

points to *Edmond* to reiterate the U.S. Supreme Court's view that a drug dog sniff is not a search, and there is no need to justify it with probable cause.[161] That being the case, there was no search, and thus no Fourth Amendment violation. The U.S. Supreme Court will resolve the case; Illinois Supreme Court Justice Thomas's dissent may be vindicated.

Seizure—Let's Not Forget the Second Part of S & S

Finally, the Court heard another case from Texas, this time dealing with arrest, also known as seizure. In *Kaupp v. Texas*,[162] the court reiterated "that a confession obtained by exploitation of an illegal arrest may not be used against a criminal defendant."[163] The Court found that under the facts there was an arrest.[164]

"The facts of the case are these."[165] Seventeen-year-old Robert Kaupp was suspected of being an accomplice to murder. On 27 January, without a warrant, Texas police officers bearing badges and weapons roused Mr. Kaupp from his bed at 0300. They said "we have got to talk" to which Mr. Kaupp replied "okay."[166] The officers handcuffed Mr. Kaupp and took him, shoeless and in his underwear, to the police station, stopping at the murder site for fifteen minutes. After being properly *Mirandized*,[167] Kaupp promptly confessed to helping his eighteen-year-old friend kill the friend's fourteen-year-old half sister (and sexual partner.)[168] In response to a defense motion to suppress the confession as the result of an illegal arrest, Texas prosecutors argued that Kaupp was never under arrest, thus had not been seized for Fourth Amendment purposes, and lack of probable cause was irrelevant. The trial court and both Texas appeals courts agreed with the government.[169]

The Supreme Court, in a *per curiam* decision, found that Mr. Kaupp was indeed arrested, and thus seized, for Fourth Amendment purposes.[170] The test for seizure, derived from *United States v. Mendenhall*,[171] emphasizes amongst its factors transport in a police vehicle from a private dwelling, as an indication of arrest.[172] Consequently, the court held that a reasonable person in Mr. Kaupp's circumstances would not feel he "was at liberty to ignore the police presence."[173] Accordingly, Mr. Kaupp's confession was suppressed.[174]

Conclusion

None of the cases discussed in this article radically alter practice within the search and seizure landscape. Instead, they refine the law in new and unique situations and extend civilian law into military case law terrain. This is not to say it has been an uneventful year; search and seizure has had more attention than in the recent past. Moreover, both the Supreme Court and the CAAF are set to rule on several interesting issues in the upcoming year. Nonetheless, the trend continues to be the refinement of existing law.

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161. *Id*. at 514. Justice Thomas appropriately noted that "under the Supreme Court cases, a canine sniff is not a search." *Id*. at 511 (citing Indianapolis v. Edmond, 531 U.S. 32 (2000); United States v. Place, 462 U.S. 296 (1983)).

162. 538 U.S. 626 (2003).

163. *Id*. at 627 (citing Brown v. Illinois, 422 U.S. 590 (1975)).

164. *Id*. at 630, 632.

165. *See supra* note 13.

166. *Kaupp*, 538 U.S. at 627.

167. Miranda v. Arizona, 384 U.S. 436 (1966).

168. *Kaupp*, 538 U.S. at 628-29.

169. *Id*. at 629.

170. *Id*. at 627 (citing Brown v. Illinois, 422 U.S. 590, 601-03 (1975)).

171. 446 U.S. 544 (1980).

172. *Id*. at 553. "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *Id*. A recent case from the Sixth Circuit Court of Appeals, which cites *Kaupp*, reiterates the factors to consider in determining whether an arrest occurred. *See* United States v. David Lopez-Arias and Antonio Egues, 344 F.3d 623 (6th Cir. 2003).

173. *Kaupp*, 538 U.S. at 629 (citing Florida v. Bostick, 501 U.S. 429 (1988)).

174. *Id*. at 633 (citing principles established in *Brown v. Illinois*, 422 U.S. 590 (1975)).